

US Foreign Policy on Transitional Justice: Case Studies on Cambodia, Liberia and Colombia

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Declaration

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Abstract

The US has been involved in the majority of transitional justice measures established since the 1990s. This study explores this phenomenon by examining the forces that shape US foreign policy on transitional justice. It first investigates US influence on the evolution of the field, and then traces US involvement in three illustrative cases in order to establish what US involvement entails, why the US gets involved and how the US has impacted individual measures and the field as a whole. The cases include: the Khmer Rouge Tribunal in Cambodia; the trial of Liberian President Charles Taylor and the Liberian Truth and Reconciliation Commission; and the Justice and Peace Process in Colombia. These cases represent different transitional justice measures, transition types and geographic regions – all key dimensions in the field. These measures were also all established in the 2000s, a period which reflects a different historical moment in the field's evolution. The cases shed light on the actors who play a key role in the field – from presidential administrations to Congress to the State Department and others. The study is based on nearly 200 interviews and archival research undertaken in the US, The Hague, Cambodia, Liberia and Colombia, providing a strong basis on which to draw conclusions about US foreign policy on transitional justice.

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Chapter 1 Introduction

Although transitional justice (TJ) is a contested concept since understandings of transition and justice remain disputed, the term rapidly came to represent a field of practice and has received increasing attention over the past two decades.¹ Policymakers and activists began to rely on a set of transitional justice measures, including criminal prosecutions, truth commissions, reparations and institutional reforms, which were thought to address past human rights violations. It was argued that one or a combination of these measures could help a society deal with the past and move forward.²

The classical formula of TJ was how to balance ethical imperatives and political constraints and settle a past account without upsetting a transition.³ However, by the 2000s, the term covered a much broader terrain than transitions to democracy, addressing transitions and non-transitions in a range of societies. The concept thus evolved to involve not only past-focused transitions, but to include situations where violations continue as well. In addition, the range of mechanisms expanded, intersecting with those working in and writing about security, peacebuilding, development, gender, reconciliation and memory, in addition to human rights.⁴ This shift involved a more explicit recognition of transitional justice as a tool for a range of political and social goals beyond accountability. Despite the

¹ On the contested conception of ‘transition’ and ‘justice’, see, for example, Bell, Campbell and Ni Aoláin, 2004/2007a; Bell, 2009: 22-24; Roht-Arriaza, 2006. For the debate about whether transitional justice constitutes a ‘field’, see, Bell, 2009; and Arthur, 2009.

² See for example, Annan, 2004; Boraine, 1994; De Greiff, 2008; Elster, 2004; Hayner, 2001; International Center for Transitional Justice, 2001; Kritz, 1995; McAdams, 1997; Orentlicher, 1991; Teitel, 2000; Zalaquett; 1989.

³ Zalaquett, 1995 in Kritz; O’Donnell and Schmitter, 1986: 28.

⁴ On the intersection between transitional justice and security sector reform, see Bryden and Hanggi, 2005, and Patel, De Greiff and Waldorf, 2010, as well as Sriram, 2009; and McEvoy and Shirlow, 2009 for their work on TJ and DDR. On TJ and peacebuilding, see Lambourne, 2009. On TJ and development, see Arbour, 2006; Alexander, 2003; De Greiff and Duthie, 2009; Mani, 2008. On TJ and gender, see Askin, 2003; Buckley-Zistel, 2012; Campbell, 2007; Hamber, 2007; and Nesiha, 2006. On TJ and reconciliation, see Chapman, 2009; Fletcher and Weinstein, 2002; Mamdani, 1996. On TJ and memory, see Bickford, 1999/2000; Hamber, Ševcenko, and Naidu, 2010).

conceptual stretching of the field, its initial boundaries explain how certain measures became ‘*the* legitimate justice initiatives during a time of political change.’⁵

Several authors have written about how the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), the International Criminal Court (ICC) and other measures provide evidence of the global trend toward greater accountability for human rights violations. The establishment of TJ measures has been cited as evidence of transitional justice ‘globalized’, the ‘justice cascade’, the ‘internationalization of justice’, the ‘international legalist paradigm’, the ‘judicialization of international relations’ or what I call the ‘transitional justice trend’.⁶ What underpins each of these concepts is an acknowledgement that a paradigm shift has taken place within local, national, international and global relations in which discourses on justice and accountability are now prevalent.

These accounts raise important issues, but skew understandings of international involvement in transitional justice. Edward Newman explains how the internationalization of justice can advance the prospects for justice since it can provide a more impartial view than purely local solutions, which are more likely to be conditioned by local power balances rather than concerns of justice (Newman, 2002: 41). He acknowledges that transitional justice will continue to be as much a political as a legal and moral process, but the politics he focuses on are local, not international.

⁵ See, Arthur, 2009. I understand TJ as a ‘transition’ from a situation where human rights violations are ignored to one where there is an attempt to provide some form of accountability. My understanding is based on the conception of the field as developed in the 1990s, which focuses on certain accountability measures, but entails a wider conception of transition. For more detail on my understanding of transition, see Bird, 2011.

⁶ See, Teitel, 2008. Sikkink, 2011. Newman, 2002, Oomen, 2005. On the influence of the ‘international legalist paradigm’ on transitional justice, see Nagy, 2008: 278-279. Also see Snyder and Vinjamuri, 2004.

Barbara Oomen is more critical of international activity in transitional justice that is ‘often deemed neutral, universal and above all a-political’. She argues that the costs of investing in justice seem much lower, be it politically, physically or financially, than military or other interventions and finds that justice efforts are perceived as one of the safest ways in which to engage with other countries. She then argues, however, that the legal has been made ‘subservient’ to local politics (Oomen, 2005, 893, 906). She thus critiques international involvement, but then focuses on local, not international politics.

Other scholars focus on politics at the international level, but do so by making claims about Western hegemony without adequate empirical backing. They argue that hegemonic international approaches to transitional justice are represented as politically and economically neutral, but are instead directed at reconstituting post-conflict societies in the image of Western liberal democracies (i.e., McGovern and Lundy, 2008: 276-277). ‘Steeped in Western liberalism’, Rosemary Nagy argues that transitional justice is a discourse and practice imbued with power, which calls into question ‘the very legitimacy of a globalized transitional justice’ as well as the efficacy and legitimacy of mechanisms designed to help those who must live together after atrocity (Nagy, 2008: 287). Chandra Sriram argues that TJ is externally imposed since it is largely formulated by external actors (Sriram, 2007).

The transitional justice literature lacks empirical examination of international involvement that considers the significant role that many foreign state governments, international organizations and NGOs play in the field. To address this gap, this study focuses on one particularly important actor in international relations and transitional justice – the US.

For the past two decades, transitional justice has become an integral part of US

foreign policy. The US has been significantly involved in the majority of measures established since the 1990s, including international, hybrid and domestic criminal tribunals, truth commissions, reparation programmes and other institutional reforms. For this fact alone, US involvement merits attention within the transitional justice literature. Failing to take into account the US role limits understandings of the field.

The scholarship that does address the role of the US has focused on criticisms of US opposition to the ICC or its role in the Iraqi Special Tribunal (IST). Scholars argue that the Bush administration's decision to 'unsign' the Rome Statute and subsequent policies aimed at safeguarding US nationals from ICC prosecution represent deep-seated American hostility toward international law and justice.⁷ Others argue that the IST was a puppet court of the US, where the US was seen to use transitional justice discourse as a tool to pursue its war on terror.⁸ Adding significant damage to the US reputation was its backing of the notion of 'unlawful combatants', evidence of torture of Guantánamo detainees after 9/11 and since, its failure to close this prison (i.e., Center for Constitutional Rights, 2006; Amnesty International, 2011).

These issues justifiably raised alarm within the US and around the world, and

⁷ See, for example, Amann and Sellers, 2002; Brown, 1999/2002; Broomhall, 2003; Goldsmith, 2003; Hafner, Boon, Rübesame and Huston, 1999; King and Theofrastous, 1999; Mundis, 2004; Leigh, 2001; Lietzau, 2001; Orentlicher, 2003-2004; Sadat and Carden 2000; Schabas, 2004; Scharf, 2001; Sewall and Kaysen, 2000; Vicuna, 2004; Wald, 2004; and Wedgwood, 1998.

⁸ Bell, Campbell and Ní Aoláin state: 'In Iraq, the US has used past-focused transitional justice discourse to justify and underwrite the 'de-Baathicisation' process, attempting at a subtle level to justify its own role as 'democratiser' rather than 'occupier'. 'The' conflict (or the undemocratic era for which accountability is required) is thereby defined as the one that preceded and was 'ended' by its use of force. Prisoner ill-treatment in Abu-Ghraib, and other alleged abuses in Iraq fall outside this frame; to that extent, there is an attempt to employ 'transitional justice' both as a framing narrative that doubles as an instrument of hegemonic power. Whether the US will succeed or not in this attempt is an open question, one given particular salience by identifying Iraq as merely one site in a never-ending (and to that extent 'ordinary') 'war on terror'. The complexity here is evident from the interconnectedness of transitional justice with multiple and overlapping spheres of international law, as well as from its becoming knitted into the unsettled sphere of local law (which itself is reconfigured by external legal interface to 'fit' the transitional justice narrative being advanced) (Bell, Campbell and Ní Aoláin, 2007). For more on the US role in the Iraqi Special Tribunal, see: Alvarez, 2004; Bali, 2005; Bassiouni, 2005; Bell, Campbell and Ní Aoláin, 2007; Dermody, 2006-2007; Gersh 2004-2005; Ni Aolain, Bell and Campbell, 2007b Parker, 2005; Scharf, 2004; Scharf and Kang, 2005; and Zolo, 2004.

appeared to represent a considerable reversal from previous leadership on human rights and transitional justice activity. Nevertheless, there is more to US foreign policy on transitional justice than its position toward the ICC or role in the IST. A narrow focus on the most controversial TJ measures fails to provide an accurate portrayal of US engagement in the field. US involvement in other measures warrants investigation, which leads us to the aim of this study.

US involvement in transitional justice, as in many areas, is multifaceted and complex. By examining the forces that shape US foreign policy on transitional justice, this study uncovers some of this complexity and helps explain how and why the US is involved in this field. Four questions guide the study and are briefly explored here.

The first question that guides the study is: How is the US involved in transitional justice? I address this question by considering four phases in a measure's lifespan: the decision to establish a transitional justice measure; negotiations and establishment; operations; and follow-up. Some phases may receive greater attention than others, but tracing US involvement throughout these phases will uncover the diverse roles the US plays during a measure's existence. The US may, for example, provide financial or technical assistance to measures, advocate for or against them and cooperate to differing degrees with other actors involved. Answering this question will reveal what US foreign policy on transitional justice actually entails.

The second question that guides the study is: Who is involved in transitional justice? Foreign policy is made and implemented by several government actors, especially in a state like the US.⁹ A useful starting point is consideration of the actors responsible for US foreign policy decision making (i.e., the President and Congress)

⁹ For a general discussion of US foreign policy, see, i.e., Cox and Stokes, 2008; Jentleson, 2000; Henriksen, 2001; Hastedt, 2003; Ikenberry, 2005; Kegley, 1996; Parmar and Cox, 2010.

and those responsible for its implementation (i.e., State Department and USAID).¹⁰ Since each of these actors represents a large segment of government, it is also necessary to investigate within each institution in order to identify who is involved. The following table illustrates some US government actors that may be involved in transitional justice.

Figure 1: US actors involved in transitional justice

| President | Congress | State Department | USAID |
|--|--|--|---|
| White House staff, National Security Council | Congressional committees (i.e., Appropriations, Foreign Relations) | Regional bureaus, Office of War Crimes Issues, Office of the Legal Advisor, US embassies | Country offices, Office of Transition Initiatives |

Presidential involvement may include responses to transitional justice, proposals for legislation, negotiation, policy statements and implementation.¹¹ A presidential administration sets the tone on an issue like transitional justice, regardless of whether or not it takes a specific stance on a particular measure. Presidential involvement may shift from President to President and also from measure to measure, but any presidential involvement is an important factor to take into account.

Congressional involvement may include resolutions and policy statements, legislative directives, pressure, funding restrictions or denials, informal advice and congressional oversight.¹² This involvement may be divided along partisan lines and vary depending on the specific measure in question.¹³ Transitional justice measures

¹⁰ Christopher Hill distinguishes between actors responsible for decision making and agents responsible for implementation (Hill, 2003). However, scholars tend to focus on the actors responsible for decision making, instead of those responsible for implementation. Lindblom argues that study of implementing agents is important since they attribute meaning to foreign policy, which affects the manner in which directives are actually operationalized (Lindblom, 1959). This study looks at both groups – those responsible for decision making and those responsible for implementation.

¹¹ See, Grimmett, 1999. For more on presidential involvement in US foreign policy making, see, i.e., Hodge and Nolan, 2007; Briggs, 1994; Hersman, 2000.

¹² See, Grimmett, 1999. For more on congressional involvement in US foreign policy making, see, i.e., Lindsay, 1992-93; Zoelick, 1999-2000.

¹³ Alden and Aran argue that the role of political parties have been overlooked in foreign policy analysis (Alden and Aran, 2012).

may be likely to involve certain congressional committees (i.e., Appropriations, Foreign Relations).

The State Department may also be involved considering its mandate to carry out the foreign policy agenda of the President.¹⁴ Several offices or bureaus within the agency may be involved in transitional justice, including, for example, the regional bureaus, Office of War Crimes Issues, Office of the Legal Advisor and the US embassies.¹⁵ USAID may also be involved in transitional justice considering its responsibility for providing assistance in support of US foreign policy goals. Offices that may be involved include country offices or the Office of Transition Initiatives.¹⁶ Although other actors may be involved, considering these four actors offers a starting point for identifying who is involved in transitional justice.

The third question guiding this study is: Why is the US involved? Here, the foreign policy literature, which investigates the actors, structures and broader context of foreign policy, offers several theoretical approaches that may help explain US foreign policy on transitional justice. Potential explanations are depicted in the following table and then described briefly below.

¹⁴ For more on State Department involvement in US foreign policy making, see, i.e., Wilson, DiIulio and Bose, 2012;

¹⁵ Regional bureaus advise and guide the operation of the US diplomatic missions within their regional jurisdiction. The Office of War Crimes Issues formulates US policy responses to atrocities committed in areas of conflict and elsewhere throughout the world. It coordinates US government support for war crimes accountability in regions where crimes have been committed against civilian populations on a massive scale. The office monitors, advises and helps administer or report on international tribunals. The Office of the Legal Adviser furnishes advice on all legal issues, domestic and international, arising in the course of the State Department's work. This includes assisting Department principals and policy officers in formulating and implementing US foreign policies, and promoting the development of international law and its institutions as a fundamental element of those policies. The Office is organized to provide direct legal support to the State Department's various bureaus, including both regional, geographic and functional offices. US embassies work to improve political, economic, and cultural relations between almost every country worldwide and the US.

¹⁶ The USAID Office of Transition Initiatives supports US foreign policy objectives by helping local partners advance peace and democracy in priority countries in crisis. Seizing critical windows of opportunity, OTI works on the ground to provide fast, flexible, short-term assistance targeted at key political transition and stabilization needs.

Figure 2: Explanations for US involvement in transitional justice

| National interest | Individuals | Bureaucratic politics | Domestic influences | External influences | Norms | Change over time |
|--|---------------------------|------------------------------|---|--|--|----------------------------------|
| Impact of TJ on political, economic, or security interests | Individual interest in TJ | Interplay wibetween agencies | Impact of TJ interest groups, public opinion or the media | Pressure from external, actors or events | Influence of TJ norms and/or identity issues | Impact of socio-temporal context |

One explanation is offered by realist accounts of foreign policy making, which would argue that the US, as a unitary and rational actor, is involved in transitional justice when it advances the national interest. These scholars find that calculation of the national interest is self-evident and can be arrived at rationally through careful analysis of the material conditions of states as well as the particulars of a given foreign policy dilemma. The pursuit of security and the efforts to enhance material wealth place states in competition with each other, limiting the scope for cooperation to a series of selective, self-interested strategies.¹⁷

Behaviorists, who would contend that individuals are key to understanding US involvement in transitional justice, propose a second explanation. Behavioral accounts investigate the role of the individual decision maker – focusing on psychological and cognitive factors, beliefs, biases and stereotypes, personality and emotions, leadership style and role – as an explanatory source of foreign policy choice.¹⁸ Behaviorists categorize foreign policy making as a far less organized, consistent and rational process than depicted by the realists. Psychology constrains rationality and human divisions and disagreements challenge the notion that the state is a unitary actor.

¹⁷ For rational accounts, see, i.e., Snyder and Diesing, 1977; Powell, 1990; Schelling, 1960; Putnam, 1988; Levy and Razin, 2004.

¹⁸ For behavioural accounts, see, i.e., Sprout and Sprout, 1956; Jervis, 1976; Festinger, 1957; Boulding, 1959; Janis and Mann, 1977; Orbovich and Molnar, 1992; Janis, 1982; Hollis and Smith, 1986.

A bureaucratic politics explanation offers a third explanation, which would look at the interplay and competition within and among relevant state agencies in explaining US foreign policy on transitional justice. This approach highlights the fragmented and often institutionally driven nature of foreign policy. Different institutional settings mean officials and politicians view foreign policy issues through different prisms resulting in distinctly different views. For example, when considering a particular issue, the Treasury tends to focus on the budgetary implications, the Department of Defense on the repercussions for national security, while the State Department focuses on the diplomatic and international political ramifications. Foreign policy is thus depicted as the unintended result of a bargaining process involving the principal participants.¹⁹

A fourth explanation by those focusing on domestic influences would highlight the ability of sub-state and non-state actors within the domestic arena to exert influence over US foreign policy on transitional justice. This approach views foreign policy as the product of a competitive domestic environment, where the interplay between interest group politics, public opinion, the media and state decision makers and structures is an important explanatory factor.²⁰

A fifth explanation is offered by pluralists, who would consider the interaction between domestic and external sources as crucial for an understanding of US foreign policy on transitional justice. Robert Putnam's 'two-level game', in

¹⁹ See, Allison, 1971; Halperin, 1971; Allison and Halperin, 1972. For a critique of the bureaucratic politics literature, see, i.e., Krasner, 1972; Art, 1973; Freedman, 1976; Caldwell, 1977; Hollis and Smith, 1986; Bendor and Hammond, 1992; Rosati, 1981; Hart and Rosenthal, 1998; Weldes, 1999.

²⁰ For more on interest groups, see, i.e., Hughes, 1978; Payne and Ganaway, 1980; Putnam, 1988; Kegley, 1987. For more on public opinion, see, i.e., Hill, 1981; Almond, 1950; Rosenau, 1961; Holsti, 1992; Foyle, 1997. For more on the media, see, i.e., Robinson, 2001; Herman and Chomsky, 2002. Some scholars have focused on the structure and nature of state political institutions, the features of society and the institutional arrangements linking state and society and channelling societal demands into the political system (i.e., Katzenstein, 1976; Risse-Kappen, 1991; Rosenau, 1967). Others view foreign policy making as driven by the nature of the economic system within states and, concurrently, in the interests of a narrow elite that traditionally has acted in what it perceives to be the national interest (i.e., Marx, 1967; Moon, 1995; Cox, 2001; Clapham, 1996; Mills, 1956).

which foreign policy makers try to balance the logic and demands of the domestic and international arenas, attempts to capture the challenges imposed by the complex interdependency between these two levels.²¹

Constructivists offer a sixth explanation, with their focus on the role of norms and ideational factors as a way to explain US foreign policy on transitional justice. For constructivists, the ‘national interest’ is not objectively given or based solely on material interests, but instead must be interpreted through the prism of ideas, which are seen to construct both identities and interests.²² Jeff Checkel argues that the moral force of commonly held values and norms and increasing exposure to a globalized social environment exerts pressure on policy makers to act in a certain way (Checkel, 2008: 74-75). In addition, liberal notions of progress, which underlie much of constructivism’s focus on norms, may also help explain US foreign policy on transitional justice, considering its promotion of certain ideals (such as human rights, liberty and democracy), social forces (capitalism, markets) and political institutions (democracy, representation).²³

Lastly, a historical sociologist would consider the socio-temporal context as an important explanation for US foreign policy on transitional justice.²⁴ This perspective intersects with discussion about foreign policy change, where scholars

²¹ See, Putnam, 1988. For more on complex interdependency, see Keohane and Nye, 1977. Even though scholars have overlooked the intersection between foreign policy and globalization, Alden and Aran argue that foreign policy offers a site where states might seize the opportunities and meet the challenges posed by globalization. They also argue that globalization reinforces the foreign policy stance of political-military integration within the west and the expansion of liberal spaces (Alden and Aran, 2012: 89-90). For hyperglobalist perspectives, see, i.e., Friedman, 2005; Fukuyama, 1993. For transformationalist theses, see, i.e., Held, 1999; Nye and Keohane, 2000; Giddens, 1991/1999; Rosenau, 1997; Scholte, 2005.

²² For more on constructivism, see, i.e., Houghton, 2007; Finnemore and Sikkink, 2001; Adler, 2002; Barnett and Duvall, 2005; Checkel, 2007; Gheciu, 2005; Hansen, 2006; Johnston, 2007; Klotz and Lynch, 2007; Guzzini and Leander, 2006.

²³ See, Weldes, 1999. For more on liberalism, see, i.e., Doyle, 2008; Brown and Miller 1996; Doyle, 1997; Kant, 1970; Mill, 1973; Rousseau, 2005. On the intersection between liberalism and constructivism, see Alden and Aran, 2012: 116; Arthur, 1994; David, 1985.

²⁴ See, Hobson and Hobden, 2002. Path-dependent explanations may also be useful, see, i.e., Goldstone, 1998; Mahoney, 2000 Meierhenrich, 2010; David, 1985; Arthur, 1994.

consider how state actors reinterpret changes in international society over time. Understanding and integrating change into analyses of foreign policy requires accounting for its impact in relation to individual decision makers, institutions and structures of decision making as well as the wider socio-political and external context within which such change occurs.²⁵

Although other explanations may exist, these approaches offer a way to initiate thinking about why the US is involved in transitional justice. Though there is no consensus amongst these approaches, the literature on foreign policy is helpful since it explores several ways of understanding the conduct and significance of states in foreign policy making.

The fourth and final question guiding the study is: What is the impact of US involvement on transitional justice? Although not a major focus of this study, the previous three questions enable some assessment of the impact of US involvement. It will be possible to consider the extent to which US goals have been reached; how US involvement impacted transitional justice aims of the country that established a measure; and, more broadly, how US involvement has impacted the field in general. Although a complete impact assessment is not within the scope of this research, some comment will be possible.

The study is designed in a way to answer these questions. It first traces US influence on the evolution of transitional justice, and then undertakes three comparative case studies, which examine US involvement in the establishment and operations of illustrative transitional justice measures. The cases include: 1) the Khmer Rouge Tribunal in Cambodia; 2) the trial of Liberian President Charles

²⁵ See, Alden and Aran, 2012: 11. The literature on 'learning' is also helpful in this regard. See, i.e., Vertzberger, 1986; Khong, 1992; Barnett, 1999. Also, see discussion of epistemic communities, i.e., Haas, 1989; Haas, 1992; Adler and Haas, 1992.

Taylor and the Truth and Reconciliation Commission in Liberia; and 3) the Justice and Peace Process in Colombia.

The cases vary on key dimensions to the field, but operate during a similar time frame. They represent different transitional justice *measures*, different *transition types* (past conflict, post-conflict and ongoing conflict) and different *geographic regions*. Variation along these dimensions is often relied on in the transitional justice literature. Many studies have focused on one measure, similar measures (i.e., international criminal tribunals), measures in a particular region, or measures in contexts that have experienced a similar type of transition.²⁶ The variation among the cases selected represents some of the diversity within the field of transitional justice. It also aims to shed light on a range of US government actors involved in the field.

Much of the literature has explored measures established in the 1990s. In this study, the cases selected were all established in the 2000s, a period which reflects a different historical moment in the field's evolution with the establishment of new measures and models of transitional justice. For example, the Cambodia case provides an example of a 'hybrid' court – after ad-hoc tribunal fatigue had set in; the

²⁶ Certain measures have received significant scholarly attention, particularly the ICTY and ICTR (i.e., Arbour and Neier, 1998; Bassiouni and Manikas, 1996; Goldstone, 1997; Scharf, 1997), as well as the South African TRC (Boraine and Levy, 1995; Gibson, 2002/2004; Hamber and Kibble, 1998). Legal scholars and practitioners have written extensively about the development of international criminal law with a focus on genocide, crimes against humanity and war crimes (Bassiouni, 1986/1992/1998/2008; Cassese, 2003/2008/2011; Goldstone, 1996; Schabas, 2000/2006). Priscilla Hayner wrote the definitive text on truth commissions in 2001, where she assessed the experience of 20 different commissions.²⁶ Pablo de Greiff edited *The Handbook on Reparations*, which examines in detail reparations programs in different parts of the world and addresses key thematic issues that have come about in the design and implementation of reparations programs (De Greiff, 2008). The institutional reform literature has focused on lustration (Boed, 1998; Cohen 1995; David, 2003/2004/2006) and vetting (Mayer-Rieckh and De Greiff, 2007). Amnesty has also been a focus within the literature (Chigara, 2002; Freeman, 2009; Mallinder, 2007/2008; Snyder and Vinjamuri, 2004). Some have debated the extent to which these mechanisms were complementary, i.e., truth and justice (Rotberg, 2000; Schabas, 2004) and amnesties and justice (Mallinder, 2007/2008). Many have focused on transitional justice in particular regions, i.e., in Africa (Bosire, 2006; Crane, 2005; Huyse and Salter, 2008; Waddell and Clark, 2008); in Europe and the former Soviet Union (Akhavan, 1998; Nalepa, 2010; Stan, 2009); in Latin America (Lutz and Sikkink, 2001; Roht-Arriaza, 1999; Sikkink, 2006; Zalaquett, 1999); and in Asia (i.e., Cohen, 2007; Linton, 2010). Scholars have focused on transitional justice measures in post-authoritarian settings, i.e., Huyse, 1995; Kritz, 1995; post-conflict settings, i.e., Sieff and Vinjamuri, 1999; Van Zyl, 2005; and in situations of on-going conflict, i.e., Campbell, 2010; Campbell and Ni Aolain, 2005; Laplante and Theison, 2006-2007.

Liberian case explores the prosecution of a head of state as well as a truth commission (both more controversial in the 1990s); and the Colombian case represents a new model of transitional justice, which attempts to combine amnesty, prosecutions and reparations. This time frame also corresponds with three presidential administrations (Clinton, Bush and Obama), which enables comment on the development of US foreign policy on transitional justice over the past two decades.

Although this research focuses on TJ measures, it does not overlook factors important to any research that examines US foreign policy. US foreign policy in each case is taken into account in order to base subsequent discussion of TJ within the wider historical and geopolitical context. For example, US actions in Cambodia during the Vietnam War are discussed, as is the long, historical relationship between the US and Liberia since Liberia's founding, as is the US drug war in Colombia. Each of the case study countries has a specific history with the US that impacts US involvement in transitional justice. Geopolitical considerations are also taken into account, but do not necessarily determine the level of US involvement in a measure. For example, it is not the case that countries with high geopolitical import receive more US attention on transitional justice, nor is it the opposite, where high geopolitical importance results in insignificant US attention. Nevertheless, an understanding of historical relations and geopolitical considerations provides important contextual factors that need to be considered.

Process-tracing guided the way in which data was collected, and provided a way to establish the facts of each case by drawing on multiple sources of information. Similar questions were asked of each case so that comparable data could be obtained, compared and systematically analyzed in order to infer answers about US foreign

policy on transitional justice. This form of analysis offered a way in which to make sense out of the material, analyse qualitative information, and systematically observe US involvement in the three cases (See Appendix 1 for more information on methodology).

Data was collected through extensive interviews and archival research of key stakeholder groups in Washington DC, The Hague and the three case study countries. Four months of field research in DC, five weeks in each case study country and a trip to The Hague provided an excellent opportunity to conduct nearly 200 interviews with officials from the US government, international organizations, local and international NGOs, media, academics and staff of transitional justice measures (See Appendix 2 for interview list). Within each of these stakeholder groups, interviews were conducted with high-level and lower-level officials. For example, all of the US War Crimes Ambassadors were interviewed, as were local civil society groups that represented victims. The sheer number of interviews and diversity of input sought ensured a level of triangulation was achieved.²⁷ Case study experts were shown the results of the study and asked for their reflections on the research. Interviews, along with a wide review of documents, reports and studies from these same groups provide a strong empirical grounding for this research (See Appendix 1 for more information on interviewing method).

Most concretely, the study discovers something about US involvement in three TJ cases. However, the research design and method also provide a robust foundation on which to draw broader conclusions about US foreign policy on

²⁷ The quality of the sources including their authenticity, credibility, representativeness and meaning was taken into account. The research aims to be transparent by being clear about what was done, ensuring a fit between methods and research questions, establishing the relationship between my work and pre-existing literature, and accounting for and acknowledging any influences I may have had on the findings.

transitional justice. The study also has implications for those interested in exploring the role of other international actors involved in transitional justice, and other related research. An empirically grounded, systematic study of US involvement in three cases of transitional justice offers a significant contribution to the transitional justice literature by filling a gap on the role of the US in the field. The study also contributes to the foreign policy literature by drawing on its theoretical approaches, which help to explain actual state conduct in the international system and the sources of foreign policy formulation and implementation.

The study is structured as follows: Chapter 2 provides a historical overview of US influence on the evolution of transitional justice over the last century. It explores the US role through three stages in the field's evolution: the precursors to transitional justice from WW1 through the 1970s; the emergence of the field in the 1980s and early 1990s; and its institutionalization in the 1990s and 2000s. This background provides useful context for the three case studies explored in chapters 3-5. These chapters investigate US foreign policy in the Cambodian, Liberian and Colombian cases of transitional justice. Each case study chapter begins with a discussion of US foreign policy in the country. It then examines US involvement in the establishment and operations of the transitional justice measures, and concludes with an explanation and assessment of US involvement. Chapter 6 undertakes a systematic comparison of the data collected from the three cases in order to draw conclusions about US foreign policy on transitional justice. Chapter 7 concludes the study by reflecting on its broader implications, and considers possibilities for future research. We now turn to chapter 2, which considers US influence on the evolution of transitional justice.

Chapter 2 US Influence on the Evolution of Transitional Justice

The last chapter made the case for an examination of US foreign policy on transitional justice. This chapter documents US influence throughout three stages of the field's evolution, which are depicted in the following table.

Figure 3: The evolution of transitional justice: three stages

| Stage | Time period | Examples |
|------------------------------------|---------------------------|--|
| Precursors to transitional justice | WW1 through 1970s | International Military Tribunals at Nuremberg and Tokyo |
| Emergence of the field | 1980s through early 1990s | Latin American truth commissions and Eastern European lustration |
| Institutionalization | 1990s through 2011 | ICTY, ICTR, ICC |

The first stage explores the precursors to transitional justice, which includes a proposal for an international criminal tribunal after WW1 and the international military tribunals established after WW2. The second stage explores the emergence of the field between the 1980s and early 1990s, paying specific attention to the role of the human rights movement, the 'transition' paradigm and the creation of an epistemic community, which all helped to clarify and solidify the measures commonly associated with transitional justice. The third stage explores the institutionalization of the field, and focuses on the establishment of the ICTY, ICTR and ICC. This chapter explores each stage with attention to US influence, and argues that one cannot fully understand the evolution of transitional justice without taking the role of the US into account.

2.1 Precursors to Transitional Justice

Jon Elster has written about trials and purges more than 2,000 years ago during political upheavals in ancient Athens (Elster, 2004). Gary Bass recounts a history of war crimes tribunals that extends at least 200 years into the past (Bass, 2000). Establishment of an international criminal tribunal, however, first appeared on the international agenda in a serious manner following the conclusion of WW1.

Although there had been some support for the idea of individual criminal liability,²⁸ when a commission at the Paris Peace Conference in 1919 proposed the establishment of a tribunal to prosecute German combatants and officials for ‘violations of the laws and customs of war and the laws of humanity’, the US issued a dissenting report, explaining its opposition to the idea. It urged that the nations

use the machinery at hand, which had been tried and found competent, with a law and a procedure framed and therefore known in advance, rather than to create an international tribunal with a criminal jurisdiction for which there is no precedent, precept, practice, or procedure (AJIL, 1920: 95, 142).

The recommendations of the commission were not followed because of American dissent. However, President Woodrow Wilson eventually reached a compromise with British Prime Minister Lloyd George, who was determined to hold trials (Willis, 1982: 80). The result – article 227 of the Treaty of Versailles – called for the former German Emperor Kaiser Wilhelm II to stand trial before an international tribunal ‘for a supreme offence against international morality and the sanctity of treaties.’ President Wilson drafted the provision, but must have known he would undermine the proposed prosecution since, shortly after, the Dutch gave asylum to the German emperor and refused to extradite him (Ibid). Accountability for war crimes did not rank high on President Wilson’s list of priorities. He was more concerned with a

²⁸ At the 1915 annual meeting of the American Society of International Law, a former Yale University law professor, Theodore S. Woolsey, proposed that war criminals be tried before ‘an international court . . . previously agreed to in treaty form’ (Woolsey, 1915: 68).

‘moderate peace, a viable democratic government for Germany, and, most of all, a League of Nations to secure future peace’ (Taylor, 1992: 15).

Early in its existence, the Council of the League of Nations had before it a proposal to create a ‘High Court of International Justice’, which would be competent to criminally prosecute individuals for violations of the ‘universal law of nations’ (Alfaro, 1950). However, the proposal was rejected for similar reasons as those given by the US delegation at the Paris Peace Conference (Cerone, 2007: 282).

During the interwar years, there was little activity within international organizations concerning the establishment of international criminal tribunals. European academics and policymakers kept the idea alive, but American international lawyers watched the process from the sidelines’ (Schabas, 2011: 771).

This all changed after WW2. On 1 November 1943, the US, the UK and the Soviet Union issued the ‘Moscow Declaration’, which stated that perpetrators of ‘atrocities, massacres and cold-blooded mass executions’ would be judged and punished after the war (Smith, 1982: 13-14). By the end of the year, the US, UK and other allied powers set up the UN War Crimes Commission to lay the legal and evidentiary groundwork for postwar trials (UN War Crimes Commission, 1948). In August 1944, the Commission proposed establishment of an international tribunal. The idea was opposed by Britain, which asked the US to join with it and block the concept. US Secretary of the Treasury Henry Morgenthau Jr. said that, with respect to the major criminals, he did not favor trials and proposed, instead, that the Nazi leaders be subject to summary execution, an idea that President Franklin Roosevelt himself entertained (Smith, 1982: 27-29). Soon, however, the execution plan, and the harsh proposal for de-industrialization of postwar Germany with which it was linked, lost their momentum. Within the US administration, the views of those who insisted

upon trials, like Secretary of War Henry Stimson, who had the support of the military, came to prevail and a proposal for the trial of Nazi leaders was developed (Kochavi, 1998).

The US government's preference for a 'judicial' solution to the problem of war criminals was ultimately made clear in the Yalta Memorandum, which had been prepared to guide President Roosevelt when he attended the Yalta conference:

We think that the just and effective solution lies in the use of the judicial method. Condemnation of these criminals after a trial, moreover, would command maximum public support in our own times and receive the respect of history. The use of the judicial method will, in addition, make available for all mankind to study in future years an authentic record of Nazi crimes and criminality (Yalta Memorandum, 1945).

This same Memorandum envisions the creation of an International Military Tribunal (IMT), to be established by Executive Agreement, and formed the groundwork of the later drafts submitted by the US for international agreement. Secretary Stimson, Secretary of State Edward R. Stettinius Jr. and Attorney General Francis Biddle initialled the Memorandum. Support for the tribunal came from the highest levels of the US administration, including President Harry Truman. Taylor notes that Truman, soon after taking office, made clear that he opposed summary execution and supported the establishment of a tribunal (Cerone, 2007: 284).

The IMT at Nuremberg was established on the basis of the London Agreement, a treaty concluded among the four allies, and the IMT for the Far East (Tokyo) was created by a special proclamation of General Douglas MacArthur, acting as Supreme Commander of the Allied Forces. Both tribunals were given jurisdiction to prosecute crimes against peace, war crimes and crimes against humanity. Their jurisdiction was limited to prosecuting those fighting on behalf of enemy states with no possibility of prosecuting those who fought on behalf of the Allies. Although France, Britain and the Soviet Union were equal players in theory, from the start, the initiative lay with

the Americans, led by Supreme Court Justice Robert Jackson (Schabas, 2011: 772).

Goering, Hess, Speer and others were convicted on 30 September and 1 October 1946. The plan at the London Conference had been to hold at least one additional trial, but there was declining enthusiasm for the idea except for in the US (Earl, 2009). Instead, the Americans organized a series of additional trials before their own military tribunals. Built around groups of defendants who were identified thematically – the Nazi judges, the SS, the military leaders, and so on – these were held in the same Nuremberg courtroom as the trial of the International Military Tribunal. Judges were drawn from US courts (Schabas, 2011: 772).

US interest in drafting a code of ‘international criminal law’ continued in 1946 when US Attorney General Francis Biddle, who served as a judge at the Nuremberg tribunal, urged President Truman to support the development of permanent procedures and institutions in order to effectively enforce international law and utilize the experience of Nuremberg. President Truman was strongly supportive:

That tendency will be fostered if the nations can establish a code of international criminal law to deal with all who wage aggressive war. The setting up of such a code as that which you recommend is indeed an enormous undertaking but deserves to be studied and weighed by the best legal minds the world over. It is a fitting task to be undertaken by the governments of the United Nations. I hope that the United Nations, in line with your proposal, will reaffirm the principles of the Nürnberg Charter in the context of a general codification of offences against the peace and security of mankind (Spiropoulos, 1950: para. 10).

Some days later, the US submitted a proposal to the first session of the UN General Assembly directing that the International Law Commission (ILC) begin work on ‘a general codification of offences against the peace and security of mankind or in an International Criminal Code’ (UN *General Assembly Resolution 177*, 1947).

The following year saw the negotiation of the Genocide Convention. An early draft prepared by the Secretariat included alternative proposals for a permanent, ad-

hoc international criminal court to try and punish acts of genocide. However, the US proposed that this issue be considered separately. This proposal was formalized in article VI of the Genocide Convention, which established that genocide would be punished by the territorial state or by the international criminal court, yet to be created (Genocide Convention, 1948).

Exacerbated by the nascent Cold War, enthusiasm in the US for the Genocide Convention and for multilateral commitments in the field of international justice and human rights soon met with fierce opposition in the Senate (LeBlanc, 1991). At the UN, work on the code of offenses was halted in 1954 and did not revive until the early 1980s. Ruti Teitel argues that the incomplete internationalization of justice represented by the Nuremberg tribunal was foreclosed by the emergence of the Cold War. Despite the development of human rights law after WW2, the incorporation of human rights criteria into national foreign aid and the selective linkage between human rights promotion and military sales and trade policies by Western governments in the 1970s profoundly politicized human rights, and violations often went unaddressed during this period (Teitel, 2000: 21).

2.2 Emergence of the Field

It was not until the 1980s and early 1990s that transitional justice emerged in the form that it did. During this period, a shift took place within the human rights movement that signalled the need for a response to concrete political dilemmas human rights activists faced in what they understood to be ‘transitional’ contexts. At the same time, the ‘transition’ paradigm shaped understandings of the kinds of justice claims that were considered legitimate or illegitimate in a period of transition to democracy. Also during this time, a series of foundational conferences helped create

an epistemic community, which played a critical role in clarifying and solidifying the concept of transitional justice. The first mention of the phrase ‘transitional justice’ came in a *Boston Herald* article about one of these conferences. The reporter covering the conference noted in passing that this was to be ‘the first in a year-long series of meetings on transitional justice’ (Palumbo, 1992: 16).

This section examines the role of the human rights movement, the transition paradigm and an epistemic community, which brought about the emergence of transitional justice. These groups had support within the US. In addition, the US democracy promotion agenda developed during this time frame and was clearly linked to discussions about transitions to democracy.

The human rights movement

Up to the mid-1980s, the central aim of the international human rights movement had been to shame repressive governments into treating their citizens more justly and to seek international sanctions where abusive regimes did not comply. Organizations like Human Rights Watch and Amnesty International, therefore, had not focused on the issue of accountability for violations. The response by Latin American countries to the end of repressive regimes in the region, however, forced a shift in the thinking of human rights activists.

The end of the dictatorship in Argentina and its establishment of the first, so-called ‘truth commission’ in 1984 was followed by similar events in several Latin American countries. Investigations into human rights violations were undertaken in Bolivia (1982–3), Uruguay (1985), and Paraguay (1992) by parliamentary commissions. NGOs also undertook investigations in Brazil (1979–85), Paraguay (1984–90), Uruguay (1986–9) and Bolivia (1990–3), each producing unofficial truth

reports. An emphasis on truth-seeking over criminal prosecutions in the region was illustrated through the significant use of amnesty laws, which either excluded or limited the scope of prosecutions. Amnesty laws were used in Brazil (1979), Chile (1978), Uruguay (1989), Nicaragua (1990 and 1991) and El Salvador (1992 and 1993).

The aftermath of these authoritarian regimes forced a shift in strategy and thinking on the human rights issues related to democratic political transitions (Zalaquett, 1995: 24). In José Zalaquett's article, 'Confronting Human Rights Violations Committed by Former Governments,' he spelled out the dilemma human rights advocates found themselves in by the early 1980s. He noted that

the focus of human rights activism was on current abuses and only seldom on past abuses or on preventing the recurrence of human rights violations ... Starting in the 1980s, however, human rights organizations have had to focus much more centrally on the human rights issues related to political transitions ... The fragile character of the gains [in new democracies] made human rights organizations aware of the fact that measures which are straightforward from the standpoint of human rights norms could have undesired political implications, which in turn would affect human rights adversely. Human rights organizations were thus unavoidably drawn into the ambiguities of transitional situations (Ibid, 1989: 24-25).

Thus, the decision of human rights activists to begin to address abuses by former regimes without endangering political transformations was intimately connected to the Latin American transitions then under way.

The transition paradigm

The notion of a 'transition to democracy' emerged as the principal paradigm by which to interpret the reform or overthrow of authoritarian regimes. Several factors may be offered to explain why the new focus on transitions came about. First, and most obvious, is the fact that democratic reform was a stated goal of important

segments of the population in countries undergoing political change at the time. Second, earlier theories of democratization associated with structural determinants (encapsulated in modernization theory) had been steadily transcended in the late 1970s and 1980s by an emphasis on the role of political contingency and actors. It was thought that transitions could happen through a shortened sequence of elite bargaining and legal-institutional reforms rather than through long-term socioeconomic stages (O'Donnell and Schmitter, 1986). Third, the transitions concept was transformed from a tool of socioeconomic transformation to one of legal-institutional reform. Finally, a global decline of the radical Left during the 1970s and a concomitant ideological shift in favour of human rights helped the shift in favour of the concept of liberalisation, opening ('apertura'), elite pacts, and transitions to democracy (Guilhot, 2005).

The emergence of the 'transitologists' in the late 1970s and 1980s were crucial to the development of this paradigm. In 1978, Argentine political scientist Guillermo O'Donnell, Swiss political scientist Philippe Schmitter, and Brazilian sociologist (and later president of Brazil) Fernando Henrique Cardoso focused on 'transitions' as a crucial area for exploration. The three were part of a newly formed advisory council for the Latin American Program at the Woodrow Wilson Center for Scholars in the US (along with US policymakers and members of the Inter-American Dialogue), and with the help of the program's director, Abraham Lowenthal, they put together a groundbreaking new project on transitions (Paige Arthur, interview, 22 February 2010). The Transitions project resulted in the publication of the book *Transitions from Authoritarian Rule* (1986), which offers a rigorous and influential window into the processes, risks and challenges of democratic transitions – particularly in many of the cases, such as Spain, Argentina, Uruguay and Brazil –

that were important to the development of the field of transitional justice. The authors acknowledged that the normative impulse guiding their work was that a transition to democracy was a desirable outcome, and they wanted to offer a useable instrument for those trying to effect a transition to democracy.

One of the reasons why the project was so influential was because it decisively shifted focus away from an analysis of the structural conditions for democracy that had been the mainstay of earlier social science and policy concerns. These included issues such as the behavioural, institutional, social or economic conditions of democracy – issues that tended toward structural rather than causal explanations of democracy (Arthur, 2009: 28). Drawing on the case studies they had commissioned for the project, O'Donnell and Schmitter emphasized the inherent uncertainty of transitional outcomes, rejecting the contention that approaches applicable to stable periods were appropriate to transitional ones. They emphasized the significance of bargaining on political outcomes, particularly in the form of pacts among elite groups, which they saw as the best method of maintaining the stability necessary to establish a democracy (O'Donnell and Schmitter, 1986: 37-39).

O'Donnell and Schmitter also placed a strong accent on the resurrection of civil society and the necessity of 'restructuring public space' during a transition and addressed the problem of 'settling a past account,' as they put it, 'without upsetting a present transition.' Focusing solely on prosecutions and purges of the state security forces, they asserted, 'Transitional actors must satisfy not only vital interests but also vital ideals—standards of what is decent and just,' and 'the worst of bad solutions would be to try to ignore the issue [of past violations].' Confronting past abuse, especially gross violations of human rights, were important in their view in order to transform the military's 'messianic self-image' as *the* institution representing the

interests of the nation, to combat impunity, and to reinforce the ethical values necessary to social health (Ibid: 28, 30-31). Legal-institutional reforms that led to a set of elections and the installation of party politics was seen as the ideal outcome of a transition to democracy (Ibid: 11-12).

The ‘transition’ idea was indeed influential and made its way into policy circles and domestic public spheres around the globe. Given the constraints and normative aims of transitions in the 1980s, a normative agenda on issues relating to the transformation of an abusive state security apparatus and the restoration of democratic citizenship helped to shape the emerging field of transitional justice. This agenda strongly colored perceptions of what justice entailed, or could become, during a time of transition.

While this idea was gaining momentum, US democracy assistance was taking root in the first Reagan administration. Early efforts involved support for transitional elections and the administration of justice in Central America, which were part of the Reagan administration's effort in that region of supporting transitions to democracy—or, more accurately, elected civilian rule—which in turn was a part of the larger policy of resisting the spread of what the Reagan administration believed to be Soviet-sponsored leftist subversion of the region (Carothers, 2000: 183). They quickly gained momentum of their own, however, and USAID began to sponsor elections assistance, rule-of-law aid, and other types of aid directly aimed at fostering democracy in various parts of Latin America and the Caribbean (Trubek, 2006). As countries in other parts of the world began to democratize in the second half of the 1980s, US democracy assistance followed. Democracy assistance mushroomed in the 1990s with support for elections, parties, rule of law, and civil society in Eastern Europe, Asia and sub-Saharan Africa.

The transitional justice epistemic community

By the end of the 1980s, a particular group of individuals began to focus more directly on challenges to justice in times of transition. This group played a decisive role in clarifying and solidifying the concept of transitional justice. Three conferences offered the venue in which the beginnings of a transitional justice ‘epistemic community’ could be created: the 1988 Aspen Institute conference, ‘State Crimes: Punishment or Pardon (funded by the Ford Foundation); the 1992 Charter 77 Foundation conference in Salzburg, Austria, ‘Justice in Times of Transition’; and the 1994 Institute for Democracy in South Africa (IDASA) conference, ‘Dealing with the Past’.²⁹ These conferences brought together experts in the fields of human rights, law and comparative politics from Latin America, Uganda, Haiti, and South Korea in an effort to compare experiences on the pursuit of justice initiatives in varying transitional contexts. The Open Society Institute and the Ford Foundation helped forge South-South links and transmission of these ideas, for example, between Chile and South Africa (Arthur, 2009).

Some of the participants had been actors in transitional justice efforts; some would become actors in such efforts; and others were observers with varying degrees of interest in the outcome of any particular national situation. Each of the conferences not only featured the same kinds of participants (in terms of professional competencies), but they also had many overlapping participants, including José Zalaquett (Chilean human rights lawyer), Jaime Malamud-Goti (Argentine human rights lawyer), Aryeh Neier (American human rights activist), Juan E. Méndez (Argentine human rights lawyer and activist), Diane Orentlicher (American

²⁹ An ‘epistemic community’ is a network of knowledge-based experts, who share a common outlook, methodology and set of normative commitments. The ability of these communities to manage the highly technical requirements of a particular subject area provides them with a potentially high level of influence over key foreign policy decisions (i.e., Haas, 1989; Haas, 1992; Adler and Haas, 1992; Haas, 1997).

international lawyer), Lawrence Weschler (American journalist), Alice Henkin (American human rights lawyer and activist) and Adam Michnik (Polish member of parliament) (See Appendix 8 for Arthur's list of participants at each conference, including overlap of participants). This network of professionals would go on to develop authoritative claim to knowledge about transitional justice, and may therefore be considered an epistemic community.

While these conferences account for the formal setting of the epistemic community's activity, there are also numerous informal channels of communication, including long-lasting personal friendships. When following the career paths of some community members, one finds that they often crosscut each other's past (for example, working at one point for the UN or being affiliated with the law schools of Harvard and New York universities) (Hirsch, 2007: 189). These conferences also served as inspiration for the creation of a number of organizations, namely the US-based Project on Justice in Times of Transition (1993), the South Africa-based Justice in Transition (1994), and an international NGO called the International Center for Transitional Justice (2001), as well as pockets within other NGOs, universities and international institutions (Arthur, 2009).

Transitional justice measures and their aims

Significantly, each of the conferences was structured in a similar way: they dealt with a distinct set of measures – prosecutions, truth-seeking, reparations and institutional reforms. These conferences, as well as the US Institute of Peace (USIP) publication of Neil Kritz's widely cited, four-volume compendium *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* in 1995, all consistently referred to these measures as necessary efforts in dealing with past

violations.³⁰ This is how these four measures – and not some other measures of justice – came to be recognized as *the* legitimate justice initiatives during a time of political change (Arthur, 2009). These measures are still commonly advocated for in transitional societies, as illustrated in the following figure, along with their aims and a few examples.

Figure 4: Measures commonly associated with transitional justice

| Measure | Aim | Examples |
|-----------------------|--|--|
| Criminal prosecutions | To prosecute perpetrators of human rights violations | ICTY, ICC, SCSL |
| Truth-seeking | To investigate past violations and provide an official account of what happened | South African TRC; Moroccan Equity and Reconciliation Commission |
| Reparations | To repair the material and moral damages of past abuse | Reparation policies in Brazil and Malawi |
| Institutional reforms | To reform public institutions that abused human rights into institutions that protect them | Lustration in Eastern Europe |

These measures are seen to provide justice for victims and to facilitate the transition in question. Prosecutions are seen to play a leading role in addressing the commission of human rights violations by helping to ‘transform the state’ from the illegitimate rule of a ‘lawless’ regime into a more liberal, legitimate, law-abiding political order (Teitel, 2000: 7, 28). They are thought to provide ‘a unique means by which to assert democratic values’ through their five consequences: establishing tangible facts about past crimes; offering disapproval of official policies; promoting confidence in the new political arrangements; restoring to citizens full membership in society; and improving chances for a transformation of military/civilian relations (Malamud-Goti, 1989: 81).

³⁰ When asked about the motivation behind his volumes on transitional justice, Neil Kritz said that no one had undertaken a comparative study of post-communist cases and that the study was linked to discussions in the 1990s about democratization (Neil Kritz, interview, 16 March 2010).

International criminal tribunals were established by the UN Security Council under its Chapter VII authority in the former Yugoslavia and Rwanda with a mandate to try individuals accused of genocide, crimes against humanity and war crimes. In response to criticisms that these ad-hoc tribunals were too expensive and lengthy, the UN supported the establishment of 'hybrid' tribunals in Sierra Leone, Cambodia and Bosnia, which involve a mix of domestic and international involvement. In cases where domestic capacity was lacking, such as in East Timor and Kosovo, the UN administration placed an internationalized criminal capacity within the domestic legal system. The ICC was established as the first permanent, treaty-based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community.

Truth-seeking, often in the form of a truth commission, is seen as a way to establish an official account of past violations. Priscilla Hayner defines truth commissions as temporary bodies that are officially sanctioned, authorized or empowered by the state which investigate a pattern of abuses over a period of time and complete their work with the submission of a report (Hayner, 2001: 14). The 1995 South African Truth and Reconciliation Commission (TRC) popularized the idea of truth commissions, but there have been over thirty official truth commissions established since 1974, though they have gone by many different names.³¹ While there has been much in common between these various bodies, their specific investigatory mandates and powers have differed considerably to reflect the needs and political realities of each country (Ibid: 15).

³¹ For example, commissions were established in Zambia (1998), Nigeria (1999), Burundi (1998), Ethiopia (1994), Sierra Leone (2002), Liberia (2006), Guatemala (1994), El Salvador (1992), Honduras (1990), Haiti (1994), Peru (2001), Colombia (2005), Sri Lanka (1995 and 1998), East Timor (2001), and Morocco (2004).

Numerous goals have been attached to these truth bodies, including national reconciliation, advancing healing for individual victims, ending impunity and putting in place protections to prevent the repetition of abuses in the future (Ibid: 16). Truth commissions are not judicial bodies and they hold fewer powers than courts. However, some claim their broader mandate to focus on a pattern of events, including the causes and consequences of political violence, allows them to go further in their investigations and conclusions than is generally possible in any trial of individual perpetrators (Ibid). Hayner finds that truth commissions may have any or all of the following five basic aims: to discover, clarify and formally acknowledge past abuses; to respond to specific needs of victims; to contribute to justice and accountability; to outline institutional responsibility and recommend reforms; and to promote reconciliation and reduce conflict over the past (Ibid: 24).

Reparation programmes are state-sponsored initiatives meant to help repair the material and moral damages of past abuse, which may include financial compensation, official apologies or memorialisation efforts (Kritz, 1995, xxxi).³² Some claim that reparations can contribute to individual and societal aims of rehabilitation, reconciliation, consolidation of democracy and restoration of law (Redress, 2007: 6). In transitional contexts, they often seek to compensate in some way a large universe of victims of human rights violations (De Greiff, 2006: 2). Reparation policies and programmes have been carried out in several countries, including Argentina, Chile, Brazil, South Africa and Malawi. Many truth commission reports recommend reparations programmes, although their implementation record varies (i.e., El Salvador, Haiti).

³² International law recognizes the obligation to provide reparations for international wrongful acts (*Chorzow Factory Case*, 1928; *Geneva Conventions III and IV*, 1949; *Additional Protocol I*, 1977). The right to reparation can take on different forms, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (Basic Principles, 2005).

Reforms of public institutions that have abused human rights have included, for example, the creation of oversight; complaint and disciplinary procedures; the reform or establishment of legal frameworks; the development or revision of ethical guidelines and codes of conduct; changing symbols that are associated with abusive practices; and the provision of adequate salaries, equipment and infrastructure (OHCHR, 2006: 4). Reform efforts have reviewed the functioning of an entire public sector and considered merging, disbanding or creating public institutions (Ibid). Vetting of personnel, as well as exclusion from public service, is another form of non-criminal accountability seen to help fill the immunity gap (Ibid).

Examples of lustration in Eastern Europe characterized transitional justice policy after the collapse of the Soviet Union.³³ In contemporary practice, security sector reform of the police and military, which aims to train personnel and reform institutions, has been seen as necessary in a sector potentially complicit in committing violations. Justice sector reform, including the training of judges, has also been undertaken. Additionally, transitional justice has had direct effects upon activities such as the disarmament, demobilisation and reintegration (DDR) of ex-combatants and their inclusion in new security structures (Sriram, 2007: 584). Efforts traditionally seen as ‘peacebuilding’ activities that address restoration of the rule of law and security have also been discussed within the framework of transitional justice (Ibid: 585).

³³ De-communicization or purge laws were passed in Albania (1992), Bulgaria (1992, 1997, 1998), the Czech Republic and Slovakia (1991), Poland (1992, 1997, 1998), Romania (1998), and Hungary (1994, 1996), although these led to actual widespread purges only in Albania, the Czech Republic, and Germany. In Germany, after opening the political police records and creating a truth commission for their review in 1992, thousands of civil servants, including judges and police officers, were dismissed from service for collaboration. Hungary, Poland, Romania, and Bulgaria also set up offices to permit the reviewing of secret police files, but with different levels of accessibility for the general public. There were a few trials in the region but many sentences were annulled along with other problems about fairness. With the exception of some Baltic states, there has been no comparable process in the new republics of the former Soviet Union (Aguilar Fernández, 2001: 6, 8).

Considerable debate took place about each of these measures, and many issues raised during the 1980s and early 1990s remain as central challenges to the field. For example, some critics have argued that transitional justice emerged out of an explicit democratization framework, which cannot be replicated by other types of transitions and where transitional justice measures may not be the most appropriate response, i.e., socialist transitions or transitions to peace (Arthur, 2009: 46). Others raised the difficulties of transposing the regional diagnoses of Latin American observers to other parts of the world (Ibid: 47). In the mid-1990s, for example, a group of Central and Eastern European regional specialists argued that ethnic, religious or national identities were more likely to be mobilized than class structures as in Latin America (Schmitter and Karl, 1994/1995; Bunce, 1995; Terry, 1993). Similarly, African transitions from neo-patrimonial states were more likely to begin with mass protest, rather than elite pacts (Arthur, 2009: 48).

A third critique has been offered by those working in the field of historical justice who view transitional justice as overly narrow with measures specifically designed for the brief duration of a political transition. They emphasize the importance of long-term efforts at transformation that involve some element of social restructuring, such as affirmative action or land reform, which they see as fundamentally different from the limited aims of prosecutions, reparations and the like (Ibid: 49).

A fourth critique is based on the observation that a number of countries that were supposed to be making a transition to democracy had ultimately failed to do so (Zakaria, 1997; Kaplan, 1997; Carothers, 2002). For these observers, the transition paradigm raised false hopes, perhaps mostly among democracy promoters, of an easily identifiable, sequential path toward a new political regime. Finally, others

reject transitional justice altogether, on the grounds that it is too tainted by a specific political project (democratization) and by the support of specific institutional actors (US democracy-promoting organizations) (Arthur, 2009: 50). Some are tempted to change the term to ‘mass atrocity’ justice instead.

Despite these critiques, the field continued to grow throughout the 1990s and 2000s. The measures and the conceptual framework of the field as a whole remain very similar to that developed by the epistemic community, human rights movement, and transitologists in the 1980s and early 1990s. Transitional justice was justified through appeals to universal human rights norms; seen as legitimate only when undertaken by a democratic polity; and seen as having an underlying, determined connection related to the normative goal of promoting democracy (Arthur, 2009: 22). The creation of the epistemic community during the three conferences, as well as the USIP volumes on TJ, solidified the framework for the emerging field.

Although the US was not directly involved in this stage of the field’s development, the US democracy promotion agenda was clearly linked to the transition paradigm. In addition, the US-based human rights NGOs, foundations and think tanks formed a basis of support for US influence in the next stage of the field’s evolution.

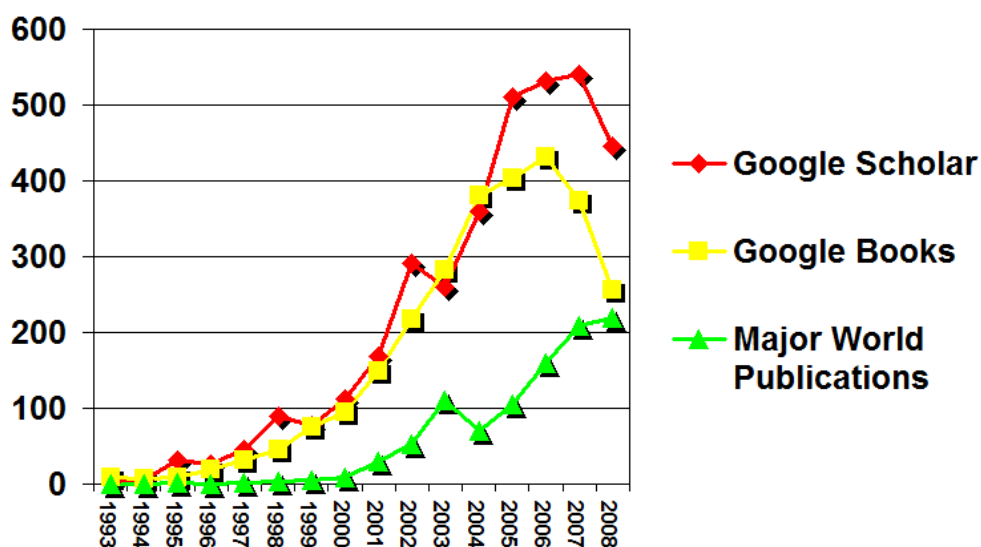
2.3 Institutionalizing Transitional Justice

During the 1990s and 2000s transitional justice measures were established around the globe, and garnered increasing attention from states, international organizations and NGOs, universities, and local civil society groups. ICTY Prosecutor Richard Goldstone spoke about an ‘industry’ that developed around the field (Hirsch, 2007: 191). The International Center for Transitional Justice (ICTJ) was established in

2001 to assist measures, carry out research and provide guidance to policymakers on the growing field. The organization grew from a staff of 12 with one office in New York to a staff of over 100 with ten offices around the world by 2008. Amnesty International, Human Rights Watch, and the Open Society Justice Initiative have also been heavily involved in the field, as have the Ford and MacArthur foundations.

Several universities have courses on transitional justice (i.e., UC Berkeley, NYU), specific institutes dedicated to the topic (i.e., Ulster) and research networks (i.e., Oxford, Essex and London TJ networks). In 2007, the International Journal of Transitional Justice began publishing TJ-specific research. A web search of the term ‘transitional justice’ identified a significant increase in reference to the term in Google Books, Google Scholar and major world publications between 1993 and 2008.³⁴

Figure 5: Web search results for ‘transitional justice’



Within the UN system, former Secretary-General Kofi Annan drew attention to TJ in a 2004 report where he urged the strengthening of UN support for criminal prosecutions, truth commissions, vetting processes and reparations programs in the

³⁴ Search completed on 16 February 2009.

interests of justice, peace and democracy (Annan, 2004). Since this report, the Office of the High Commissioner for Human Rights (OHCHR), the UN Development Programme (UNDP) and the Department of Peacekeeping Operations (DPKO) have actively promoted transitional justice measures in their work. In 2005, the UN Economic and Social Council published the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, which lays out the framework for the status of transitional justice as an international norm (Principle 2: the inalienable right to the truth; Principle 19: the right to justice; Principle 31: the right to reparation). In 2012, the UN appointed ICTJ Research Director Pablo de Greiff as the first Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence of serious crimes and gross violations of human rights.

The US was also heavily influential during this period, with significant involvement in the field's institutionalization through support of several transitional justice measures. In a study on international assistance to internationalized tribunals and truth commissions, Muck and Wiebelhaus-Brahm identified the US as a 'dedicated supporter' of transitional justice since it financially assisted the majority of measures examined in their study.³⁵ They found that the top five TJ donors, who account for three-quarters of TJ total state assistance, are Canada, Japan, Netherlands, UK and the US. Of these five, the US contributes almost one-third of the total financial assistance, far surpassing other donor governments' contributions, as shown below.³⁶

³⁵ Muck and Wiebelhaus-Brahm examined the following seven measures in their study: the ICTY, ICTR, SCSL, ECCC, SLTRC, LTRC and the CAVR (Muck and Wiebelhaus-Brahm, 2011).

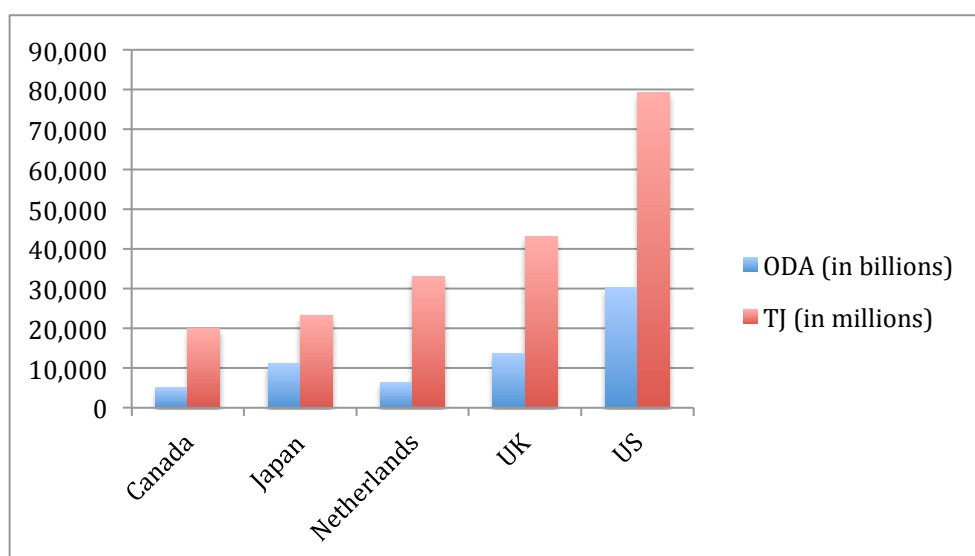
³⁶ Data obtained from Muck and Wiebelhaus-Brahm, 2011: 31.

Figure 6: International assistance to transitional justice

| Donor | Amount (in USD) | Percentage |
|-------------|--------------------|------------|
| Canada | 19,888,000 | 7 |
| Japan | 23,099,000 | 9 |
| Netherlands | 33,110,000 | 12 |
| UK | 43,025,000 | 16 |
| US | 79,192,000 | 30 |
| Total | 270,908,273 | 100 |

Their study also made a direct comparison of foreign aid and TJ aid in order to explore the similarities and differences in state donation patterns. For many states, there is a level of uniformity in the proportion of their TJ assistance to total foreign aid donation. In other words, their foreign aid donation, relative to other state contributions, is very similar to their TJ donation. However, as depicted in the chart below, the TJ assistance of the same five states listed above (Canada, Japan, Netherlands, UK and the US) dramatically exceeds their foreign aid (official development assistance - ODA).³⁷

Figure 7: Foreign aid versus TJ assistance



³⁷ Foreign Aid totals measured in billions from OECD Net Official Development Assistance 2010; also see Muck and Wiebelhaus-Brahm, 2011: 35).

This suggests that although an ever-increasing number of states are supporting TJ measures, the field is dominated by a handful of key states. TJ assistance from the US is strikingly high compared to its overall development assistance, which again signals the importance of examining the US role in TJ.

The remainder of this chapter examines the US role in the establishment of the ICTY, ICTR and ICC in the 1990s – courts that were all key to the institutionalization of transitional justice. The emphasis on criminal prosecutions was not only a result of US influence, but also heavily advocated for by human rights organizations, that were more wary of other transitional justice measures like truth commissions (Neil Kritz, interview, 16 March 2010).

The International Criminal Tribunals for the Former Yugoslavia and Rwanda

In October 1992, the Security Council requested that the Secretary-General establish a Commission of Experts to examine and analyze information about violations being committed in the former Yugoslavia (UN, 1992). The US, which was behind the initiative, had wanted to create a body similar to the 1943 war crimes commission that prepared the ground for the Nuremberg trials. However, the UK, France and China watered down the American draft and argued that it be named a committee, with no reference to war crimes.³⁸

To get around this resistance, the US circulated a letter at the UN Commission on Human Rights (UNCHR) from the president of Bosnia and Herzegovina calling for the creation of a Nuremberg-like international criminal court (UNCHR, 1992). The Commission called on ‘all States to consider the extent to which the acts committed in Bosnia and Herzegovina and in Croatia constitute

³⁸ Tran and Foot, 1992; Morris and Scharf, 1995: 26.

genocide,' in accordance with the Genocide Convention (UNCHR, 1992b). In December 1992, US Secretary of State Lawrence Eagleburger 'named names' of persons suspected of crimes against humanity, saying the US had provided details to the Commission of Experts 'whose decision it will be to prosecute or not.' Eagleburger had previously served as US Ambassador to Belgrade, and had been considered sympathetic to the Serbs, but by August 1992, his views had evolved, and he began calling for a war crimes tribunal. At a conference on the Balkan conflict, Eagleburger said:

We know that crimes against humanity have occurred, and we know when and where they occurred. We know, moreover, which forces committed those crimes, and under whose command they operated. And we know, finally, who the political leaders are and to whom those military commanders were — and still are — responsible (Sciolino, 1992: 1).

The names included the Bosnian Serb leaders Karadžić' and Mladic', who figured in early ICTY indictments,³⁹ and Serbian President Slobodan Milošević', who would subsequently travel to the US for the Dayton negotiations.⁴⁰ Eagleburger warned that 'a second Nuremberg awaits the practitioners of ethnic cleansing' (Ibid).

In one of his first policy initiatives as Secretary of State, Warren Christopher, who was sworn in as Eagleburger's replacement in January 1993, instructed senior advisers in the State Department to investigate how best to organize an international war crimes tribunal. He said they could take place either under the jurisdiction of the International Court of Justice in The Hague or in a specially created tribunal in the US (Sciolino, 1993; Tisdall and Stephen, 1993). Christopher submitted a report to the UN on human rights violations during the Balkan conflict based on material collected by US intelligence agencies (Schabas, 2011: 776). During debate of

³⁹ Karadžić' Indictment, 1995.

⁴⁰ Milošević' was not indicted for alleged crimes committed in Bosnia and Herzegovina until November 2001 (Milošević' Indictment, 2001).

Security Council Resolution 808, which established the ICTY, then US Ambassador to the UN Madeleine Albright said that President Clinton ‘has long supported the establishment of a war crimes tribunal at the UN to bring justice and deter further atrocities in the former Yugoslavia’ (UN, 1993). In preparing his report and the draft statute, the secretary-general drew upon a substantial submission from the US (US Letter to UN, 1993; Morris and Scharf, 1994: 451-457).

Many observers credit Albright with the creation of the ad-hoc tribunals. Part of her legacy as USUN Ambassador and then Secretary of State was the promotion of justice and accountability for human rights violations – an issue she took a personal interest in and decided to prioritise (See, i.e., David Scheffer, interview, 12 March 2012; Tom Malinowski, interview, 15 March 2010). According to her advisor David Scheffer, Albright often construed herself as the ‘mother of the war crimes tribunals’ (Scheffer, 2011: 8). Upon the establishment of the ICTY, Albright stated, ‘There is an echo in this chamber today. The Nuremberg principles have been reaffirmed. The lesson that we are all accountable to international law may finally have taken hold in our collective memory’ (Albright, 1993). However, America’s chief Balkans negotiator at the time, Richard Holbrooke, acknowledged that the tribunal was widely perceived within the government as little more than a public relations device and a potentially useful policy tool (Scharf, 1999: B01). Nevertheless, the US was the ‘driving force’ behind the establishment of the tribunal, contributing the greatest share of political and financial muscle. John Cerone said: ‘It is clear that without the support of the US, the ICTs would never have come into being...The establishment of the ICTY was a US idea and it was the US that pushed it through the Security Council’ (Cerone, 2007: 288).

On 15 June 1994, Albright initiated State Department discussions about prosecution of those responsible for atrocity crimes in Rwanda, which received the support of Secretary of State Christopher (USUN, 1994; Scheffer, 2011: 71). In early August, senior State Department human rights official John Shattuck visited Kigali and convinced Rwanda's new regime to go along with the idea.⁴¹ David Rawson, who was the US Ambassador to Rwanda at the time, said that the Rwandan request was prepared in the US Embassy in Kigali and taken for signature to the Rwandan Minister of Justice by Shattuck (Rawson, 2001: 125-134). On 28 September 1994, Rwanda formally requested the UN to establish a tribunal (Rwanda Letter to UN, 1994).

President Clinton expressed strong support for the ICTY and ICTR in a 1995 speech at the University of Connecticut:

With our purpose and with our position comes the responsibility to help shine the light of justice on those who would deny to others their most basic human rights. We have an obligation to carry forward the lessons of Nuremberg. That is why we strongly support the United Nations War Crimes Tribunals for the former Yugoslavia and for Rwanda (Clinton, 1995).

Clinton reiterated his support in a 1997 address before the UN General Assembly, and also endorsed the creation of a permanent international criminal court, saying:

[W]e must maintain our strong support for the United Nations war crime tribunals and truth commissions. And before the century ends, we should establish a permanent international court to prosecute the most serious violations of humanitarian law (Clinton, 1997).

The ad-hoc tribunals also enjoyed broad, bipartisan support in Congress. Congressional pressure on the Clinton and then Bush administrations helped ensure US support, particularly on the issue of conditioning economic infrastructure aid on

⁴¹ Lewis, 1994: 6; Gray, 1994: 1. After losing power in mid-July, the remnants of the Rwandan regime that presided over the genocide issued a call for the creation of an international tribunal, adding that its jurisdiction should cover human rights violations in Rwanda since October 1990, when the civil war had begun.

the arrest and transfer of indicted suspects to the tribunals (Cerone, 2007: 289).

US support to the tribunals took several forms. In his personal history of the war crimes tribunals, *All the Missing Souls*, David Scheffer discusses his lead role in building the ICTY, ICTR and other tribunals as senior adviser and counsel to Albright while she served as the US Ambassador to the UN from 1993-1996 and as the first US Ambassador-at-large for War Crimes Issues from 1997-2001 (Scheffer, 2011: 3). Scheffer said that he fielded ‘endless requests’ throughout the 1990s for support from international prosecutors and judges, persuaded federal agencies to provide personnel to the tribunals, garnered evidence for the tribunals, helped secure the apprehension or surrender of the indicted fugitives,⁴² lobbied Congress to appropriate the necessary funds to make voluntary contributions, and intervened with other governments to increase their support for tribunals. The US contributed 25 percent of the budgets for the ICTY and ICTR (Scheffer, 2011: 28, 107).

ICTY Prosecutor Richard Goldstone said an American deployment of seasoned investigators and attorneys from the Justice Department (DOJ) enabled the tribunal to launch its work and was instrumental in preparing early indictments and trial work (Goldstone, 2000: 82). Some stayed on at the ICTY for many years and joined the tribunal payroll.⁴³ ICTY Special Advisor to the Prosecutor Frederick Swinnen said some accused the court as being ‘pro-US’, but the personnel that came from DOJ are ‘some of the most senior trial attorneys at the court that have stayed on because of their commitment to the court. This is why the ICTY is successful.’⁴⁴

⁴² The US launched a Rewards for Justice program, which offered up to \$5 million for information leading to the arrest or conviction of ICTY and ICTR indictees.

⁴³ More critically, one off-the-record comment with a former ICTY official suggested that the US manipulated the ICTY by providing gratis staff, which was a practice later suspended. He also said that the US was selective in the evidence it provided the court in order to support its interests.

⁴⁴ Mark Harmon, Alan Tieger, Peter McCloskey and Dermot Groome are some of the US attorneys that stayed on at the ICTY (Frederick Swinnen, interview, 13 January 2012).

During the Dayton Peace Accords, US officials worked to protect the ICTY from being undermined. Weeks before the signing of the agreement, Clinton said:

Some people are concerned that pursuing peace in Bosnia and prosecuting war criminals are incompatible goals. But I believe they are wrong. There must be peace for justice to prevail, but there must be justice when peace prevails (Clinton, 1995).

According to Scheffer, no other government so strongly opposed amnesty as part of a peace agreement (Scheffer, 2011: 131).

Despite challenges in coordinating US intelligence-sharing with the tribunal, he claims that much of the American-generated evidence ultimately made its way, directly or indirectly, into trials (Ibid: 44). In addition, he writes, ‘although other governments pitched in, the US often became the one-stop shopping ally of the war crimes tribunals’ (Ibid: 29).

The creation of an ambassadorship for war crimes issues was a result of Scheffer’s early experiences with the ICTY and ICTR, which, he said, demonstrated to Albright and others the critical utility of having someone coordinate intelligence-sharing and other matters with the war crimes tribunals (Ibid: 44). It illustrated that support for the investigation and prosecution of atrocity crimes had become an official diplomatic function (Ibid: 10). Scheffer said:

On the one hand, this initiative marked a sad commentary on the state of the world at the close of the twentieth century ... On the other hand, my ambassadorship demonstrated that the United States recognized the gravity of the situation and rose to the challenge. No other nation had seen fit to designate anyone as an ambassador to cover atrocity crimes (Ibid: 3).

The office was responsible for ‘formulat[ing] US policy responses to atrocities committed in areas of conflict and elsewhere throughout the world’ and ‘coordinat[ing] US government support for war crimes accountability in regions where crimes have been committed against civilian populations on a massive scale.’

The office also monitored, advised and helped administer or report on international tribunals.⁴⁵

In addition to the war crimes office, the ICTY and ICTR have interacted with a range of US actors, including legal and political advisors in US embassies, State Department European and African bureaus (for political knowledge of the regions), the National Security Council, the US Mission to the UN, members of Congress (on financial issues) and DOJ (on capacity-building). An ICTY adviser said that US support for the ICTY declined in the 2000s when the European Union took on a more significant role. He noted that ICTY officials never meet with US Secretaries of State, but always meet Ministers of Foreign Affairs in Europe perhaps, he said, because the court is not as political an issue for the US as it is for Europe (Frederick Swinnen, interview, 13 January 2012).

The International Criminal Court

After a campaign of several decades, US Senator William Proxmire managed to steer the Genocide Convention through congressional approval in 1988. That same year, the US Congress passed legislation urging the President to

begin discussions with foreign governments to investigate the feasibility and advisability of establishing an international criminal court to expedite cases regarding the prosecution of persons accused of having engaged in international drug trafficking or having committed international crimes (US PL 100-690, 1988).

However, this same piece of legislation was careful to preserve the possibility of an exemption for US nationals. It stipulated, ‘[s]uch discussions shall not include any commitment that such court shall have jurisdiction over the extradition of United States citizens’ (Ibid).

⁴⁵ This description was formerly posted on the State Department’s website before a recent change in the office’s description. See <http://www.state.gov/j/gcj/>.

In 1989, Trinidad and Tobago placed the question of an ICC back on the agenda of the UN General Assembly, which reignited discussions for a court. The GA requested the ILC to prepare a draft statute. President Clinton supported the idea:

nations all around the world who value freedom and tolerance [should] establish a permanent international criminal court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law (Clinton, 1995).

In July 1997, Congress reminded Clinton of his earlier expressions of support for the creation of a court, urging him ‘to continue to support and fully participate in negotiations at the UN to conclude an international agreement to establish an international criminal court’ (US House Joint Resolution 89, 1997). Nonetheless, there was a broad spectrum of views within the US, and each agency had its own concerns. While the State Department, as a whole, was in favour of establishing a court, there was resistance from the intelligence community and the Joint Chiefs of Staff. Through inter-agency dialogue, some of the rough edges were smoothed, and inter-agency consensus in favour of establishing a court was ultimately achieved (Cerone, 2007: 291).

Led by War Crimes Ambassador David Scheffer, the US delegation to the Rome Conference, where the court’s statute was negotiated, was the largest of any government. A number of US agencies, including the Departments of Justice, State, Defense, Treasury, the Joint Chiefs of Staff and the intelligence community, had all been involved in developing the US position at Rome (US Congress, 1998). The delegation arrived with a number of concerns that it sought to have addressed during the conference. Broadly these concerns fell into three categories: the crimes that would fall within the subject matter jurisdiction of the court; the way in which cases would be triggered; and the exposure of US personnel. In general, the delegation engaged in what it considered to be a constructive approach – to influence the

Conference to accede to US demands in the hope of establishing a court acceptable to the US (Cerone, 2007: 291).

However, US support waned after it was unsuccessful in having its concerns addressed at the Rome Conference.⁴⁶ Despite US efforts to block support for the court, the Rome Statute was passed by a large majority.⁴⁷ Scheffer explained that the US voted against the statute primarily because it objected to the breadth of the court's jurisdiction, in particular, its jurisdiction over nationals of non-states parties, absent a Security Council referral (US Congress, 1998). Although he tried, Scheffer says he 'could not break the logjam' between Security Council control, which satisfied the Justice Department, and the precondition requiring consent of the state of nationality, which Justice rejected and the Pentagon strongly preferred (Scheffer, 2011: 181).

The Rome Statute was open for signature until the end of December 2000. There was a split view within the US over whether or not to sign. The Department of Defense (DoD), and the Joint Chiefs of Staff, in particular, did not want to sign; however, there was division even within DoD (Cerone, 2007: 293). On the last day that it was open for signature, the Clinton administration signed the treaty. Upon signature, Clinton made clear that the US was not prepared to ratify the treaty in its present form, citing 'significant flaws' in the statute – language that was heavily

⁴⁶ In the drafting of the Rome Statute, a coalition of middle and small powers, including allies of the US like Germany and Canada, coalesced into a group known as the 'like-minded', which agreed on the following issues: inherent jurisdiction of the court over the 'core crimes' of genocide, crimes against humanity, and war crimes (and, perhaps, aggression); the elimination of a Security Council veto on prosecutions; an independent prosecutor with the power to initiate proceedings on his or her own initiative (*proprio motu*); and the prohibition of reservations to the statute (Kirsch and Robinson, 2002: 70-71). The US found itself at odds with all of these propositions. But it was outmaneuvered at the Rome Conference by the 'like-minded', which managed to dominate much of the debate and the organization. Their program was incorporated into the final draft (Schabas, 2011: 778).

⁴⁷ In the final sessions of the Rome Conference, the US tried desperately to block the groundswell of support for a court that was largely independent of the Security Council, unsuccessfully proposing some last-minute amendments and then calling for an unrecorded vote on the final version of the Statute, thereby preventing adoption of the draft statute by consensus. The result was 120 in favor to seven against with twenty-one abstentions, a comfortable majority (UN Diplomatic Conference, 1998).

negotiated in order to satisfy DoD (Ibid). Clinton stated, 'I will not, and do not recommend that my successor, submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied' (Clinton, 2000). Scheffer offered several reasons for US signature, including maintaining influence within the ongoing negotiations, influencing national judges and prosecutors to take a positive view of the Court and enhancing the country's 'leadership on international justice issues' (Scheffer, 2002: 47).

The new Bush administration was more hostile toward the Court, evidenced in statements from officials like Under Secretary John Bolton.⁴⁸ Democrats were at best tepid in their support,⁴⁹ and key Republican legislators, such as Tom DeLay and Jesse Helms, shared the administration's hostility toward the ICC. A number of events that occurred after the change in administration seemed to augment this initial hostility. After the 9/11 attacks, the ICC was seen as a possible restraint on the use of force by the US in its war on terror (Cerone, 2007: 294). In addition, by early 2002, the Rome Statute had obtained the requisite number of ratifications, which meant it would enter into force in July 2002. The Bush administration had already indicated that it would not proceed with ratification, and in May, the US 'unsigned' the statute, stating, the US 'does not intend to become a party to the treaty. Accordingly, the US has no legal obligations arising from its signature on 31 December 2000' (US Letter to UN, 2002). The purpose of this statement was presumably twofold: to make clear US opposition to ICC jurisdiction over US nationals, and to relieve itself of any legal

⁴⁸ A wariness about international law and institutions was evident on the part of Bush, Vice-President Dick Cheney, and a number of their appointees, including Donald Rumsfeld, Secretary of Defense, and John Bolton, Under Secretary of State for Arms Control and International Security. Bolton, whose anti-ICC position was clearly set forth in a 1998 Senate hearing had an influence greater than his title would ordinarily imply because he was perceived to have helped Bush win the 2000 presidential election (Cerone, 2007: 293).

⁴⁹ Very few Democrat legislators have gone on record as supporting US adherence to the ICC Statute. Even Chris Dodd, who was the chief opponent of the anti-ICC provisions of the ASPA stated that he would not support US ratification of the ICC Statute (Cerone, 2007: footnote 110).

obligation it may have undertaken upon signing the treaty (Vienna Convention, 1969: Art. 18).

On the same day, Marc Grossman, Under Secretary of State for Political Affairs, said ‘after years of working to fix this flawed statute, and having our constructive proposals rebuffed, it [was] our only alternative.’ Grossman stated that the principles that the US stands for – including state responsibility for ensuring justice in the international system and the strengthening of domestic judicial systems – are not consistent with the Rome Statute. Reflecting US concerns expressed at Rome, Grossman listed four critiques of the ICC, stating that it undermined the role of the UN Security Council in maintaining international peace and security; created a prosecutorial system that is an unchecked power; asserted jurisdiction over citizens of states that have not ratified the treaty, which threatens US sovereignty; and was built on a flawed foundation that left it open for exploitation and politically motivated prosecutions (US Grossman Press Release, 2002). In an interview about US opposition to the ICC, the second war crimes ambassador, Pierre Prosper, reiterated Grossman’s concerns about a politically motivated prosecutor that might unfairly target Americans:

We are in a unique position internationally. We have the unique responsibility to preserve international peace and security. Whenever there is a conflict, whenever there is a hot spot, the first nation that people look to is the United States. Currently we have service members deployed in over 100 countries at a given time. We feel that this is a process that exposes us to politicization. We believe that a prosecutor with this unbridled authority to pursue any case that he or she feels is appropriate is a dangerous one and will expose us (PBS, 2002).

Despite these concerns, it appeared that the US would refrain from interfering in ICC operations in relation to the states parties to the Rome Statute. Both Grossman and Prosper stated that the US ‘respects the decision of those nations who have chosen to join the ICC’ (US Grossman Press Release, 2002) and that it did not intend to ‘take

aggressive action or wage war' against the ICC or its supporters (US Prosper Press Release, 2002).

Shortly after, however, the US began to pursue an aggressive strategy for limiting the exposure of all US citizens to the jurisdiction of the ICC. By June 2005, the US, at times applying tremendous political and financial pressure, had persuaded 100 states to sign 'Article 98 agreements' (a provision of the ICC statute), whereby those states would undertake not to surrender US citizens to the ICC (US Fact Sheet, 2002). The US also worked through the Security Council to obtain an exemption for peacekeepers from non-states parties. Congress prepared legislation to support these efforts. In August 2002, Bush signed into law the American Service-members' Protection Act (ASPA). This legislation, dubbed the 'Hague Invasion Act' by critics, contained provisions restricting US cooperation with the ICC, making US support of peacekeeping missions largely contingent on achieving ICC exemption for all US personnel, cutting off military assistance to states that refused to sign Article 98 agreements and granting the President permission to use 'all means necessary and appropriate' to free US citizens and allies from ICC-ordered detention or imprisonment (ASPA, 2002).

Despite this position on the ICC, the US surprisingly remained involved in a number of other transitional justice measures, including the Special Court for Sierra Leone (SCSL). Several court officials said that the US supported the Special Court because, as a hybrid court model, it offered an alternative to the ICC (interviews with SCSL, STL⁵⁰ and ICTR officials, 12-13 January 2012). For example, peacekeepers were exempt from this court's jurisdiction, an exemption that the US had sought at

⁵⁰ Special Tribunal for Lebanon.

the Rome Conference (Cerone, 2007: 308). The extent to which US support for the SCSL was meant to serve as an ICC-alternative is unclear.

Increased US support for national and hybrid processes, however, was not only about the ICC. It was also a product of the evolution of the field. By the early 2000s, ‘tribunal fatigue’ had begun to set in, not only within the US but among NGOs as well, who were concerned about the high costs and lengthy time frame of the ad-hoc tribunals.⁵¹ As early as 2001, Prosper stated, ‘international tribunals are not and should not be the courts of first redress, but of last resort’ (Prosper, 2001a). He said that ‘international practice should be to support sovereign states seeking justice domestically when it is feasible and would be credible’ (Prosper, 2004). He felt that initial enthusiasm for the international tribunals had essentially neglected domestic processes (Pierre Prosper, interview, 22 April 2010).

Where there was no possibility for credible justice at the national level, Prosper indicated a preference for regional solutions. This policy line was manifested in US proposals to find a regional solution to the situation in Darfur, despite the recommendation by a UN commission of inquiry that the Security Council refer the situation to the ICC. The US instead proposed a ‘Sudan Tribunal’ as an alternative to the ICC, though this proposal did not gain support (Alta, 2005; Rice, 2005; Crook, 2005; US State Department, 2005). After months of negotiations, the US allowed the referral to go through by abstaining on the UNSC referral to the ICC (UNSC 1593, 2005). State Department Legal Adviser John Bellinger stated:

While the United States continues to maintain fundamental objections to the ICC, we did not veto [the referral] because we recognized the need for the international community to work together to end the atrocities in Sudan and speak with one voice to bring to account the perpetrators of those crimes (US Bellinger Press Release, 2005).

⁵¹ Scheffer claims that he coined the term ‘tribunal fatigue’ to describe the Security Council’s weariness of building more ad hoc tribunals or expanding the two that existed (Scheffer, 2011: 118).

Later that year, Assistant Secretary of State for African Affairs Jendayi Frazer indicated a willingness on the part of the US to assist the ICC in Darfur prosecutions. She told the House International Relations Committee ‘that if the ICC requires assistance, the United States stands ready to assist ... we don’t want to see impunity for any of these actors’ (US House Subcommittee on Africa, 2005). An ICC Adviser said that the US abstention on Darfur was seen as its tacit acceptance of the ICC (ICC Adviser, interview, 13 January 2012).

In addition to the Darfur abstention, in September 2006, Congress approved legislation eliminating some of the aid restrictions imposed by the ASPA on states parties to the ICC Statute. In November 2006, President Bush also waived the penalties imposed upon countries that refused to reach Article 98 agreements, because it was interfering with other US foreign policy objectives, such as counterterrorism and counterdrug policy (Schabas, 2011: 783). In June 2006, the *Wall Street Journal* reported on an interview with Bellinger:

US officials concede they can’t delegitimize a court that now counts 100 member countries, including such allies as Australia, Britain and Canada. While insisting the Bush administration will never allow Americans to be tried by the court, ‘we do acknowledge that it has a role to play in the overall system of international justice,’ John Bellinger, the State Department’s chief lawyer, said in an interview ... In a May speech, Mr. Bellinger said ‘divisiveness over the ICC distracts from our ability to pursue these common goals’ of fighting genocide and crimes against humanity (Bravin, 2006).

A statement by the third war crimes ambassador, Clint Williamson, reflected further support of the ICC:

We look at all the tools available to us, starting with the international support for local courts and non-judicial mechanisms, when these institutions are robust enough and may simply need a small amount of training and additional resources. If this is not a possible solution to the problem of accountability, we examine options for a hybrid-type of accountability mechanism. Finally, if domestic or hybrid courts would not be a viable option, we look at a purely international process, which

now, with the new Administration, presumably would be through the International Criminal Court (ASIL, 2009).

The shift in US policy on the ICC ripened with the election of President Barack Obama, followed by the appointment of Harold Koh as legal adviser to the State Department and Stephen Rapp as the fourth war crimes ambassador. An ICC Adviser called it a ‘180 degree turnaround with Obama’ with positive engagement, active communication and a good relationship with the US. He said that Ambassador Rapp ‘visits the ICC several times a year – more than states that are party to the court’ (ICC Adviser, interview 13 January 2012).

In March 2010, Harold Koh delivered an important address to the American Society of International Law:

Significantly, although during the last decade the US was largely absent from the ICC, our historic commitment to the cause of international justice has remained strong. As you all know, we have not been silent in the face of war crimes and crimes against humanity. As one of the vigorous supporters of the work of the ad hoc tribunals regarding the former Yugoslavia, Rwanda, Cambodia, Sierra Leone, and Lebanon, the United States has worked for decades, and we will continue to work, with other States to ensure accountability on behalf of victims of such crimes. But as some of those ad hoc war crimes tribunals enter their final years, the eyes of the world are increasingly turned toward the ICC ... Even as a non-State party, the United States believes that it can be a valuable partner and ally in the cause of advancing international justice. The Obama Administration has been actively looking at ways that the US can, consistent with US law, assist the ICC in fulfilling its historic charge of providing justice to those who have endured crimes of epic savagery and scope. And as Ambassador Rapp announced in New York, we would like to meet with the Prosecutor at the ICC to examine whether there are specific ways that the United States might be able to support particular prosecutions already underway in the Democratic Republic of Congo, Sudan, Central African Republic, and Uganda (ASIL, 2010).

Since Koh’s statement, the US took the position as an observer in ICC bodies and developed a policy of supportive engagement (Rapp, 2011). The US first attended the ICC’s Assembly of States Parties in 2009, where Rapp confirmed that the US was back where it had been a decade earlier in terms of a positive, if critical,

approach to the court (Schabas, 2011: 784). In early 2010, he participated in the preparations for the Review Conference of the Rome Statute, at which such matters as the definition of the crime of aggression were discussed. In February 2011, the US and other members of the Security Council unanimously referred the Libya case to the ICC (UNSCR 1970, 2011).

The ICC asked Ambassador Rapp to clarify the US position on the court since many countries were concerned about joining in case of US objection (ICC Adviser, interview 13 January 2012). Rapp did so: ‘Even while the US has not made the decision itself to join, we are content to see other countries join and we wanted to make that very clear here’ (Rapp, 2011). Rapp also stated that the ICC is the venue where atrocities will be dealt:

We are now coming to the end of the era of the Yugoslavia and Rwanda Tribunals and Sierra Leone Special Court; institutions with narrow jurisdictions and ad hoc mandates. In the future, for crimes committed after 2002, there will not be the will to establish temporary international courts for single situations. If international justice is required, it will be delivered at the International Criminal Court. That is where these trials will be conducted. That is where the mass butchers and rapists will face justice, and that is where the United States needs to provide support to ensure success (Rapp, 2010a).

According to Rapp, the US wants to help the ICC succeed in the cases that it has undertaken, serving as a ‘non-party partner’ to make it possible to make these arrests. Rapp noted that when the US is focused on specific cases, ‘there is broad support for international justice in our Congress’, and mentioned legislation passed to support the arrest and trial of LRA leader Joseph Kony. In addition, President Obama issued a statement expressing disappointment that Kenya failed to honor its commitment to the ICC to arrest Sudanese President Bashir (Ibid).

When asked about US ratification of the ICC Statute, Rapp relied on arguments based on American exceptionalism: the fact that the US takes a ‘very long

time' to decide whether to ratify international treaties and conventions; 'a tradition of self-reliance, an aspiration to do what is right in our own way, and a pride in the protections provided by our constitution and laws'; 'a well-developed system of military justice' which already fulfils military obligations; and concerns about a 'politically-motivated prosecutor' (Rapp, 2010a/2011). Rapp said that it will take the development of case standards in actual practice by a succession of prosecutors and judges to relieve the US concern. 'Meanwhile', he said, 'our engagement policy allows us to get closer to the ICC and to work to resolve these issues' (Rapp, 2011).

Although the US has warned about politicization of the court, William Schabas finds that a politicized ICC is not a problem for the US 'as long as the politics of the institution are compatible with its own national interests' (Schabas, 2011: 785). He argues that the gradual warming of the US to the ICC, which began early in the second term of the Bush administration, is the result of 'a growing level of comfort with the policy choices and the political orientations of the prosecutor' (Schabas, 2011: 785). The Prosecutor has pursued cases in Uganda, Sudan and Kenya, but not against British forces in Iraq. If he proceeds in Colombia, it is likely to be against the rebel FARC and not the pro-government militias. Investigations in Afghanistan will probably target the Taliban, not North Atlantic Treaty Organization (NATO) forces.

All of this is reassuring to the US, which feared a radical prosecutor who would complicate American foreign policy. Instead, it has a tame institution that focuses its energies where the US would prefer, helping pursue perceived American interests in the same way as the Nuremberg, Yugoslavia, and Rwanda tribunals ... While the US would be happier with an ICC whose subservience to the Security Council was clearly established, its anxiety level with the institution has declined to the extent that the prosecutor seems to respect American interests and spheres of influence (Ibid: 786).

Similarly, ICC Legal Advisor Rod Rastan said: ‘So far, all cases have converged with US interests (i.e., in Libya, Darfur, Uganda), but it is unclear what will happen when a case comes up which is more sensitive for the US’ (Rod Rastan, ICC visit, 13 January 2012).

2.4 Explaining US Influence

This chapter has examined US influence on the evolution of transitional justice from WW1 to the present. It has explored this influence over three stages: precursors to transitional justice; the emergence of the field; and its institutionalization. The US initially resisted the idea of international prosecutions proposed by Britain and France after WW1. By the time of WW2, however, the prevailing view had changed, ‘and the US became a keen supporter, indeed the keenest supporter, of individual criminal accountability for perpetrators of war crimes and other atrocities’ (Schabas, 2011: 785). It provided the backbone to the Nuremberg tribunal, and then continued with major prosecutions long after the interest of its allies had waned.

US interest declined during the Cold War, which is linked to slow developments in the field during this period. The US was not directly involved in the field’s emergence in the 1980s in Latin America and Eastern Europe, however, Reagan’s democracy promotion policies ran in parallel to transitional justice activity. In addition, human rights NGOs, transitologists and the epistemic community all had support within the US, which contributed to significant US influence in the field’s institutionalization during the 1990s and 2000s.

When transitional justice took off in the early 1990s, ‘no other nation showed such enthusiasm’ for the ad-hoc tribunals for the former Yugoslavia and Rwanda and a range of similar efforts in Sierra Leone, Cambodia, Kosovo, East Timor and Lebanon. The Clinton administration, and specifically Madeleine Albright, was

responsible for this support and the creation of a new ambassadorship to develop and coordinate war crimes policy. Scheffer said that Albright saw early on that this issue was not only ‘a clear opportunity to do the right thing’, but also a way ‘to put herself on the map very quickly’ (David Scheffer, interview, 12 March 2012).

The Bush administration was less interested in international courts than its predecessor, focusing more on national and hybrid processes. With regard to the ICC, the US was overtly hostile, ‘unsigned’ the Rome Statute and passing legislation to undercut the court’s effectiveness. US involvement in the Iraqi Special Tribunal garnered negative attention, and allegations of torture in the war on terrorism further damaged the US reputation. Scheffer deemed this period as the end of ‘the era of American leadership in the arena of international justice’ (Scheffer, 2011: 247).

Despite the setback in the perception of its leadership role in transitional justice, the US remained active in the tribunals already under way and was key to the establishment of the Special Court for Sierra Leone. In addition, by Bush’s second term, officials scaled back on the anti-ICC rhetoric and began reversing some of the policies they found to be problematic. The Bush administration may have been affected by other states, international NGOs and domestic pressure groups, however the shift was driven internally with high-level officials instituting policy reversals. For example, Secretary of State Condoleezza Rice said that the war crimes ambassador should no longer work on Guantánamo detainee issues; the US abstained on the Darfur referral to the ICC and supported efforts to arrest and prosecute Sudanese President al-Bashir. This shift is important to note. Despite the backward nature of some policies in Bush’s first term, even his administration walked back from its more extreme positions just a few years after their creation, and began to return to the status quo (Clint Williamson, interview, 21 April 2010). This shift

cannot be completely attributed, as Schabas and others maintain, to US comfort with ICC case selection (Schabas, 2011: 785). This view overlooks American recognition, at high levels, that a shift on US policy in this area was necessary for a broad range of reasons.

Many assumed US foreign policy would change dramatically with the election of President Obama. Some change did take place, particularly with regard to the appointment of high-level officials with expertise on accountability issues (i.e., Samantha Power at the NSC, Susan Rice at the USUN, Anne-Marie Slaughter, Eric Posner, Harold Koh, Stephen Rapp and Diane Orentlicher at the State Department. Orentlicher was even present at the early conferences on transitional justice in the 1980s). However, there is also a level of continuity with the Bush administration. For example, the emphasis on national processes has continued as the first line of defense in addressing serious human rights violations. The Obama administration has also continued the shift in policy on the ICC, which began during Bush's second term, toward one of active support and engagement.

This discussion illustrates the important influence of the US on the evolution of transitional justice. A range of US government actors provided significant financial, technical and political support to the ICTY, ICTR and ICC – war crimes tribunals that have been key to the development of the field. This overview should serve as a useful entry point into the three case studies that follow.

The next three chapters undertake a close examination of US foreign policy on transitional justice after the initial intrigue with ad-hoc tribunals had subsided and where the ICC was not a major factor of influence. The Cambodia, Liberia and Colombia cases offer an opportunity to more deeply understand the US approach to a wider set of transitional justice measures in the 2000s – a period which reflects a

different historical moment in the field's evolution with the establishment of new measures and models of transitional justice. The Cambodia case is explored first, with an examination of US involvement in the Khmer Rouge Tribunal.

Chapter 3 US Involvement in the Khmer Rouge Tribunal

The last chapter presented an overview of US influence on the evolution of transitional justice from WW1 to the present. This chapter narrows the focus to a specific case, that of US involvement in the Khmer Rouge Tribunal in Cambodia. Examining the role of the US in the negotiations and operations of this transitional justice measure will offer an empirical basis for the claims made in this study.

People don't realize that the number of dead in Cambodia exceeded the total number of dead in Bosnia, Rwanda, Sierra Leone and Darfur combined - about 1.2 million to 1.7 million, so this should be of interest (Scheffer in Bernstein, 2009).

From 1975 to 1979, an estimated 1.7 million of Cambodia's seven million people died through disease, overwork, starvation or execution under the Khmer Rouge (KR) regime of Democratic Kampuchea.⁵² In an attempt to revolutionize Cambodian society into one without class or ethnic differences, the urban population was forced into the rural parts of the country to carry out forced labor. Approximately two-thirds of the deaths during this era are attributed to starvation and disease, and almost two million Cambodians were made homeless by the war.

Vietnamese troops invaded Cambodia in late 1978 and installed the People's Republic of Kampuchea (PRK), a communist government made up mostly of former Khmer Rouge cadres who had defected to Vietnam, including current Prime Minister Hun Sen. Fighting continued between the government and Khmer Rouge between 1979 and 1991. Millions of Cambodians remained in refugee camps during the unrest.

The 1991 Paris Accords established the UN Transitional Authority in Cambodia (UNTAC), which led to the elections in 1993, where a power-sharing arrangement was made for a two-headed administration led by Hun Sen and Prince

⁵² 1.7 million deaths is Ben Kiernan's estimate (Kiernan, 1994: 193; Kiernan, 1996: 458; Kiernan, 2003). Craig Etcheson's estimate is between 2.2 and 2.5 million deaths (Etcheson, 2000: 171).

Ranariddh. In 1997, the Co-Prime Ministers requested UN assistance to set up a tribunal to try those responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975-79. Negotiations took years, but the 2001 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia (ECCC) and the 2004 Agreement between the UN and the Royal Government of Cambodia together established the ECCC. The Cambodia tribunal has a mixed structure, with Cambodian judges and staff in the majority, assisted by international judges and staff recruited through the UN. The court has a statutory mandate to bring to justice surviving senior leaders of Democratic Kampuchea and those who were most responsible for genocide, crimes against humanity, serious war crimes, and certain other Cambodian crimes during the Pol Pot era.

The basic rules of the court were agreed in 2007. Case 001, which tried Kaing Guek Eav, alias Duch, began in 2009, and resulted in his conviction in July 2010 of crimes against humanity and war crimes committed while he ran Tuol Sleng (S-21) prison camp. Case 002, which is investigating three senior Khmer Rouge cadres, began in November 2011.⁵³ The defendants have been indicted on charges of crimes against humanity, war crimes and genocide, as well as homicide, torture, and religious persecution within Cambodian law. Senior Cambodian government officials, including the prime minister, have publicly opposed extending prosecutions beyond the present defendants (OSJI, 2011: 3). Several international court officials, including one of the judges, resigned in 2011 due to Cambodian government opposition to progress of Cases 003 and 004 (UN Press Statement, 2011). Future trials are therefore uncertain.

⁵³ A fourth accused, Ieng Thirith, a former Khmer Rouge minister and the wife of accused Ieng Sary, was declared unfit to stand trial, predicated on her diagnosis of dementia caused by Alzheimer's disease. Ieng Thirith has been ordered unconditionally released by the Trial Chamber and the Supreme Court Chamber is currently seized of the Prosecution's appeal against the lack of conditions required by the order.

The US government played a critical role in this process. Since no studies have focused exclusively on US involvement in the establishment and operations of the ECCC from the late 1980s to 2011, this chapter provides insight into how and why the US was involved in this process. It concludes with some ideas about the impact of US involvement. This case study represents some of the diversity of transitional justice measures since it concerns a hybrid court established in Asia many years after violations were committed. It draws on archival research undertaken in Washington DC and Phnom Penh, and 40 Cambodia-specific interviews with officials from the US government, ECCC, international organizations, NGOs, academia and the media (See Appendix 2 for interview list). It also relies on accounts by US and UN officials directly involved in the negotiations (particularly UN Special Representative for human rights in Cambodia Thomas Hammarberg and US War Crimes Ambassador David Scheffer), as well as other Cambodia experts. Before turning to tribunal negotiations, a review of US foreign policy in Cambodia helps frame the topic of study within its historical context.

3.1 US Foreign Policy in Cambodia

Cambodia won independence from France in 1953 and was ruled by King Norodom Sihanouk until 1970. In 1966-69, South Vietnamese and American forces mounted frequent small raids across the Cambodian border, despite protests by the Cambodian government. In 1970, Sihanouk was overthrown by a coup and Lon Nol seized power. US attacks against communist bases continued with Nixon's support (Shawcross, 1979: Chronology). The January 1973 Paris Agreement, which ended the Vietnam War, included a provision on the withdrawal of foreign troops from Cambodia. However, massive B-52 and F-111 bombings of Cambodia resumed after the

ceasefire. Congress opposed the bombing but agreed that the attacks could continue until 15 August 1973. On 7 August, an off-target B-52 plane bombed the government-held town of Neak Luong, killing over 125 people and injuring more than 250. The US bombing of Cambodia between 1969-73 killed 50,000 to 150,000 people.⁵⁴ Many have discussed how this bombing contributed to the circumstances that enabled Pol Pot to seize power in 1975 (i.e., Bernstein, 2009).

The Khmer Rouge was the name given to the followers of the Communist Party of Kampuchea, who were the ruling party in Cambodia from 1975 to 1979, led by Pol Pot, Nuon Chea, Ieng Sary, Son Sen and Khieu Samphan. After taking power, the Khmer Rouge leadership renamed the country Democratic Kampuchea. The Khmer Rouge subjected Cambodia to a revolution that was aimed at creating a purely agrarian-based Communist society. Those living in cities were deported to the countryside, and subjected to forced labour. Nearly 2 million Cambodians are estimated to have died in waves of murder, torture and starvation, aimed particularly at the educated and intellectual elite.

The US (along with many other governments) withdrew its embassy staff from Cambodia in April 1975 and did not re-establish a diplomatic mission until 1991. Although there was little information about what was happening inside Cambodia during the Khmer Rouge years, US Rep. Stephen Solarz held a subcommittee hearing on human rights abuses in Cambodia in 1977 (US House of Representatives, 1977). Senator George McGovern tried to get support for an international force to stop the Khmer Rouge violations, but this was not approved (New York Times, 1978). In 1979, a State Department spokesman said ‘while the US takes great exception to the human rights record of the government of Kampuchea,

⁵⁴ The estimate of 50,000 to 150,000 bombing deaths is cited in Kiernan, 1989.

we as a matter of principle do not feel that unilateral intervention against the regime of any third power is justified' (Washington Post, 1979: 22).

In December 1978, Vietnamese troops took Phnom Penh and established the People's Republic of Kampuchea (PRK), which was later called the State of Cambodia (SOC). Hun Sen was appointed as Foreign Minister of the PRK/SOC in 1979 and in 1985 he was made Chairman of the Council of Ministers and Prime Minister until 1990. The Khmer Rouge retreated to camps on the Thai border, allied with two smaller non-communist parties, and called themselves the Coalition Government of Democratic Kampuchea (CGDK). Since the US and other nations did not want to recognize a Cambodian government dominated by Vietnam, they recognized the CGDK as the legitimate government of Cambodia until 1992 (Kiernan, 1999; Picken, 2011).

President Carter's National Security Adviser Zbigniew Brzezinski's objective during this time was to enhance US-China strategic relations in the common anti-Soviet effort (Brown, 1989: 43). Brzezinski recalls that in 1979, 'I encouraged the Chinese to support Pol Pot. I encouraged the Thai to help Democratic Kampuchea...Pol Pot was an abomination. We could never support him but China could' (Becker, 1986: 440). According to Brzezinski, the US therefore 'winked, semi-publicly' at Chinese and Thai aid to the Khmer Rouge forces, while US officials pushed through additional UN and other international aid to their camps on the Thai border (Becker, 1986: 440). Official US policy during this time was that all covert aid was non-lethal and that none of it went to the Khmer Rouge, except for the border relief programs. However, there is evidence of unreported American assistance to the Khmer Rouge.⁵⁵ In a widely seen documentary in 1990, Peter

⁵⁵ Kiernan, 1993: footnote 48. Cambodian historian Kenton Clymer finds that the most persuasive indication was US Public Law 99-83, which made it illegal to spend any funds to bolster Khmer

Jennings argued that the US was covertly supporting the return to power in Cambodia of the Khmer Rouge.⁵⁶

Without the support of the Soviet Union after it collapsed, it became more difficult for Vietnam to occupy Cambodia. Vietnamese troops withdrew from the country in 1989, and a political settlement, as opposed to a military settlement, was finally possible. The Paris Peace Conference brought together representatives of 18 countries, the four Cambodian parties (KPLF, FUNCINPEC, KR and CPP) and the UN Secretary-General in an effort to negotiate the withdrawal of the remaining Vietnamese occupation troops and self-determination for the Cambodian people. The US helped negotiate a Security Council agreement for a UN-managed peace process that was formally adopted by the General Assembly. Cambodian historian Ben Kiernan said that, initially, the US goal was to find a settlement that China would approve, which meant including the Khmer Rouge in the settlement and rejecting a tribunal to judge them (Ben Kiernan, personal communication, 14 April 2011). However, this goal conflicted with congressional concerns about preventing another genocide and the political imperative of being seen to be doing so. The Assistant Secretary of State for East Asian and Pacific Affairs at the time, Richard Solomon, said that support from Rep. Solarz and a number of senatorial Vietnam War veterans was critical in preventing a split between Congress and the administration (Solomon, 2000: 102-103).

In July 1991, Secretary of State James Baker announced that the US would no longer recognize the CGDK, and would open negotiations with Vietnam and

Rouge military capacity (US Public Law 99-83, 2004:141). This was part of the legislation that ultimately allowed lethal assistance to the noncommunist resistance, introduced in the House by Rep. Solarz (US House of Representatives, 1990). Clymer asks: 'Why was such a law needed if aid had not been getting to the Khmer Rouge?' (Clymer, 2004: 142).

⁵⁶ Clymer believes the Jennings documentary was a major factor in changing American policy toward Cambodia in the 1990s (Clymer, 2004: 142).

provide humanitarian aid to Cambodia (Clymer, 2004: 155). The primary goal became to keep the Khmer Rouge from taking power, a goal which, Baker acknowledged, the US had not been able to achieve with the former policy. The US would no longer defer to ASEAN countries and China on Cambodian matters (Ibid). The US agreed to pay 30% of UN operations and, at least on the surface, warmed to Hun Sen's government (Ibid: 162).

The Paris Peace Accords were signed in October 1991, establishing the UN Transitional Authority for Cambodia (UNTAC), the largest peacekeeping operation the UN had ever mounted and the first occasion on which the UN had taken over the administration of an independent state. UNTAC oversaw the 1993 elections, which led to the creation of a constitutional monarchy led by King Norodom Sihanouk (followed by his son, Prince Norodom Sihamoni in 2004). Although the royalist FUNCINPEC party won a plurality in the elections, a power-sharing arrangement was made for a two-headed administration led by Co-Prime Ministers Hun Sen (CPP) and Prince Ranariddh (FUNCINPEC).

After UNTAC's dissolution in September 1993, the Clinton administration restored diplomatic relations with Cambodia and ended a long-standing trade embargo. Between 1994 and 1997, the US put in place a variety of economic, diplomatic and military support programs for the new Cambodian government. In 1994, the Clinton administration threatened Thailand, a long-standing US ally, with military sanctions over the issue of continuing relations between the Thai military and the Khmer Rouge (Etcheson, 2005: 43). The Pentagon also dispatched military advisers and trainers to assist in the reorganization of the Royal Cambodian Forces. The US provided nearly \$1 million in nonlethal military assistance in 1994, and sent a succession of military delegations in subsequent years to study lethal aid

requirements (Ibid: 44). USAID initiated a rural development and democratization program on the scale of \$25-30 million per year, including projects to assist with the reintegration of defecting KR soldiers into society. The National Democratic Institute (NDI) and the International Republican Institute (IRI), both funded by US Congress, increased their number of projects in Cambodia.

The US cut off aid, however, after a coup by Hun Sen in 1997. Hun Sen and the CPP were re-elected in 1998 and used their control of the National Assembly as well as the military, courts and police to remove and outmaneuver opposition groups (Freedom House, 2008). Nevertheless, in 2008, the US resumed direct government aid, with assistance to the Cambodian military to train soldiers in fighting terrorism, information sharing, training in surveillance techniques and tracking the flow of terrorist finances around the world (Mathaba News, 2007). According to Human Rights Watch, the US provided more than \$4.5 million worth of military equipment and training to Cambodia since 2006, some of which has gone to military units and officials with records of serious human rights violations.⁵⁷

Despite concerns about weak governance, widespread poverty and corruption (the World Bank designated Cambodia as a fragile state in 2006), roughly half of Cambodia's national budget is provided by foreign governments and development agencies (Picken, 2011). China is the largest contributor and does much to keep the ruling party in power (Hauter, 2007). Japan is next, vying with China for influence, and also largely supportive of the regime. France, the former colonial power, is pragmatic and influential in the European Commission, a significant contributor. In

⁵⁷ In a statement of July 8, 2010, HRW called for a halt to US military aid pending thorough vetting of Cambodia's armed forces to screen out individuals and units with records of human rights violations. Its call was prompted by Angkor Sentinel, a regional military exercise held in Cambodia in July as part of the US Defense and State Departments' 2010 Global Peace Operations Initiative to train peacekeepers, and the selection of the ACO Tank Unit, which has been involved in illegal land seizures, to host part of the exercise (Picken, 2011: footnote 14).

June 2010, donor nations including Japan, the US and members of the EU pledged a record \$1.1 billion in foreign aid (Picken, 2011). Hun Sen, now one of the world's longest-serving prime ministers, maintains good relations with China, Japan, Australia, France and the US.

This section sped through 60 years of US foreign policy in Cambodia in order to provide a cursory understanding of key events during this period. The bombing of Cambodia during the Nixon administration contributed to circumstances that enabled Pol Pot to seize power in 1975. Despite limited information about KR crimes taking place, the Carter administration failed to respond. While Vietnam was in control of the country during the 1980s, the Reagan administration, along with the UN, recognized the CGDK (of which the Khmer Rouge was part) as the legitimate Cambodian government, which helped the Khmer Rouge maintain control. In the 1990s, the Clinton administration supported the establishment of the first UN transitional administration and contributed aid to the new government after the 1993 elections. Aid was cut off in 1997, but resumed in the 2000s during the Bush administration with a focus on military and counterterrorism assistance. This brief background should help to frame the following discussion of US involvement in the establishment of the Khmer Rouge Tribunal.

3.2 The Tribunal

Accountability for human rights violations committed by the Khmer Rouge did not receive significant attention until the 1990s, with some exceptions. In 1979, Vietnam sponsored a trial that convicted Pol Pot of genocide in absentia.⁵⁸ In the 1980s, the PRK called for an international tribunal to try other Khmer Rouge leaders (FBIS,

⁵⁸ On 15 July 1979, the PRK promulgated a decree-law establishing a Revolutionary People's Tribunal for the Trial of the Genocide Crime of the Pol Pot-Ieng Sary Clique.

1981: H4). In 1986, Australian Foreign Minister Bill Hayden endorsed this call at an ASEAN conference in Manila.⁵⁹ In 1988, two thousand Cambodians living abroad signed a petition to Australian Prime Minister Bob Hawke and leaders of other governments asking for action against the Pol Pot regime in the International Court of Justice (Kiernan, 1993: footnote 22)

However, it was not until after the Cambodian peace process and elections that Cambodian Co-Prime Ministers Hun Sen and Prince Ranariddh requested UN assistance in setting up an international tribunal. This request began a long period of negotiations between the UN and Cambodia, which eventually resulted in the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC, also known as the Khmer Rouge Tribunal).

This section first looks at early US opposition to a tribunal and the subsequent passage of legislation to support accountability efforts in Cambodia. It then examines US technical and political involvement in detailed aspects of the UN-Cambodia negotiations. It lastly explores congressional funding restrictions to the court, and re-engagement with the process in recent years.

Early opposition to a tribunal

US interest in Cambodian trials initially came from a small group of advocates in the 1980s. As a Yale law student, Gregory Stanton started the Cambodian Genocide Project in order to document the charge of genocide after visiting the excavations of the Choeung Ek ‘killing fields’ site with Australian historian Ben Kiernan. Shortly

⁵⁹ Kiernan, 1993: 196. Ben Kiernan suggested that the Australia-Kampuchea Support Committee invite Gregory Stanton to address its meeting in Sydney in May 1986. An ex-officio representative from the Australian Department of Foreign Affairs present at the meeting invited Stanton to Canberra to meet with Department of Foreign Affairs officials, which led to Hayden’s call for an international tribunal at the ASEAN conference in Manila in June 1986 (Ben Kiernan, personal communication, 14 April 2011). Also see, FBIS, 1986a: H1; FBIS, 1986b: H2; FBIS, 1986c: H1.

after, David Hawk, former executive director of Amnesty International USA started the Cambodia Documentation Commission (CDC), which documented abuses and advocated for a war crimes tribunal. The film, *The Killing Fields*, helped increase public attention to human rights violations committed by the Khmer Rouge.

However, because the Khmer Rouge was viewed as a counterbalance to Vietnam, US officials were unwilling to support their prosecution. President Reagan's Secretary of State George Shultz opposed efforts to indict the Khmer Rouge for genocide or other crimes against humanity and, in 1986, declined to support Australian Foreign Minister Bill Hayden's proposal for an international tribunal to judge KR crimes (Stanton, ND; Kiernan, 1993: 196). Calls by Reps. Jim Leach and Robert Kastenmeier for an international tribunal also went unheeded (Haas, 1991: 225).

Advocacy efforts continued and intersected with those concerned about the return to power of the Khmer Rouge. In 1988, a joint resolution adopted by Congress asked the Reagan administration to prevent a return to power of Pol Pot and the Khmer Rouge (US House of Representatives Joint Resolution 602 and US Senate Joint Resolution 347, 1988).⁶⁰ Yet, the US was still not ready to take up the issue. One example was Assistant Secretary of State Richard Solomon's refusal to describe Pol Pot's crimes as genocidal (US House of Representatives, 1991). Jeremy Stone, the founder of the Campaign to Oppose the Return of the Khmer Rouge (CORKR), explained that the State Department

would not accuse the Khmer Rouge of genocide because it might give the Vietnamese justification for their invasion; it would force the United States to take action under the genocide convention to bring them to justice; and it would make it hard for [the US] to support Prince Sihanouk in his desire to deal with the Khmer Rouge as part of a new Cambodian government (Stone, 1999: 270).

⁶⁰ Although nonbinding, Reagan signed the bill into law (US Public Law No. 100-502, 1988).

CORKR, formed in 1989,⁶¹ with nearly fifty endorsing and sponsoring organizations, urged the Bush administration to open direct contacts with the Hun Sen government.⁶² This group felt that power-sharing was impossible and there was no choice but to back Hun Sen and help the Thais disengage from the forces of Pol Pot (Colby and Stone, 1989). Congressional Democrats became increasingly concerned about the return of the Khmer Rouge and 203 members signed a petition requesting that Secretary Baker identify a policy that would deny a role for Pol Pot and the Khmer Rouge in Cambodia (Greenberg, 2000: 151). CORKR and others were also concerned about the leaking of US aid for the noncommunist resistance to the Khmer Rouge (Stone, 1989).

During the peace talks, the SOC (earlier known as the PRK) had attempted but failed to get specific reference to trials or the issue of genocide written into the texts of the agreements (FBIS, 1991a: 26; Bangkok Post, 1991: 4; Le Monde, 1991: 9; FBIS, 1991b: 32; AFP, 1991: 42). However, these omissions were partially compensated for by the inclusion in the Paris Agreements of allusions to atrocities under Khmer Rouge rule and to the SOC demand for judicial accountability.⁶³ These formulations reflected a compromise between the SOC and the US delegation to

⁶¹ According to Ben Kiernan, CORKR was founded in January 1990 at a meeting in Washington DC that was convened by a group of former antiwar activists, including Anne Gallivan, Paul Shannon, Kathy Knight, Sally Benson, Walter Teague, Chan Bun Han and others. CORKR then asked Kiernan to join their board. Kiernan involved Gregory Stanton in the project. Chan Bun Han and Kiernan invited a number of key Cambodians to join the CORKR Board, including former Cambodian Prime Minister In Tam, and former Information Minister Chhang Song and Kim Eng Chantarit. Executive Director Ruth Cadwallader (1990-1992) and Craig Etcheson (1992-1994), Anne Gallivan, and Kathy Knight undertook CORKR's lobbying and other Washington work with the support of Jeremy Stone and others (Ben Kiernan, personal communication, 14 April 2011).

⁶² Stone identified the main actors he felt were responsible for pushing US policy on the Khmer Rouge, including the Indochina Project, a group run by William Herod that spread information about Indochina problems to Washington policy analysts; Chang Song, a former minister of the Lon Nol government and a Cambodian who was respected on Capitol Hill; William E. Colby, former Director of Central Intelligence from 1973 to 1976; Edmund Muskie, former Secretary of State; Michael Horowitz, a Reagan administration official; and those involved with CORKR (Stone, 1999: 270).

⁶³ Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, 1991: Preamble and Article 15.

make a specific reference to the Genocide Convention and opposition to this by the PDK, among others. This signified a change in US policy. In his speech to the conference, US Secretary of State James Baker highlighted the shift when he declared:

What makes the case of Cambodia so extraordinary - and its claim for international support so compelling - is the magnitude of the suffering its people have endured. The Khmer Rouge were no ordinary oppressors. In the name of revolution, they used violence against their own people in a way that has few parallels in history. We condemn these policies and practices of the Khmer Rouge as an abomination to humanity that must never be allowed to recur. To prevent such a recurrence, we have encouraged the incorporation of strong human rights guarantees into this settlement agreement. And I can assure ... that we will steadfastly sustain our efforts to ensure that the human rights of the Cambodian people are supported by the international community. Cambodia and the US are both signatories to the Genocide Convention, and we will support efforts to bring to justice those responsible for the mass murders of the 1970s if the new Cambodian government chooses to pursue this path (Heder, 2011: 6-7).

This statement signalled a shift, but the US was still not prepared to support a tribunal. Australia and Japan suggested a court, but China and the US opposed and it was not included in the peace accords (Kiernan, 1993: 207, 231, 246).

Legislation to support accountability

Peter Cleveland, congressional aide to Senator Chuck Robb (Democrat from Virginia), proposed the idea of a Cambodia tribunal to the Senator, after attending several conferences run by the Aspen Institute's Indochina Program where he had met Ben Kiernan and others (Ben Kiernan, personal communication, 14 April 2011). Cleveland drafted a bill initially entitled 'The Khmer Rouge Prosecution and Exclusion Act', which was introduced by Senator Robb to Congress in May 1992, but was not adopted. CORKR continued to lobby Washington officials, and the

Cambodia Genocide Justice Act (CGJA) was passed by Congress on 1 April 1994 and signed by President Clinton in May.

CGJA made it ‘policy of the US to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity committed in Cambodia between April 17, 1975, and January 7, 1979.’⁶⁴ The legislation required the establishment of a new office in the State Department that would be responsible for supporting investigations of crimes against humanity as well as ‘develop[ing] the US proposal for the establishment of an international criminal tribunal for the prosecution of those accused of genocide in Cambodia.’

CGJA initiated what would be a long period of US involvement in the establishment of a tribunal for Cambodia. Early on, the State Department commissioned attorneys Jason Abrams and Stephen Ratner to prepare a legal analysis of the potential culpability of members of the Khmer Rouge on charges of war crimes, genocide and other crimes against humanity. Their study found culpability for all three, and weighed various avenues for prosecution that might be followed (Abrams and Ratner, 1995).

⁶⁴ See US Cambodian Genocide Justice Act (1994) 22 U.S.C. 2656, Part D, Section 571-574: The law urged the President to: 1) to collect, or assist appropriate organizations and individuals to collect relevant data on crimes of genocide committed in Cambodia; 2) in circumstances which the President deems appropriate, to encourage the establishment of a national or international criminal tribunal for the prosecution of those accused of genocide in Cambodia; and 3) as necessary, to provide such national or international tribunal with information collected pursuant to paragraph (1). The legislation also directed the creation of an ‘Office of Cambodian Genocide Investigations’ within the State Department. The office was meant to support, through organizations and individuals, efforts to bring to justice member of the Khmer Rouge, including the following: 1) to investigate crimes against humanity; 2) to provide Cambodians with access to documents and records as a result of investigation; 3) to submit relevant data to a national or international penal tribunal that may be convened to formally hear and judge the genocidal acts committed by the Khmer Rouge; and 4) to develop the US proposal for the establishment of an international criminal tribunal for the prosecution of those accused of genocide in Cambodia. The President was to report to the Senate and House Committees on Foreign Relations/Affairs every six months on the activities of the new State Department office; new facts learned about past Khmer Rouge practices; and the steps the President had taken ‘to promote human rights, to support efforts to bring to justice the national political and military leadership of the Khmer Rouge, and to prevent the recurrence of human rights abuses in Cambodia through actions which are not related to UN activities in Cambodia’ (emphasis added).

Within the State Department's East Asian Bureau, a small 'Office of Cambodian Genocide Investigations' was created and headed by Alfonse La Porta. This job was not sought after since a tribunal was not a popular idea within the State Department (Fred Z. Brown, interview, 6 November 2009). Officials 'didn't want to rock the boat' on these issues with Thailand and China (Ibid). State Department lawyers also cautioned that the first priority (before a tribunal was established) had to be the apprehension of the Khmer Rouge leadership. The requirement for prior apprehension meant that concrete thinking about a tribunal did not progress until the arrest of Pol Pot became plausible (Scheffer, 2011: 344).

La Porta's work continued at State, where he oversaw a competitive bidding process in 1994, which awarded Yale University with a \$500,000 grant for two years to document Khmer Rouge violations. This grant provided funds to establish the Cambodian Genocide Program (CGP) at Yale, which was (and continues to be) directed by Professor Ben Kiernan. Stanton, who had begun working at the State Department, helped convince the State Department to provide a second grant of \$1 million to the CGP (Power, 2007: 487). A third grant of \$150,000 was provided in 1998, and some additional funding was provided by State through 2001.

Craig Etcheson was appointed as CGP's Program Manager; Helen Jarvis was Consultant for Documentation; and Youk Chhang headed CGP's field office in Phnom Penh, known as the Documentation Center of Cambodia (DC-Cam). Kiernan determined that after the expiration of this first CGP grant, DC-Cam would become an independent NGO, which it did in January 1997. DC-Cam received CGP/Yale funding, totalling approximately \$1 million (CGP, ND). DC-Cam has also received direct US government assistance, in addition to CGP assistance, for nearly two decades.

By early 1997, CGP and DC-Cam had amassed a wealth of primary source documents and began to make them publicly available. The work of the two organizations presented a mass of potential evidence, available to be used by a prosecutor. This work contributed to the recommendations proposed in Abrams and Ratner's legal study commissioned by the State Department (Fawthrop and Jarvis, 2005: 113). Meanwhile, the Cambodian government and UN were exploring the possibility of criminal trials.

Technical and political involvement in the negotiations

With the urging and guidance of the UN special representative for human rights in Cambodia, Thomas Hammarberg,⁶⁵ the Cambodian Co-Prime Ministers sent a letter to the UN Secretary General in June 1997, which requested

the assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979 ... Cambodia does not have the resources or expertise to conduct this very important procedure. Thus, we believe it is necessary to ask for the assistance of the United Nations. We are aware of similar efforts to respond to the genocide and crimes against humanity in Rwanda and the former Yugoslavia, and ask that similar assistance be given to Cambodia... We believe that crimes of this magnitude are of concern to all persons in the world, as they greatly diminish respect for the most basic human rights, the right to life. We hope that the United Nations and the international community can assist the Cambodian people in establishing the truth about this period and bringing those responsible to justice. Only in this way can this tragedy be brought to a full and final conclusion (Hammarberg, 2001).

Shortly after the request had been sent, however, tensions between the two coalition parties escalated and in early July, Hun Sen staged a coup, ousting Prince Ranariddh.

⁶⁵ In June 1996, Thomas Hammarberg was appointed as the Special Representative of the UN Secretary General for human rights in Cambodia. During the UN Commission on Human Rights session in April 1997, Hammarberg suggested that a resolution on Cambodia mention the possibility of international assistance to enable Cambodia to address past serious violations of human rights. On initiative of the US, the Commission said that any request by Cambodia for international assistance in responding to past serious violations should be examined (UNCHR, 1998; Fawthrop and Jarvis, 2005: 117).

At the same time, the disintegration of the Khmer Rouge movement sped up. Khmer Rouge Deputy Prime Minister for Foreign Affairs Ieng Sary had defected with a couple of thousand soldiers the year before, and more defections were expected. Pol Pot was tried by a 'people's court' close to the Thai border in late July and sentenced to lifelong detention.

The plausible arrest of Pol Pot drew the attention of US officials who worked on a scheme to capture him at the Thai-Cambodian border and bring him to another country for trial. Canada, Denmark, Sweden and Israel, among others, had been approached by US representatives about hosting such a trial. The UN was not formally informed about these diplomatic activities and Hammarberg was critical of the way the plan was pursued, stating, 'no country was prepared to host this type of trial' (Hammarberg, 2001). According to then-War Crimes Ambassador David Scheffer, the White House believed that US efforts to prepare for Pol Pot's capture would boost President Clinton's credibility as he embarked on his long-awaited trip to Rwanda to confront the memory of genocide there (Scheffer, 2011: 352).

During this time, Hun Sen sent a letter to President Clinton requesting US assistance 'to set up an international criminal tribunal [according to US laws] and to bring to trial the Khmer Rouge leadership while they are still alive' (Letter dated 27 November 1997 in Scheffer, 2008: 3). The death of Pol Pot in April 1998 reaffirmed US resolve to bring senior Khmer Rouge leaders to justice. Clinton stated:

Although the opportunity to hold Pol Pot accountable for his monstrous crimes appears to have passed, senior Khmer Rouge, who exercised leadership from 1975 to 1979, are still at large and share responsibility for the monstrous human rights abuses committed during this period. We must not permit the death of the most notorious of the Khmer Rouge leaders to deter us from the equally important task of bringing these others to justice (Associated Press, 1998).

At the end of April, the US Mission to the UN circulated a draft UNSC Chapter VII resolution (drafted by Scheffer) to establish an International Criminal Tribunal for Cambodia (ICTC), which would share much of the infrastructure and resources of the ICTY, and would prosecute ‘senior members of the Khmer Rouge leadership who planned or directed serious violations of international and humanitarian law’ committed in Cambodia between April 1975 and January 1979 (USUN, 1998; Scheffer, 2011: 364-366). However, the proposal failed to attract support; China was opposed to the idea and it was reported that Russia and France also had problems with the US initiative.

These events continued alongside further moves by the UN to bring about a judicial process of accountability. Because Hun Sen had told Hammarberg that the request to the UN for assistance was still valid, Hammarberg recommended that a ‘Group of Experts’ evaluate the existing evidence of responsibility for the Khmer Rouge human rights violations and propose further measures (UNGA resolution 52/135, 1998). The UN Group of Experts included Stephen Ratner, who had undertaken a similar study for the US State Department in 1994-1995. The group found that serious crimes had been committed under both international and Cambodian law and that sufficient evidence existed to justify legal proceedings against Khmer Rouge leaders for these crimes (UN Report of the Group of Experts for Cambodia, 1999). The experts analysed several legal options for bringing to justice Khmer Rouge leaders, but ultimately recommended that the UN, in response to the request of the Cambodian Government, should establish an ad-hoc international tribunal to try Khmer Rouge officials for crimes against humanity and genocide committed from 17 April 1975 to 7 January 1979. They did not recommend

a tribunal established under Cambodian law because it was found that the judiciary would not be fair or effective.⁶⁶

By the time the experts' report was released, further defections had been announced, including from senior KR leaders. Hun Sen's views appeared to shift, stating there might be a conflict between a trial and peace, rejecting the experts' recommendations for an international criminal tribunal and asserting his preference for trials in Cambodian courts or a South African-style truth commission which would investigate crimes committed from 1970 to 1998. Madeleine Albright rejected the truth commission idea and remained in support of an international criminal tribunal (Scheffer, 2011: 382). Scheffer noted US concern, however, about the possibility of a longer timeframe, which would have implicated US involvement in Cambodia in the early 1970s. He said the US continued to press for an international criminal tribunal in part because it 'had to keep the matter out of the control of the General Assembly, which could, by majority vote, create a tribunal with wide-ranging jurisdiction' (Ibid).

When UN Secretary-General Kofi Annan submitted the experts' report to the General Assembly and the Security Council, he said that although the tribunal should be international in character, this did not mean other models could not be explored (Hammarberg, 2001).

⁶⁶ Para. 126 of the report stated: 'It is the opinion of the Group that the Cambodian judiciary presently lacks three key criteria for a fair and effective judiciary: a trained cadre of judges, lawyers, and investigators; adequate infrastructure; and a culture of respect for due process.' Para. 133 stated: 'First, in the light of what we heard during our mission to Cambodia, even from some high official sources, the level of corruption in the court system and the routine subjection of judicial decisions to political influence would make it nearly impossible for prosecutors, investigators and judges to be immune from such pressure in the course of what would undoubtedly be very politically charged trials. The decisions on whom to investigate and indict, and to convict or acquit, must be based on the evidence and not serve to advance the political agenda of one or another political group. This is necessary in order to respect the integrity of the proceedings and to accord fundamental fairness to defendants (UN Report of the Group of Experts for Cambodia, 1999: para. 126).

In response to the lack of support by UNSC members and the Cambodian government for an international criminal tribunal, Scheffer began to explore other options. He wrote: 'As is often the case in negotiations, my task in this situation was to push the envelope to find an acceptable means to a desired end' (Ibid: 381). One idea being discussed was a 'mixed' tribunal that would guarantee international standards and be based in Cambodia. Senator John Kerry, a Vietnam veteran and chairman of the East Asian Foreign Relations Subcommittee supported the idea and proposed it to Hun Sen in April 1999. Hun Sen expressed interest and requested technical assistance from the UN in creating the Cambodian draft law. The US officially shifted its position to support a mixed tribunal, and the UN Office of Legal Affairs (OLA) began discussions with the Cambodian government on the task of its establishment.

When UN Assistant Secretary-General for Legal Affairs Ralph Zacklin and Cambodian Senior Minister Sok An met in August 1999 to discuss their respective drafts of the enabling law, there were major differences between the two. They differed on several issues, including the issue of personal jurisdiction, i.e. who could be charged. The Group of Experts had used the notion that only 'the most responsible for the most serious crimes' be tried, an approach that had been echoed in General Assembly and Human Rights Commission resolutions. There was a need to find a legal formulation that would limit the number of prosecutions without giving an implicit amnesty to those outside that limited group (Hammarberg, 2001). Other issues included the method of appointing judges and prosecutors, and the numbers of foreigners and Cambodians among them (Ibid).

In late 1999, Scheffer prepared a draft law that addressed some of the differences between the UN and Cambodia drafts. He proposed the establishment of

‘Extraordinary Chambers’ – a special trial chamber and special appeals chamber in the Cambodian courts with participation by an international prosecutor and judges. He also suggested the Cambodians be in the majority but that a ‘supermajority’ vote would be needed, requiring one international judge behind decisions. He wrote:

I introduced the supermajority vote rule because I was convinced that some formula had to be developed to ensure the participation of Cambodian judges in the court, but in a way that preserved international influence and oversight ... There was no magical historical reflection or precedent that brought it to mind. I simply tried to figure out how to manage a Cambodian majority on the bench (if that proved to be the endgame) and determined that requiring the vote of at least one international judge could establish the minimum threshold of international oversight in the decision-making process of the judges ... The supermajority would be a lower threshold than required in the US and yet an appropriately higher bar to surmount than that found in civil-law jurisdictions (Scheffer, 2011: 387).

Regarding personal jurisdiction, Scheffer foresaw two groups of suspects: DK senior leaders and all persons responsible for the most serious violations of Cambodian law (Scheffer, 2011: 4). This issue was (and continues to be) contentious. For example, a 2000 UN Non-Paper stated that Kofi Annan gave into US and Cambodian demands to limit prosecution only to senior leaders of the Khmer Rouge who committed serious violations, which excluded both lower-level officials regardless of the seriousness of their crimes, and the highest leaders if their crimes were not serious (UN Non-Paper, 2000: 38). According to former ECCC official and Cambodia expert Stephen Heder, in order to assuage Cambodian government fears that the court might indict a large number of persons, US Ambassador Kent Wiedemann suggested limiting the personal jurisdiction to six or seven persons, ‘that is, the senior most leaders of the KR most responsible for crimes against humanity, war crimes, genocide, etc.’ According to Heder, this limitation drew criticism and the US clarified that the possible list of suspects should be flexible (Heder, 2011: 30). According to Scheffer, however, it was the UN that proposed to limit the scope to

senior leaders and those ‘most responsible’ for crimes, which the US then agreed to (Scheffer, 2011: 7). Who was ultimately responsible for the ‘most responsible’ formulation remains unclear, but this notion was ultimately retained in the final version of the law.

Lastly, Scheffer’s proposal suggested that the UN monitor the process to ensure that international standards were met. If they were not, the international community could withdraw from the process.

US Ambassador Wiedemann formally delivered Scheffer’s proposal to the Cambodian government. Shortly after the US visit, Hun Sen said: ‘At this hour, we and the UN, especially considering the US position towards us, can reach a deal. I have agreed to this proposal, there is no more doubt left’ (Hammarberg, 2001).

Hammarberg said: ‘Hun Sen, and others, obviously believed that with US support any trial would not be much criticized abroad.’ He added:

Though the US intervention in some respect was helpful, it would have been more useful if there had been better co-ordination with the UN efforts or with other governments. I was not consulted on Ambassador Wiedemann’s initiative, nor was anyone else on the UN side. This gap was partly remedied in mid-October when I and Ambassador David Scheffer were in Phnom Penh at the same time (Hammarberg, 2001).

The Cambodian government sent the revised draft, which bore clear traces of the US proposals, to the UN in December. Although the draft law proposal was not acceptable to the UN, the Cambodian cabinet adopted the draft ECCC Law in January 2000.

In February 2000, Kofi Annan raised four concerns: 1) that there be guarantees that those indicted be arrested; 2) that there would be no amnesties or pardons; 3) that the prosecutor be foreign in order that independence be guaranteed; and 4) that the majority of the judges be foreign and appointed by the Secretary-General (Hammarberg, 2001; UN Secretary-General Briefing, 2000).

Hun Sen found himself faced with continued UN insistence on a fair trial and the possibility that some elements of FUNCINPEC, the public and even the CPP might actively ally with the UN against him. He also had the US pushing him to talk to the UN even as it pressured the UN to accommodate him, but he could still take advantage of French⁶⁷ and Chinese⁶⁸ opposition to UN involvement. Moreover, as his minister of commerce explained, Hun Sen believed that the government could not simply walk away from talks with the UN because economic assistance was linked to the trial. To maintain the aid flow, Hun Sen had at least to appear serious about trying some former CPK leaders (Far Eastern Economic Review, 2000).

Japan became increasingly involved beginning in 2000 and pledged new aid to Cambodia if Hun Sen would 'go just one step further in efforts with the UN' (Reuters, 2000b). In return, Hun Sen allowed for a second foreign co-investigating judge, which he broadly hinted should come from Japan (Associated Press, 2000a). Hun Sen used the announcement of his compromise to garner diplomatic support for pressuring the UN to send a delegation to Phnom Penh on his terms (South China Morning Post, 2000b). In this, he had the support of the US, whose diplomats criticized the UN for lacking enthusiasm for making a deal, and also for 'bungling' negotiations so far by being reluctant to engage Hun Sen (South China Morning Post, 2000c).

The US remained convinced that the way forward was for the UN to make concessions. It suggested that the UN team going to Cambodia should include legal

⁶⁷ Hun Sen had the backing of the French Foreign Ministry, which condemned the US (and thus even more so the UN) for pushing too hard for an international element to the trials. It expressed support for Hun Sen's desire not to be 'dispossessed' by any trial process and sympathy for the position that political stability and economic development should be Cambodia's overriding priorities (AFP, 2000a; Ministry of Foreign Affairs, 2000).

⁶⁸ China encouraged Hun Sen to resist, threatening to withdraw aid to the government if it allowed UN participation in a tribunal (UN Non-Paper, 2000: 30). China was already providing the government with low-interest loans worth about \$200 million and some military assistance and encouraging Chinese state-owned enterprises looking to invest there (Asian Wall Street Journal, 2000).

experts, but should be guided by ‘someone with a good feel for political realities,’ because, according to the US, the main stakes in the negotiations were ‘political, not legal’ (Phnom Penh Post, 2000b). The UN conceded to this request sending Shashi Tharoor, a personal representative of Annan, who, as one UN official put it, ‘was there to ensure that political considerations overrode legal considerations, and that the ‘tremendous ... pressure’ from the US and other governments to make a deal was translated into concessions (UN Non-Paper, 2000: 17; Associated Press, 2000c).

Limited US pressure was applied on the Cambodian government. Before the UN visit, a senior US State Department official

was dispatched to persuade Hun Sen to be more accommodating, enough at least to give the deal an appearance of a mutual compromise arising from a willingness on the part of Hun Sen and the UN ‘to work flexibly together’. The sweetener, as it had been with the Japanese, was aid, although the payoff had to be put in the future. The official made it clear to Hun Sen that if he would move sufficiently to find common ground with a UN already forced into a climb down by the US, Japan, France, Russia and India, any resulting agreement with Corell [the UN OLA official] would be a ‘hugely positive thing’ that would ‘encourage the climate in Washington and elsewhere,’ and could bring about a lifting of US congressional restrictions on aid to Cambodia (UN Non-Paper, 2000: 18; See also, Associated Press, 2000b; Reuters, 2000c).

Despite these efforts, little progress was made at the March meeting between Hun Sen and UN Legal Counsel Hans Corell. A sticking point in the negotiations during this period centered on how disagreements between the Cambodian and international prosecutors, on the one hand, and disagreements between the Cambodian and international investigating judges, on the other hand, would be resolved.⁶⁹ This led to

⁶⁹ David Scheffer discussed the dispute mechanism in an article on 8 August 2011 posted on the Cambodia Tribunal Monitor. He states: ‘The prospect of disputes was driven primarily by the concern of key negotiators that the Cambodian Co-Prosecutor or the Cambodian Co-Investigating Judge, or both, might balk at investigating and indicting certain individuals who objectively fall within the personal jurisdiction of the court. Their international counterparts presumably would be less susceptible to political influence in the identification of two groups of individuals, 1) senior Khmer Rouge leaders and 2) those individuals most responsible for the crimes falling within the subject matter jurisdiction of the ECCC. If everyone thought that the only likely suspects would be a small number of long and prominently identified individuals (limited now to the surviving Khieu Samphan, Nuon Chea, Ieng Sary, Ieng Thirith, and Kaing Guek Eav (“Duch”)), the likelihood of disputes would

another US-crafted proposal (during another visit by Senator Kerry) that a separate panel of judges (three Cambodians and two international) would resolve disputes, requiring a supermajority vote of at least four judges to block a proposal from one of the two prosecutors for an indictment (AFP, 2000d).

Hammarberg said: ‘Though this approach seemed unconventional and even unprincipled, it was described in some media as a major compromise on the side of the Cambodian government’ (Hammarberg, 2001). Others familiar with international judicial standards decried the fact that it would create a ‘problem of multiple judges performing a task that should not be theirs’, ruling on prosecution decisions and then being involved in further adjudicating the same case (UN Non-Paper, 2000: 28). Together with the supermajority formula for decisions on verdicts, it set up a ‘horrendously complicated’ and ‘unworkable system’ that was insufficient to ensure that ‘evidence - and not politics - ... determines who is indicted, arrested and convicted’ (Bangkok Post, 2000; Adams, 2000).

Non-US diplomats and the UN remained sceptical about whether Hun Sen would agree to a credible tribunal or travel the route prescribed by the US. Corell was sent back to Phnom Penh in June. Upon his departure, he warned that Kofi Annan had established a time limit beyond which the UN would no longer wish to proceed, and

have been seen as so minimal as to discourage such protracted negotiations over a dispute mechanism. It was precisely because negotiators foresaw a possible rift between the Co-Prosecutors, in particular, over additional individuals to bring to trial that the dispute mechanism was developed. We did not anticipate that the International Co-Investigating Judge might take a radically different view of the evidence from that held by the International Co-Prosecutor, but that is technically possible under the ECCC Law and may yet occur with respect to Case 003 and/or Case 004. We did not build into the constitutional framework how to resolve a dispute between one of the Co-Prosecutors and any joint determination of both Co-Investigating Judges to dismiss a case. However, the Internal Rules offer some possibility of appeal to the Pre-Trial Chamber (Rule 74(2)) provided the International Co-Prosecutor can prevail in lodging an appeal without the support of his Cambodian Co-Prosecutor’ (Scheffer, 2011).

although he did not name a date, he said that the UN would not tolerate further procrastination.

The Cambodian Assembly and Senate approved in January 2001 the proposal of a special court within the existing Cambodian judicial system, with participation of UN-nominated judges and one UN-nominated co-prosecutor. The majority of the judges would be Cambodian and appointed by the Supreme Council of Magistracy while the Secretary-General would suggest the foreign judges and co-prosecutor, also to be approved by the Supreme Council. The law did not state that previous amnesties would be ignored for the crime of genocide, war crimes and other crimes against humanity.

The Cambodia proposal did not meet the UN requirement that the majority of judges be foreign and appointed by the Secretary-General. Instead, Cambodians would be in majority at all three levels; the two groups of judges would be nominated through different procedures; and all would be approved by the Cambodian Supreme Council of Magistracy. Decisions would be settled by a supermajority voting requirement.

After more disagreement throughout 2001, Kofi Annan withdrew his good offices in February 2002 and the UN Secretariat announced that it would no longer continue negotiations with the Cambodian government on establishing the ECCC.

Corell stated:

[T]he United Nations has come to the conclusion that the Extraordinary Chambers, as currently envisaged, would not guarantee the independence, impartiality and objectivity that a court established with the support of the United Nations must have....Therefore...the United Nations has concluded...to end its participation in this process (UN Press Statement, 2002).

He said that the greatest matter of contention was the Cambodian position that the ECCC Law would prevail over the agreement between the UN and Cambodia (Cambodia Tribunal Monitor, ND: 17).

One problem with this decision was that UN officials did not inform key governments about their decision to withdraw from negotiations, and so it was a surprise to them (Margo Picken, interview, 18 June 2011). Australia spearheaded a GA resolution calling for the resumption of negotiations. The Cambodian government backed out of co-sponsoring the resolution, which resulted in Australia backing out as well. At this point, Japan and France, who were more willing to compromise, took up the task and the resolution was passed in December 2002 (UNGA resolution 57/228, 2003).

The UN was thus forced to resume negotiations with Cambodia despite significant misgivings about the process (UN Report of the Secretary General, 2003). Nevertheless, in June 2003, the text was finalized and the ‘Agreement between the UN and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea’ was signed by both parties (Agreement, 2003). It took another year for the Agreement to be ratified by Cambodia’s National Assembly and it was officially promulgated on 19 October 2004 following amendment of the ECCC Law to ensure that the two documents were consistent.

Funding restrictions and re-engagement with the court

The US was less involved in the later phases of the negotiations and as the ECCC was established. The shift in administration was one reason for the decline in US attention. The Bush administration was focused on counterterrorism efforts after 9/11,

and the second war crimes ambassador, Pierre Prosper, was responsible for other activities, and not as involved as Scheffer had been (although Scheffer continued to provide technical support to the tribunal after leaving his post as Ambassador).⁷⁰ In addition, Japan and France had taken up a leadership role on tribunal issues and became co-coordinators of the ‘Friends of the ECCC’ – a group of donors to the court. However, the main reason for declining US involvement stemmed from a refusal within Congress to fund the court.

The following table shows the amount pledged to the court by international donors in 2005, with the notable exception of the US (Data obtained from Muck and Wiebelhaus-Brahm, 2011).

Figure 8: International assistance to the ECCC

| Donor | Amount (in USD) | Percentage |
|----------------------|--------------------|------------|
| Japan | 21,600,000 | 52 |
| France | 4,800,000 | 12 |
| UK | 2,873,563 | 7 |
| Australia | 2,351,097 | 5.5 |
| Netherlands | 1,981,506 | 4.5 |
| Canada | 1,612,903 | 4 |
| Others ⁷¹ | 6,239,121 | 15 |
| Total | 41,458,190 | 100 |

After Hun Sen staged an armed takeover of the government in 1997, Congress cut off bilateral assistance to Cambodia for over a decade, until 2008 (Lum, 2007: 4). Congress could have still supported the ‘UN side’ of the tribunal, but it also blocked funding to the court for the first few years of its operations.

One justification for the funding refusal was the tribunal’s failure to meet ‘internationally recognized standards of justice.’⁷² Another justification was that the

⁷⁰ In May 2006 Scheffer briefed the press and the Cambodian national judges on international standards of due process applicable to the ECCC. He also helped resolve a dispute between the Cambodian and international judges over the court’s internal rules. He also set up the Cambodia Tribunal Monitor website which follows ECCC activities.

⁷¹ Germany, Denmark, Norway, Luxembourg, Austria, Sweden, Korea, Belgium, New Zealand, Ireland, Armenia and Namibia each gave \$1,000,000 USD or less.

US had already paid \$7 million toward documentation and research costs for the crimes committed in Cambodia, referring to the funds contributed to Yale's Cambodian Genocide Program and the Documentation Center of Cambodia.⁷³ The US contributed an additional \$2 million for DC-Cam's endowment fund in August 2006.

However, Senator Mitch McConnell (Republican from Kentucky) and his Chief of Staff Paul Grove were principally responsible for the funding restrictions. While Grove worked for IRI in Cambodia and DC, his colleague, Ron Abney, had been injured during a grenade attack of a rally of an opposition party in 1997, where 13 Cambodians were killed. A number of sources found that Hun Sen was responsible for the attack and Grove was convinced of the need for regime change in Cambodia (i.e., Wells-Dang, 2004). He persuaded McConnell, then Chair of the Appropriations Subcommittee on Foreign Operations, to block funding to the court.⁷⁴

McConnell had the support of some key Democratic senators for this position, including Senator Patrick Leahy. In 2003, the two senators wrote a letter to Kofi Annan, arguing that the mixed tribunal was 'doomed to failure' (Etcheson, 2005: 157). They also co-sponsored the Cambodia Democracy and Accountability Act, which although it never became law, would have provided additional foreign assistance to Cambodia if Hun Sen was no longer in power. It also would have

⁷² US State Department press release, 2005. Nevertheless, US Ambassador to Cambodia, Kent Wiedemann, said the ECCC should be seen as a 'customized model ... to fit' the Cambodian 'national situation' (Phnom Penh Post, 2000c).

⁷³ Kyriakou, 2005. State Department grants totalling approximately \$1.7 million were contributed to CGP between 1995-2001. CGP disbursed around \$1 million of this funding to DC-Cam. The State Department also funded approximately \$300,000 for the international legal research and activities pertaining to the Khmer Rouge crimes conducted in 1995 and 1996 by Steven Ratner and Jason Abrams, (Ben Kiernan, personal communication, 25 January 2012). If the figures above are correct, the bulk of US funding has been contributed directly to DC-Cam.

⁷⁴ In one series of op-ed articles published in 2002 and early 2003, McConnell and Grove wrote, 'It is in America's interests that the opposition win ... it is time for the State Department to take sides.' This was followed by calls for 'regime change' and attempts to link the 'paranoid evil dictator' Hun Sen to the 'war on terrorism' (Wells-Dang, 2004).

allowed assistance for a Khmer Rouge tribunal under the following conditions: 1) it is not under the control or influence of the CPP; 2) includes the participation of judges of high moral character; 3) is supported by democratic Cambodian political parties; and 4) meets international standards of justice. The Act also directed the FBI to resume its investigation into the March 1997 grenade attack in Cambodia and to regularly report to the Committee on Foreign Relations (US Cambodia Democracy and Accountability Act, 2003).

Although the Cambodia Democracy and Accountability Act did not become law, for several years, appropriations legislation precluded the US from providing financial assistance to the central government of Cambodia, and, in particular, ‘to any tribunal established by the Government of Cambodia’ unless the Secretary of State

determine[d] and reporte[d] to the Committee on Appropriations that: (1) Cambodia’s judiciary is competent, independent, free from widespread corruption, and its decisions are free from interference by the executive branch; and (2) the proposed tribunal is capable of delivering justice, that meets internationally recognized standards, for crimes against humanity and genocide in an impartial and credible manner (Foreign Operations Appropriations Act, 2005).

Several officials indicated that it was highly unlikely the Secretary of State could have made such a determination, particularly with respect to the first requirement of the provision regarding Cambodia’s judiciary (Cerone, 2007: footnote 228). In the Committee Report accompanying the 2005 Appropriations Act, the Committee noted:

The Committee again restricts assistance to the Cambodian Government, with few exceptions, and notes that the budget request does not contain funding for a United States contribution to the Khmer Rouge tribunal. The Committee directs that no funds be made available for a contribution to the tribunal unless the Secretary of State reports to the Committee that the tribunal is capable of delivering justice that meets internationally recognized standards of justice for crimes against humanity and genocide in an impartial and credible manner.

The tribunal-specific provision, however, was removed in the 2006 Appropriations

Act, perhaps signaling a moderation of the US position.

Meanwhile, funding and corruption challenges plagued the court. David Tolbert, former deputy prosecutor at the ICTY, was appointed in March 2008 by the UN as a short-term expert to revise the ECCC budget, streamline administrative operations and institute anti-corruption measures. He also worked to break the gridlock on US funding. ‘I lobbied the Hill really hard,’ Tolbert said, ‘I think I convinced them that we were undertaking serious reforms’ (David Tolbert, interview, 10 May 2010). He continued:

What I argued is that the Duch case is going to be historic and important. I said we were addressing the issues and it was becoming a serious court. We removed the head of administration. We put in someone that is more serious. We brought in someone for witness protection, someone for court management and court structure. And I went through everything I did with [the US staffers]. I said, ‘I understand and I agree with you...But this is our one chance. If we don’t address it now, we’re going to lose this opportunity.’ We had support from the democratic side. Senator Kerry was very supportive. His office was very supportive. So it was just a matter of convincing the Republicans (Ibid).

Tolbert thought that US support for the ECCC was important for three reasons. First, in his efforts to raise funds generally, ‘the US was the only major country with interest in the country that wasn’t paying.’ Second, he felt that the US would help on the corruption issue. ‘I had the UK in my corner, but some of the other countries were not strong on corruption, so I thought the US would be tough on that issue.’ Third, Tolbert felt that the US should be engaged considering its past responsibility for events in Cambodia – although he did not rely on this argument in discussions with US policymakers (Ibid).

Tolbert had the support of the third war crimes ambassador, Clint Williamson, who undertook a constructive role in transforming the way US officials understood the corruption issue. According to a UN official, Williamson felt that if the US

contributed, the US ‘could have a seat at the table’ (UN official, interview, 17 June 2010).

In May, Joseph Mellot, an advisor to Ambassador Williamson, conducted a review of the ECCC, fueling rumors that the US was considering funding the ECCC. ‘If we were to consider funding the ECCC,’ US Embassy spokesman Jeff Daigle wrote, ‘we must be convinced that it is capable of meeting international standards of justice’ (Phnom Penh Post, 2008b).

Senator Kerry also called for direct US funding of the tribunal: ‘The court faces a looming financial crisis ... there is a real danger that the ECCC will collapse before it even gets off the ground.’ Though Kerry admitted that there were legitimate concerns about the court’s independence and alleged financial improprieties, he proposed the US contribute \$2 million to support victims’ rights and witness protection programs (Phnom Penh Post, 2008a).

In August 2008, the US announced that it would fund the tribunal upon resolution of the corruption investigation. The following month, at the end of his visit to Cambodia, Deputy Secretary of State John Negroponte announced that the US would give \$1.8 million to the tribunal (US Embassy Phnom Penh, 2008).

Despite the funding block, US officials remained involved in the process in a number of ways. For example, the US Embassy in Cambodia was concerned about the lack of French and Japanese leadership in the ‘Friends of the ECCC’ (the main donor coordinating body for the court) to discuss contentious issues surrounding court management, the rules debate, funding inadequacies and the allegations of corruption hanging over the court. A leaked cable titled ‘Friends of the ECCC or RGC?’ states:

we are concerned that the two countries [France and Japan] are focusing exclusively on the preservation of their bilateral relationship with the

RGC in their discussions about the ECCC, and are not taking a more nuanced approach as co-chairs of the Friends. The Japanese position is particularly sensitive due to the balancing act the GOJ plays with China in Cambodia. The Chinese, Sean Visoth believes, are placing pressure on the government with respect to moving forward with the Tribunal. The Japanese want the Tribunal to succeed at virtually any cost, and therefore will be loathe to put any pressure on the government that might make the RGC accord more sympathy to Chinese views ... As co-chair of the Friends, we believe Japan and France have some measure of responsibility to engage with the government or the ECCC if exceptional circumstances warrant the waving of a red flag. Absent a push from their respective capitals, the French or Japanese embassies in Phnom Penh will not be receptive to changing their views on the Friends mechanism and their roles as co-chairs. We would welcome Washington views on the possibility of demarching both capitals, and would be willing to send suggested talking points to that end (US Embassy in Cambodia, 2007b).

This cable shows that US embassy officials felt that France and Japan were not willing to raise controversial issues about the court with the Cambodian government. It also indicates that the US was following court issues, and willing to play a behind-the-scenes role in order to enhance court effectiveness.

Another example of US involvement was concerning controversy over a press release issued by Open Society Justice Initiative (OSJI), one of the few international NGOs following the ECCC in Phnom Penh. OSJI was the first organization to call for an investigation of corruption allegations by Cambodian judges and staff of the ECCC.⁷⁵ In response, the Cambodian government considered evicting OSJI from Cambodia and ending its monitoring role of the court. Scheffer was informed of this by Cambodian government official Sean Visoth, who requested that Scheffer alert the US embassy ‘so that a pre-emptive intervention with DPM Sok An might be made to turn off the RGC's plan’ (US Embassy to Cambodia, 2007a).

⁷⁵ In February 2007 OSJI issued a press release alleging that Cambodian judges and other Cambodian personnel of the ECCC were compelled to kickback part of their wages to Cambodian government officials in exchange for their position (OSJI, 2007). OSJI called for donors and the international community to investigate thoroughly the corruption allegations. In October, a UN Development Program (UNDP) commissioned report exposed widespread malpractice in hiring local staff members for the ECCC and handing out lucrative salaries to unqualified people. Cambodian officials objected to the recommendations that all staffing contracts on the Cambodian side of the ECCC be nullified and salaries cut and that the UNDP take a more direct oversight role. In March 2007 Scheffer visited Sok An and other ECCC officials to discuss proposals for resolving these disputes.

Scheffer did so and expressed his concern that OSJI's departure would be interpreted by the UN legal office as a breach of the UN/RGC agreement (Article 12, subparagraph 2). He also made clear that he personally believed OSJI had made a mistake in their handling of the UNDP audit by going public so quickly. On 13 March, Scheffer and US Ambassador to Cambodia Joseph Mussomeli met with representatives of several embassies about the possibility of a joint demarche with the RGC. However, Scheffer was able to resolve the issue by seeking assurance from OSJI Director James Goldston that future disclosures of information potentially damaging to the ECCC would be provided to the court with adequate notice and advance consultation before going to press. This intervention was successful in stopping OSJI's eviction from Cambodia (US Embassy to Cambodia, 2007a).

The State Department cable also showed that US officials were aware of international concerns about the Cambodian government. For example, the cable noted a meeting with the head of the UN human rights office, Margo Picken, who said that the RGC 'plays these issues very skilfully' and the OSJI matter followed a familiar pattern where the government sidesteps the real issue and heaps blame upon the organization/individual highlighting the problem (Ibid). The cable also acknowledged that kickbacks were common in the Cambodian public sector; and that these allegations at the court 'surprised no one ... No whistleblower culture exists, and people have legitimate fears when it comes to making public information that could be embarrassing to senior officials' (Ibid). Lastly, the cable said the Cambodian government's reaction to the OSJI press release revealed 'again' RGC officials' unease with a high-profile judicial process designed to limit political influence. While OSJI 'could have handled this matter better' – especially by anticipating that Hun Sen would take the OSJI letter very personally – 'RGC

sensitivities cannot be allowed to derail what must be a non-political tribunal' (Ibid).

The US intervention on behalf of OSJI illustrates that US officials remained engaged with the court. It also shows US cooperation with the Cambodian government, donor governments and a key international NGO. In a more public show of support for the court, the US agreed to fund a second UN special expert to assist the ECCC as long as the position was given to former war crimes ambassador Clint Williamson (UN official, interview, 17 June 2010). Williamson served in this position from August 2010 until September 2011.

In July 2010, the fourth war crimes ambassador, Stephen Rapp, attended the Case 001 verdict of the Duch trial. His staff also participated in meetings discussing the court's legacy. Case 002 began in November 2011, but the future of cases 003 and 004 remains uncertain. International court officials resigned in 2011 over political pressure from the Cambodian government to stop investigations for these cases. Scheffer, appointed UN special expert to the court in January 2012, said the US is more aggressive in seeing the cases go forward than other governments (David Scheffer, interview, 12 March 2012).

3.3 Explaining US Involvement

This chapter focused on US involvement in the establishment and operations of the ECCC from the late 1980s to 2011. In the 1980s, accountability for Khmer Rouge violations was not a priority for the US. This changed in the 1990s with the passage of legislation that made it US policy to support investigations and the establishment of a court. The US played a critical role in the negotiations of the Khmer Rouge Tribunal. Although its role declined after the court was established, US support continued throughout the 2000s. This section provides an overview of findings,

offers some explanation for US involvement and briefly assesses its impact on the court.

Part of the reason the US was initially unwilling to support initiatives for a tribunal in Cambodia was because it would

dredge up no little amount of embarrassment about the American role in recent Cambodian history.... [w]e were indeed there at the creation of Cambodia's troubles. For purely prudential reasons, then, a US initiative aimed at exhuming our own policy ancestor, so to speak, seems very ill-advised (Garfinkle, 1999).

However, after the end of the Cold War and the Cambodian peace process, US history in Cambodia had not been forgotten, but was used as a justification by some for US support of a tribunal. For example, War Crimes Ambassador Scheffer said:

The Cambodian tribunal is a reminder that a titanic explosion occurred in Indochina after we left there. That's one of the lessons of the Vietnam War, that the aftermath was just as important as the event itself ... For Americans in particular, the secret bombing of Cambodia during the Nixon presidency, which helped to destabilize that country as the Khmer Rouge were gaining power, leaves us no moral choice but to make every possible effort to achieve some measure of credible accountability for the slaughter that ensued (Bernstein, 2009).

The US policy shift in favour of accountability in Cambodia was possible in part because of high-level support within the US government for these types of efforts. Neil Kritz said that US involvement in the Cambodia case was about 'a few key people on the Hill' (Neil Kritz, interview, 16 March 2010). Aside from long-term interest in the subject from members of Congress like Rep. Stephen Solarz, Senator Chuck Robb and others, Secretary of State Madeleine Albright was highly interested in these cases and created the War Crimes Office with David Scheffer in mind. Scheffer was convinced of the cause: 'We have a supreme responsibility to those who perished in Cambodia to bring the leading perpetrators to justice' (Scheffer, ND). He also spoke about the importance of the international context:

I could not in good conscience negotiate the creation of tribunals for the Balkans conflict of the early 1990s, the Rwandan genocide of 1994, the Sierra Leone atrocities of the late 1990s, or the permanent International Criminal Court and at the same time ignore what happened in Cambodia in the late 1970s (Scheffer, ND).

In addition, the Cambodian context impacted reasons for US involvement. One US official stressed the importance of the defection of Khmer Rouge leaders and particularly the amnesty of Ieng Sary, since it resulted in the return to Cambodia of close to 40,000 refugees. ‘There was a small window of opportunity’ for involvement, he said (US official 1, interview, 4 August 2010).

Of course not everyone was enthusiastic about the new mandate, fearing that it might also turn up incriminating evidence concerning US bombings and other acts of warfare against the countries of Indochina (Fawthrop and Jarvis, 2005: 110). Scheffer acknowledged that limiting the court’s focus to senior Khmer Rouge leaders most responsible for crimes of the Pol Pot regime from 1975-79 was at least in part due to the Nixon administration’s secret aerial bombings of Cambodia during the Vietnam War (Scheffer, 2002). Scheffer also focused on limiting the examination of the tribunal to KR actions from 1975-79 in conversations with China:

I noted that the US had bombed Cambodia in the early 1970s and while the US acknowledged that reality, we wanted to avoid giving any individuals an excuse for using the bombing to justify their own action in Cambodia. However, if we did not maintain such a condition, China’s actions in Cambodia after 1979 would be fair game as well (Scheffer, 2011: 378).

DC-Cam Legal Advisor Beth van Schack said: ‘There’s no way [the US] would have supported the trial if that date [1975-79] had not been very clear from the start’ (Beth van Schack, interview, 31 October 2009).

Nevertheless, with the passage of the 1994 Cambodia Genocide Justice Act (CGJA), the US resolved to bring Khmer Rouge leaders to trial. Despite the lack of

political payoffs, US officials decided they were in ‘a new era of history’ and would ‘use its muscle’ to support the effort (John Ciorciari, interview, 10 March 2010).

Thus, the combination of the end of the Cold War, the Cambodia peace process, the establishment of international criminal tribunals elsewhere, high-level US support and interest in limiting the jurisdiction of any court established offered a context amenable to the US policy shift in favour of accountability efforts in Cambodia.

Before Cambodia had even requested UN assistance for a court, the US had already made it policy (through the CGJA) to support investigations into Khmer Rouge violations and the establishment of a court. Youk Chhang said: ‘The ECCC was [established] because of the CGJA’ (Youk Chhang, interview, 15 July 2010). As part of this effort, the US contributed significant funds to Yale University, which enabled the creation of the Cambodia Genocide Program and the Documentation Center of Cambodia. Once negotiations for a court began, it is striking to see the high level involvement of US officials in detailed aspects of the negotiations. Three US officials (two from the State Department and one member of Congress) were heavily involved in decisions for the court to have a ‘mixed’ structure; a supermajority voting requirement for court decisions and disputes; and a limited personal jurisdiction.

A pivotal figure in the negotiations was the first war crimes ambassador, David Scheffer. Scheffer was personally committed to the creation of an accountability mechanism. Although he initially promoted a Chapter VII UNSC tribunal, upon seeing that this proposal lacked support, he shifted gears and advocated for a mixed structure for the court. Scheffer drafted several versions of the ECCC Law and proposed the supermajority voting requirement and language

regarding personal jurisdiction. In his recent book about the tribunals, Scheffer discussed the creation of the ECCC as his ‘personal mission’:

I am often asked why the US took such a focused and sustained interest in creating the Cambodia tribunal. No other government was so determined to launch a tribunal-building initiative, and no other government became so deeply involved for four years (1997-2000) in negotiations leading to the constitutional documents of the Cambodia Tribunal. I honestly would like to write that there was a coherent policy, fully backed by the top officials in Washington, to accomplish this particular task in Cambodia. However, that was not the case. Albright inspired and supported my efforts; Tom Pickering, the under secretary of state for political affairs, was always there when I needed him; Senator John Kerry brilliantly intervened on several occasions to move the negotiations forward; and the American ambassadors to Cambodia on my watch, Kenneth Quinn and Kent Wiedemann, courageously pressed Cambodian officials to achieve the objective of a tribunal.

But this was a personal mission that I translated into an American mission once I became the war crimes ambassador. I was determined to negotiate, against all odds at times, judicial accountability for the major perpetrators of atrocity crimes during the Pol Pot era. So I prodded everyone. I kept searching for a methodology that would achieve enough support both within the Cambodian government and at the UN, to build a court that could deliver credible justice respectful of international standards of due process. I could not rationalize building the other war crimes tribunals and then ignore a reckoning for the KR and their decimation of the Cambodian people. This sometimes did not sit well with major civil society groups and UN lawyers who were seeking a near-perfect model of justice and were prepared to abandon the endeavor, which both sometimes did. The building of the Cambodia tribunal is a story of innovation, risk taking and perseverance in which some of my colleagues deserve enormous credit, while others in Washington or at the UN played the role of spoiler time and time again (Scheffer, 2011: 343-344).

When asked about whether his personal commitment to seeing the establishment of the ECCC may have hindered his involvement, Scheffer responded:

No. I know I’m being defensive here, but I’m very justifiably being defensive. You have to stick with these things. If you have a personal stake in getting it done, as I did, then by god I’m going to stick with it. I was advised many times to walk away from this project. Just walk away. And I refused to do so. If that opens me up to criticism that we built an imperfect tribunal that does not deliver perfect justice to as many people as possible, then so be it. I will live with that imperfection (David Scheffer, interview, 12 March 2012).

Part of the reason for Scheffer's interest in the Cambodia case stems from early work at an international law firm in Singapore where he worked pro bono for a charity shipping rice to Phnom Penh. When his term as ambassador came to an end, he continued to engage with the court, travelling to Cambodia often to offer advice and training and resolve disputes. Scheffer also created the Cambodia Tribunal Monitor website, a key source for accessing information about the ECCC.

Senator John Kerry's role in the negotiations can be attributed to his personal interest in Cambodia as a Vietnam veteran. He had a good rapport with Hun Sen and chose to serve as a mediator at various points in the negotiations.⁷⁶

US Ambassador to Cambodia Kent Wiedemann (1999-2002) also played a substantial role in the negotiations. In an interview, Wiedemann explained that he first had to get support for the court from the executive branch and then Congress. He said that President Clinton had told Wiedemann that the court was 'a top priority' for the US. Wiedemann said, 'Once the embassy had the green light, we worked hard, at very high levels, to get the court. Everyone wanted an international tribunal, but the supermajority was an airtight idea' (Kent Wiedemann, interview, 21 July 2010).

Although US officials believed the mixed structure, supermajority voting requirement and limited personal jurisdiction to be acceptable compromises, many legal experts disagreed. For example, the UN Groups of Experts and the UN special representative for human rights in Cambodia Thomas Hammarberg recommended that an ad-hoc international tribunal was best suited to the Cambodian context. A Cambodia expert said: 'Scheffer made standards worse and misjudged Hun Sen. If the US had put more pressure to make the court international, this option may have been possible' (Cambodia expert, interview, 28 April 2010). Since an international

⁷⁶ Kerry's Senior Foreign Policy Adviser, Nancy Stetson was also an important advocate of the court in Congress.

tribunal was not politically possible, Hammarberg said that a mixed tribunal would require guarantees for the integrity of the process, including water-tight protection against the risk of direct or indirect political pressure. The fact that Hun Sen ‘dominated every bit’ of the process ‘and most often made no secret of that fact’ was a problem (Hammarberg, 2001). Hammarberg added that the supermajority notion was clearly a compromise and not without problems. ‘It carries an implicit notion of there being two categories of judges - which would be an unfortunate perception even in more normal circumstances,’ he said (Hammarberg, 2001).

Regarding the issue of personal jurisdiction, Cambodia expert Brad Adams explained that the UN Group of Experts and other human rights lawyers had cautioned that certain top governmental leaders in Cambodia may have been removed from knowledge and decision-making power, while others not in the chart of senior leaders may have played a significant role in the atrocities (Adams, 1999). This meant that senior leaders might not correspond to those most responsible for human rights violations. Steve Heder, former ECCC official and Cambodia expert, found that the US played a key role in pushing the UN to accept personal jurisdiction clauses that were intended to limit prosecutions of those responsible exclusively to CPK senior leaders and one other CPK official. He said:

This was part of a larger pattern of pressure on the UN by the US and other governments with diplomatic interests to pursue vis-à-vis the Royal Government of Cambodia (RGC). Most importantly, after obtaining UN acquiescence to a severely limited personal jurisdiction, they also forced it to agree to involve itself in assisting with what the UN was certain would be much less than fair trials, as the CPP’s control over the Cambodian court system via its domination of the RGC was sufficient to ensure that the extraordinary chambers would not adhere to international standards of judicial independence and impartiality. They have further limited the court’s prosecutorial reach by insisting that the budget for investigations, trials and defense be kept low (Heder, 2009: 191).

Some experts expressed regret about what they saw as politics taking priority over legal standards. A UN official said:

The ECCC is not a model at all. It should never have been structured as it has been...Scheffer did a lot of work on it. If you didn't accept what Cambodians wanted, you would have had no court at all. Scheffer took a more political approach while the UN took a more legal position (UN official, interview, 17 June 2010).

Hammarberg concluded his personal remarks on the negotiations by stating:

[There] is no good reason to accept an unsatisfactory model, which might cause procedural infighting in the tribunal and thereby weaken its moral stature. Also, it is important to realise that the Cambodia tribunal may potentially be an example for the future in other situations. Also for that reason it would have been important to build its construction on principles, rather than on political compromises (Hammarberg, 2001).

The US perspective was different. A US official said the 'the US pushed the UN along. The ICTY and ICTR were seen as perfect back then. Models discussed in Cambodia were more messy – not as clean or predictable – but it is a workable model' (US official 1, interview, 4 August 2010). Wiedemann said that he was heavily involved in getting the UN on board as well as convincing Khmer Rouge members, Prince Ranariddh and FUNCINPEC to let the ECCC move forward. 'No one trusted a court with Hun Sen's involvement,' the Ambassador said, 'the US did most of the legwork' (Kent Wiedemann, interview, 21 July 2010). Scheffer defends the Cambodia model in his recent book on the tribunals, but does offer some reflection on possible missteps in US policy. He wrote:

Washington could have acted even faster than it did to track and capture Pol Pot before he met his fate. The long-standing policy focus on a Security Council-created tribunal delayed more realistic concepts from emerging sooner. My best efforts simply were not good enough, and as a result the Cambodia tribunal did not start its real work until 2007. Perhaps there really was no other path to take in Cambodia than the one that emerged year after year, but I wonder to this day where there could have been a more expeditious outcome (Scheffer, 2011: 413).

Once the court was established, Congress restricted funding. This was linked to Senator McConnell's and others' distrust of Hun Sen and their desire to see regime change in the country. Although Hun Sen remained in power, UN expert David Tolbert, with the support of then War Crimes Ambassador Clint Williamson, effectively lobbied key officials in Congress in order to lift the funding block.

The US had a less visible role during the court's initial operations, with Japan and France taking leadership roles. One US official said that this is a typical US approach – to initiate support and provide leadership at the beginning of a measure, and then to take a backseat role as other states take responsibility (US official 2, interview, 4 April 2010). However, the US remained active on a number of court-related issues. For example, when Cambodian government officials considered evicting OSJI for their press release about corruption allegations in the court, the US played a key role in stopping this from taking place. The US also applied pressure on Japan and France to play a more active role as co-coordinators of the Friends of the ECCC. In addition, the US continued its assistance to DC-Cam with a contribution of nearly \$10 million since 1994. When US officials travel to Phnom Penh, they typically meet with DC-Cam's Director Youk Chhang who is a strong supporter of US involvement in Cambodia. Chhang said: 'The US government was the only government that believed in the court and consistently supported the whole effort. The Japanese came very late and China tried to block it...People overlook the US role (Youk Chhang, interview, 15 July 2010).

Two former war crimes ambassadors (Williamson and Scheffer) were appointed as UN Special Experts to advise on assistance to the ECCC.⁷⁷ The fourth War Crimes Ambassador Stephen Rapp has travelled to Phnom Penh and is engaged

⁷⁷ Some said that Ambassador Williamson was effective because of his good rapport with Hun Sen.

with the court. According to Scheffer, the US is supportive of cases 003 and 004 despite Cambodian government wishes.

The Cambodian case study provides an illustrative example of US involvement in transitional justice. The US first opposed the idea of a tribunal, but then became a firm advocate for the establishment of a court. Interest declined with a change in administration and a congressional block on funding the court. The US continued following the process, however, and eventually lifted funding restrictions. This analysis highlighted fluctuations in the US approach over time, which oscillated between opposition in the 1980s and early 2000s, and various forms of support in the 1990s and late 2000s.

US aims were achieved with regard to transitional justice in Cambodia. The US can claim that its involvement in supporting the establishment of the tribunal was an important and symbolic effort that promoted accountability in Cambodia. It can also defend its refusal to fund the court based on corruption allegations and other concerns. Its involvement more recently suggests that the US will remain engaged until proceedings come to an end.

Through its involvement, the US exported its ideas about justice to Cambodia. One US official said, 'There was a need in Cambodia for education about accountability and rehabilitation. Cambodians had esoteric notions of justice that were foreign to Northern Europe and the US' (US official 1, interview, 4 August 2010). Jaya Ramji-Nogales, a member of the Board of Advisors to DC-Cam, said, 'the ECCC was a very American response' (Jaya Ramji-Nogales, interview, 2 November 2009). Similarly, Thun Saray, the director of the *Cambodian Human Rights Action Committee (CHRAC)*, said, 'the idea for the ECCC came from the West' (Thun Saray, interview, 19 July 2010).

Within Cambodia, Cambodian government aims have been achieved, but civil society goals have not. The US often supported government positions throughout the establishment phase. France and Japan maintained financial support while the US refused to fund the court. The government's desire to see the court close down after the second trial may converge with the interests of some donor governments to see trials come to an end. Civil society views on the court, however, are typically negative. They point to issues of corruption, a lack of victim participation and the small number of trials considering the level of violations committed. Several civil society groups also mentioned that most US funding for transitional justice is contributed to the Documentation Center of Cambodia and is unavailable for other groups.

US involvement has both helped and hindered transitional justice aims in Cambodia. US efforts to facilitate discussion between the Cambodian government and the UN were useful at times, but also contributed to confusion. Its willingness to yield to Cambodian government demands and the compromises devised to appease Hun Sen are part of the reason for continued problems throughout court operations. Tunnel vision and unreflective pragmatism hindered the possibility of a more effective transitional justice measure in Cambodia. Nevertheless, US backing of a tribunal for Cambodia in the 1990s did support an acknowledgement of the gravity of Khmer Rouge violations, a fact ignored by the US and others for several decades.

The next chapter undertakes a second case study, which examines US involvement in the trial of Liberian President Charles Taylor and the Liberian Truth and Reconciliation Commission. This chapter will provide another opportunity to explore the forces that shape US foreign policy on transitional justice.

Chapter 4 US Involvement in the Taylor Trial and Liberian Truth and Reconciliation Commission

The last chapter examined the forces that shaped US foreign policy on the first case study of this project, that of the Khmer Rouge Tribunal in Cambodia. This chapter explores a second case study, specifically looking at US involvement in the trial of Liberian President Charles Taylor by the Special Court for Sierra Leone and the Liberian Truth and Reconciliation Commission.

From 1989 to 2003, Liberia's two civil wars claimed the lives of 250,000 Liberians and displaced a million others into refugee camps in neighbouring countries. The conflicts were particularly vicious with factions committing atrocities, including rape, torture and civilian murders. Large numbers of children were forcibly enlisted as fighters. The country's unemployment rate hovers at 85 percent and four out of five Liberians live below the poverty line.

After nearly 14 years in power, President Charles Taylor resigned and accepted asylum in Nigeria in August 2003. Shortly after, a peace agreement was signed between representatives from the belligerent groups, Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL), the Government of Liberia, major political parties and civil society in Accra, Ghana. A transitional government was in place until Ellen Johnson-Sirleaf won the presidential election in October 2005, becoming the first female head of state in Africa.

This case study examines two transitional justice measures established to address serious human rights and humanitarian law violations: the trial of Charles Taylor by the Special Court for Sierra Leone (SCSL) and the Liberian Truth and

Reconciliation Commission (TRC). Although Taylor was not tried for crimes taking place in Liberia, his trial may be seen as a transitional justice measure for Liberia, as well as Sierra Leone.⁷⁸ The TRC was mandated by the Accra peace agreement to investigate and report on gross human rights violations that occurred in Liberia between January 1979 and October 2003. These measures represent some of the diversity of transitional justice measures and developments in the field since they concern the first trial of a head of state and a truth commission, in Africa/The Hague, after a peace agreement that ended the conflict.

This chapter examines the role of the US in the establishment and operations of these two measures and provides an explanation and assessment of US involvement. It draws on archival research undertaken in Washington DC and Liberia, as well as 52 Liberia-specific interviews with officials from the US government, SCSL, TRC, international organizations, international NGOs and local civil society groups (See Appendix 2 for interview list). Before turning to the Taylor trial and TRC, a review of US foreign policy in Liberia provides useful background information.

4.1 US Foreign Policy in Liberia

US involvement in Liberia dates back to 1821 when groups of African Americans established settlements in Liberia with the assistance of the American Colonization Society (ACS). African American settlers became known as Americo-Liberians, while persons from the Caribbean and slaves liberated from slave ships and resettled in Liberia became known as Congos. In 1847, following a settler referendum, the

⁷⁸ Security Council resolution 1315 recommended the establishment of a court in order to expedite the process of bringing justice and reconciliation to the *region*, not just to Sierra Leone (UNSCR 1315, 2000, emphasis added).

colony's legislature declared the territory an independent, free republic, the first on the African continent. Liberia modelled its constitution after that of the US, named its capital Monrovia, after the fifth US President, and chose a flag similar to that of the US. American companies, like Firestone, received special rights to Liberian natural resources, particularly rubber.

US-Liberian relations deepened during WW2, and were further strengthened in the 1950s through mid-1970s, as Liberia hosted major US security and communication facilities during the Cold War. A brief period of tensions characterized the mid to late 1970s during William Tolbert's administration, but relations warmed again after a coup led by Samuel Doe toppled and killed President Tolbert in April 1980. In August 1982, President Reagan met with Doe at the White House and paid tribute to 120 years of US-Liberian diplomatic relations, praising the two countries' 'special friendship,' 'firm bond,' and 'long history of cooperation,' which he said would be further strengthened in the years to come (US Public Papers of the Presidents, 1982). From 1980 to 1985, Liberia was the largest sub-Saharan Africa per-capita recipient of US aid despite the regime's record of serious human rights violations and widespread corruption.⁷⁹ In 1985, Doe won a rigged election, but his victory was not viewed critically by the Reagan administration.⁸⁰ In response to a question about US friendship to 'one dismal regime after another in Liberia,' Assistant Secretary of State for African Affairs Chester Crocker said: 'I would never

⁷⁹ Brooke, 1988. The US contributed \$402 million in aid between the 1980 coup and 1985 elections, accounting for more than one-third of the country's operating budget (Advocates for Human Rights, 2009: 288; Kramer, July 1995). For data on US assistance to Liberia from 1945 to 2001, see, *USAID Overseas Loans and Grants, Obligations and Loan Authorizations July 1, 1945 - September 30, 2001* (USAID, ND).

⁸⁰ Herman Cohen, US Assistant Secretary of State for African Affairs, 1989-1993, stated that '[Doe] should have lost, but he rigged the election. But at that time all West African elections were rigged. It was a very normal thing to do, for the government to win the election even though they had less than the majority of the vote. So it did not trouble us at all' (Bright, 2002; see also Ottaway, 1987).

in a million years tell you I was seeking what was in the best interests of Liberia...I was protecting the interests of Washington' (Fisher, 2001).

The end of the Cold War and US disillusionment with increasing corruption and dictatorial tendencies under Doe in the mid- to late 1980s led to a gradual decline in US assistance. In 1985, following US remarks critical of the Doe government's human rights record, Doe began to open lines of communication with Libya, where he travelled in 1988. In 1986 and 1987, the US suspended bilateral aid.

In December 1989, Charles Taylor and a small group of Libyan-trained rebels – called the National Patriotic Front of Liberia (NPFL) – entered Nimba County from neighbouring Côte d'Ivoire, making gains on the capital throughout the early 1990s and committing widespread atrocities in Krahn and Mandingo areas. There was insignificant pressure on the Bush administration from the media, foreign states or Congress to respond to the violence taking place. Without external pressure, the principle input for the Liberian decision-making process was the State Department-NSC-Defense Department-CIA machinery. In 1990, an interagency group, chaired by Assistant Secretary of State for Africa Hank Cohen, was convened to review the situation. Cohen wrote that he and other State Department and other agency Africa specialists supported US engagement, while the CIA, Defense Department and NSC saw little need for involvement.⁸¹ Those in favor of engagement believed

that the historically close relationship between the US and Liberia obligates the US to take special responsibility in answering Liberia's humanitarian needs. According to this view, Americans should not only provide relief when it is needed, but should help promote a democratic system and work to stop human rights abuses as well. They criticize the US response to the Liberian conflict as inadequate, and compare it to the US intervention in the Middle East on behalf of Kuwait. Some in this camp believe it would not be inappropriate for the US to send in troops to

⁸¹ At one point there were discussions that Taylor might be the lesser of two evils and the US could quietly cooperate with him. Opponents of this approach within the administration 'quickly reminded everyone that Taylor was actually an escaped convict from a Massachusetts prison,' and wanted in the US for embezzlement (Kansteiner, 1996).

help restore order and protect noncombatants in Liberia, or at least to establish a zone of safety in Monrovia. They point to Haiti and Bosnia as recent examples of successful humanitarian intervention, and ask why the same is not done for a country with historic US ties (Ek, 1996).

Other policymakers believed that US interests in Africa were peripheral, and that the US therefore had no special responsibility toward Liberia in particular and should not become involved in the country's internal affairs.

Although opponents to intervention may support humanitarian and developmental assistance, they argue that since Liberia is no longer of major strategic importance for US foreign policy interests, direct US military intervention is out of the question. They emphasize the difficulties that may be encountered when outside powers intervene in civil wars, and note that, as a result of US casualties in Somalia in 1993, there would likely be scant support among the public or in Congress for humanitarian military intervention in Liberia (Ibid).

National security adviser Robert Gates described the historical relationship as 'meaningless; it doesn't govern us anymore; we treat Liberia like any other country, we have no real interest there' (Advocates for Human Rights, 2009: 289).

As the situation in Monrovia deteriorated and foreign embassies came under threat, the Bush administration decided in late May 1990 to deploy a task force of four US Navy ships to assist in the evacuation of the embassies. The US cut direct financial and military aid to the Liberian government, withdrew Peace Corps operations and imposed a travel ban on senior Liberian Government officials.

US policy 'quietly became one of letting the Liberians work out their conflicts themselves' – a position the US maintained during the Bush and Clinton administrations (Kansteiner, 1996). From 1991 to 2003, no military aid was provided to Liberia; US assistance consisted predominantly of food aid and support for ECOMOG and the UN Observer Mission in Liberia.

Following Taylor's election in 1997, new opposition groups emerged which renewed fighting throughout Liberia. Human rights violations were being committed

by all actors in the conflict. Taylor was also supporting the Revolutionary United Front (RUF), a rebel group fighting in Sierra Leone. As political and economic conditions degenerated, US views of the Taylor administration became increasingly negative, and assistance levels reflected such concern (See Appendix 5 for data on US Assistance to Liberia, FY1990 - FY2001).

The Clinton administration threatened to take punitive actions against the Taylor government in response to Liberian intervention in Sierra Leone's civil war, which also resulted in congressional calls for tough, activist US policy measures to counter such alleged actions. In a May 2000 editorial in the *Washington Post*, Republican Senator Judd Gregg of New Hampshire stated that 'Taylor and his criminal gang must go; every feasible effort ought to be made to undermine his rule.'⁸²

According to former SCSL official Chris Mahony, Senator Gregg made the case to then-US Ambassador to the UN Richard Holbrooke and the two discussed a shift in policy against Taylor, directed at the removal of his regime using a diversity of instruments. These included sponsoring an armed rebellion against Taylor's government, establishing a tribunal that would indict him, placing sanctions on his government that would weaken his ability to repel a rebel force, and providing support to local political opponents. Holbrooke and Gregg intended that one or a combination of these methods would force Taylor from power (Mahony, 2012: 10-11).

⁸² Gregg, 2000. The position of Gregg and others likely emerged from the confluence of three factors: it provided an opportunity to: make Congress seem pro-accountability; criticize the UN, by citing the failure of the UN Mission in Sierra Leone; gain media attention (i.e., the 'sensationalism' of Sierra Leonean amputees 'appealed to the camera-chasing members of Congress'); promote anti-Clinton sentiment by publicizing the failure of the Lomé Accords (Cerone, 2007: 306). For more on congressional discussion of amputee issue, see, Congressional Record, 2000: 21850-21851. For more on US policymaking in Sierra Leone in 1999-2000, see Cook, 2008.

Within a month of the meeting between Holbrooke and Gregg, developments on a tribunal moved forward, and an armed militia called LURD attacked Liberia from Guinea. Guinea received increased US military training and ammunition for their offensive against Taylor (HRW, 2003). In October 2000, President Clinton denied entry into the US to President Taylor, senior members of the Liberian government, and their supporters and families for their failure to end trafficking in arms and illicit diamonds with the RUF (US State Department, 2000; US White House, 2000).

The Bush administration maintained support for UN and US bilateral sanctions against the Taylor government and members of Congress continued to view the Taylor regime negatively. During a March 2001 hearing, members of Congress and witnesses criticized the Taylor government, calling his government a regional menace, a source of destabilization, an abuser of human rights and anti-democratic (US House of Representatives, 2001).

With increasing levels of violence, State Department officials began discussing greater US engagement. Michael Arietti, then-Director of the Office of West African Affairs, said that he and US Ambassador to Liberia John Blaney ‘felt it was worth giving Liberia another shot.’ They had the support of National Security Advisor Condoleezza Rice and NSC’s Senior Director for African Affairs Jendayi Frazer.⁸³ ‘There was a sense that with a little bit of effort, we could make a difference...It was hardest to sell to DoD,’ Arietti said. Increased interest in Liberia motivated US support for the creation of the International Contact Group on Liberia (ICGL), a coalition of donor and West African regional governments formed in September 2002 to coordinate a comprehensive, regionally focused resolution to the second civil

⁸³ Frazer went on to serve as Assistant Secretary of State for African Affairs from 2005-2009.

war. Arietti mentioned ‘constant discussions’ between ECOWAS and the US on Liberia, but also said that the US viewed its role as secondary to African leadership.⁸⁴

By June 2003, rebel forces had made significant inroads to the capital and threatened Taylor’s stronghold on power. ECOWAS suggested peace talks to be held in Ghana and a peacekeeping mission, which were both supported by the US. Arietti, who was present at the talks, said that the historic relationship with Liberia meant that US recommendations carried a lot of weight (Michael Arietti, interview, 9 May 2011). On 18 August 2003, the Comprehensive Peace Agreement (CPA) was signed in Accra, which laid the framework for constructing a two-year National Transitional Government of Liberia (NTGL).

Two months after the peace agreement was signed, a US-drafted UN Security Council resolution established the UN Mission in Liberia (UNMIL), which would reach a total of 15,000 peacekeepers – the largest peacekeeping force to be established at that time.⁸⁵ The US Congress allocated close to half a billion dollars towards the implementation of the peace accord and UNMIL.⁸⁶ At the State Department, Liberia meetings grew from the four people who had been tracking the country over the previous years to a room full of interested people (Hayner, 2007: 28). Some observers said that the US supported a peacekeeping mission in part to gain UN support with US operations in Iraq. Others said Liberia was seen as the

⁸⁴ Michael Arietti, interview, 9 May 2011. Arietti later served as US Ambassador to Rwanda from 2005-2008.

⁸⁵ The US seconded 9 officers to UNMIL (two headquarters staff officers, seven military observers), worked to restructure and train a new Liberian army and provide development assistance (US House of Representatives, 2003: 27). US support of a robust peacekeeping mission represented a policy shift as US officials had typically been critical of these missions and were concerned about the risk of prosecution by the International Criminal Court for any actions committed by US armed forces. President Bush addressed this issue through a presidential determination certifying that the military would be under no such risk (Federal Register, 2003: 63973).

⁸⁶ Koppel, 2003. Support was particularly strong from members of the Congressional Black Caucus, i.e., Reps. Donald Payne and Maxine Waters.

‘responsibility’ of the US, since Britain and France had sent troops to former West African colonies in Sierra Leone and Ivory Coast (Feldmann, 2003).

Liberia’s transitional government received extensive US post-war reconstruction and security sector reform assistance. The US led the reconstruction of the Armed Forces of Liberia, which included the training of a newly recruited and vetted 2,000-person military. Security sector reform efforts led to the disarmament of over 100,000 ex-combatants by October 2004.⁸⁷

The Bush administration was a strong supporter of Ellen Johnson-Sirleaf’s election as president in 2005, and the Obama administration maintained this support.⁸⁸ In an official visit to Liberia in 2009, Secretary of State Hillary Clinton stated:

We are working to train the police force, which is something that the Government of Liberia places a very high priority on. We are working to help train the military. We are working in just about every sector of society.⁸⁹

From 2003 to 2010, the US contributed over \$1 billion in bilateral assistance and another \$1 billion in assessed contributions to UNMIL (See Appendix 5 for US Bilateral and Related Assistance to Liberia, FY2004-FY2011; US State Department, 2011). One US official commented: ‘the US does things in Liberia we don’t do

⁸⁷ See, Cook, 2005: Summary; US State Department, March 2011. As of late April 2010, US personnel deployed with UNMIL included 10 individual police, 3 military observers, and 5 contingent troops (Cook, 2010). A gradual, phased drawdown of the UNMIL force began in 2006 and was meant to be complete after the 2011 presidential election. However, the Security Council extended UNMIL’s mandate for another year, until 30 September 2012 (UNMIL, 2011).

⁸⁸ President Bush held four one-on-one meetings with Sirleaf between her inauguration in January 2006 and 2008.

⁸⁹ US State Department, 2009. During this visit, former Assistant Secretary of State for African Affairs Jendayi Frazer wrote an article about the importance of moving the headquarters of the US African Command (AFRICOM)⁸⁹ from Germany to Liberia: ‘This needs to be done to promote US strategic interests in the region, which include maritime security in the Gulf of Guinea, countering terrorism and drug trafficking, and promoting regional development and stability’. The Liberian government repeatedly offered to host AFRICOM headquarters, understanding that the US presence ‘will create jobs and help stabilize the country and region.’ Frazer added, ‘The command needs to be in the region its operations are charged with shaping’ (Frazer, 2009). However, a 2011 Congressional Research Service report said that DoD’s intention to locate AFRICOM’s headquarters on the continent were early in the planning process, but that such a move is unlikely to take place for several years, if at all (Ploch, 2011: Summary).

anywhere else.’ Unlike many countries, she added, ‘Liberia is one country where the State Department always gets more [funding] than what they ask’ (US official, interview, 16 March 2010).

US foreign policy in Liberia has a long history dating back to the 1820s. Bilateral relations were generally positive, except for periods during the Doe and Taylor administrations. Despite debates about US intervention in the 1990s to stop the first civil war, a policy of non-interference was taken. This changed in the early 2000s, however, with a shift toward one of greater involvement driven by the Bush administration’s interest in the situation. This engagement included involvement in transitional justice, the focus of the remainder of this chapter.

4.2 The Taylor Trial

The diplomacy to build a court in Sierra Leone began on 11 May 2000, when War Crimes Ambassador David Scheffer met with Hans Corell, the UN’s top legal counsel. The UK soon arrested RUF leader Foday Sankoh, and Scheffer began exploring options for accountability. On 3 June 2000, USUN Ambassador Richard Holbrooke recommended that Scheffer work on a proposal for a Security Council-backed international criminal tribunal,⁹⁰ which Scheffer and his adviser Pierre Prosper undertook and shared with Sierra Leonean President Kabbah. Kabbah sent a letter to Kofi Annan requesting a court, which was very similar to the American proposal. However, aside from the US and UK, Security Council members were unwilling to establish another tribunal. In response, Scheffer suggested establishing an international criminal court with a treaty between the UN and the government (Scheffer, 2011: 329-330). This hybrid model would be less expensive than the ad-

⁹⁰ Scheffer writes: ‘Holbrooke’s bottom line was to maintain the international jurisdiction of the Security Council over whatever was built’ (Scheffer, 2011: 326).

hoc tribunals, funded by voluntary contributions, instead of mandatory contributions from UN member states.

In August 2000, the Security Council passed Resolution 1315 to create the Special Court for Sierra Leone. It was mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. Shortly after, the White House asked Department of Defence (DoD) lawyer David Crane to 'help set up an experiment in West Africa' (Mahony, 2012: 14). Crane began utilising DoD intelligence information to formulate who he believed was most responsible for crimes committed during the conflict (Ibid: 17).

Several high administration officials, including Pierre Prosper, the second war crimes ambassador, as well as members of Congress, applied pressure on UN Secretary-General Kofi Annan to get David Crane appointed as the Special Court's first Chief Prosecutor. DoD, which had been a source of opposition to international criminal courts, did not express opposition to the creation of the SCSL and at times seemed affirmatively supportive. The agency's support was largely due to Crane's DoD experience (Cerone, 2007: 306). Prosper's office reportedly liked the fact that Crane had management experience (he had been a senior executive in DoD), and that he was a former Judge Advocate (having retired from the Army in 1996), which mirrored the Nuremberg model. His Africa background was another factor, as was the fact that Crane was a former teacher of Prosper's then-deputy (Ibid).

As the court was set up, Crane visited the State Department approximately four times annually where he sought the war crimes office view as to who was to be prosecuted (Mahony, 2012: 19). According to Scheffer, the decision to investigate

Taylor was made in summer 2000 when the structure of the court was being negotiated. He said:

Taylor was front and center in our minds as negotiators. There was no ambiguity that this court would investigate Taylor. None. We couldn't actually say that in the statute of course, but that was a clear mandate in the negotiating of this court (David Scheffer, interview, 12 March 2012).

However, Scheffer also made clear that his work on the court was not premised around an agenda about Taylor. He said he had not heard of the earlier Gregg-Holbrooke meeting (Ibid).

Whether or not Senator Gregg and others viewed the court as a way to remove Taylor or the structure of the court was negotiated in a way that would guarantee his prosecution, Taylor's transfer and trial to the Special Court were not inevitable. This section examines the role of the US from the time of his indictment, asylum in Nigeria, transfer to the court, move to The Hague, to present day – with the court's verdict released in April 2012.

Taylor's indictment, resignation and asylum in Nigeria

By the middle of 2003, LURD forces (initially supported by the US, Guinea and Burkina Faso) were regularly threatening the capital. Taking advantage of Taylor's weakened position, ECOWAS and the US negotiated a new round of peace talks involving all the major parties to the conflict. They undertook a concerted campaign to convince Taylor to participate personally in the talks, which would be held in Accra, Ghana. Taylor yielded, and all parties to the conflict were guaranteed their security while attending the conference. Some diplomats considered the Accra talks the best chance in years to create a peaceful, durable solution for Liberia that would also remove Taylor by allowing him to exit the presidency as part of a negotiated settlement (Tejan-Cole, 2009: 213).

On 4 June 2003, while Taylor was in Ghana attending the opening day of the talks, the Special Court Prosecutor David Crane unsealed an indictment against Taylor and appealed to Ghanaian authorities to arrest him for war crimes and transfer him to Sierra Leone.⁹¹ The Ghanaians refused to enforce the warrant and gave Taylor a presidential plane to return quickly to Liberia. They said that arresting Taylor would be a violation of the commitment they had made to guarantee the security and freedom of participants in the talks (Hayner, 2007: 8).

Although it was apparent to most observers that Crane was planning to indict Taylor, and given the SCSL's numbering of indictments, it was clear there had been a sealed indictment, the State Department found major fault with Crane's timing. The timing of the indictment was not coincidental. Indeed, the Prosecutor's strategy was to demonstrate 'the power of the rule of law by stripping Taylor of his political power in front of his peers.' Crane gave 24-hours' notice to concerned parties, including the US, of his intent to unseal the indictment. State Department officials tried unsuccessfully to persuade him to refrain from doing so (Cerone, 2007: 309).

State Department officials and members of the National Security Council were infuriated by Crane's decision. Ambassador Blaney said that 'hundreds if not thousands of people would have died' in retribution if Taylor had been arrested in Ghana. 'It would have ended the peace process and the war would have continued' he said (Hayner, 2007: 10). US citizens and the embassy were apparently directly threatened as a result of the indictment, given the belief widely held in Liberia that the US was the real power behind the Special Court (Ibid). Arietti said this was

⁹¹ Taylor was indicted under seal by the Special Court for Sierra Leone on 7 March 2003 on a 17-count indictment for crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (commonly known as war crimes) and other serious violations of international humanitarian law. On 16 March 2006 a Judge of the Special Court approved an amended indictment reducing the number of counts to 11. The indictment was ordered to be kept under seal.

farthest from the truth. After the indictment, he said that the State Department came up with a phrase used in official statements that indicated US support of accountability for Taylor, but did not expressly call for his prosecution (Michael Arietti, interview, 9 May 2011). Crane described the relationship between the court and the US as 'love-hate' (David Crane, interview, 19 April 2010). For months after the indictment was unsealed, the State Department cut off all communication with Crane's office and the US Ambassador to Sierra Leone refused access to all court personnel (Cerone, 2007: 309). Nonetheless, many observers credit the unsealing of the indictment with the hastening of Taylor's departure from Monrovia.

Meanwhile, the Bush administration was focused on Taylor's resignation – not his prosecution. During a speech on his administration's Africa policy, President Bush called on Taylor to resign: 'President Taylor needs to step down so that his country can be spared further bloodshed' (Semple and Sengupta, 2003). The Bush administration was working on a deal to provide Taylor with asylum in Nigeria, which Nigeria eventually agreed to in order to 'aid the Liberian peace process.' Taylor accepted the offer with a promise from Nigeria that he would not later be prosecuted provided he withdrew from political activity (Cook, 2005: 14).

Some members of Congress faulted Nigeria for its asylum offer, called for Taylor's immediate transfer to the Special Court and authorized a \$2 million reward for his capture (US House of Representatives, 2003: 12; Kramer, 2003). In testimony before a House Committee hearing entitled 'Confronting War Crimes in Africa', Howard F. Jeter, then US Ambassador to Nigeria, said:

When I returned to Washington in August 2003, I was stunned to learn that some members of the US Senate were planning to sanction Nigeria for taking in Charles Taylor. I was incredulous. Instead of sanctioning Nigeria, I thought we should have been praising [Nigerian President Olusegun] Obasanjo for his political courage (US House of Representatives, 2004: 19).

Ambassador Jeter went on to speak about how US officials knew and supported President Obasanjo's decision to take in Taylor:

Obasanjo did not take the decision on Charles Taylor lightly or alone. He consulted broadly and often with all key players in and outside the region...President Obasanjo acted with our full knowledge and concurrence...Before he made his final decision, the President called me and the British High Commissioner to his office to inform our respective governments that he had completed his consultations and planned to offer asylum to Mr. Taylor. He said he would not move forward, however, if the American or British governments objected...what followed was a succession of phone calls from Washington telling the Embassy to urge President Obasanjo to move forward on getting Taylor out. We wanted Taylor out of Liberia and we wanted him out quickly, was the refrain I heard many times. This message was echoed by State Department and National Security Council officials who accompanied President Bush to Abuja during his State Visit to Nigeria in mid-July. Even President Bush at that time publicly was saying that the US would not consider sending military forces to Liberia as long as Charles Taylor remained in the country. The President called for his immediate departure. I can only presume that President Obasanjo felt that America was fully supportive of what he was doing and that by taking Taylor out of Liberia, he was also responding to the wishes of the US. There could be no other conclusion...The decision to grant political asylum to Taylor prevented a humanitarian disaster and saved thousands, perhaps tens of thousands of lives. The 14-year civil war in Liberia was ended and the dreaded spill-over into neighboring countries was prevented. Liberia now has a chance and a future, and I am certain that the issue of justice for Charles Taylor will not go away (Ibid).

Over time, however, it became apparent that Taylor still communicated with groups in Liberia, and discussions about a trial continued for the next three years.

Taylor's transfer to the Special Court for Sierra Leone

Although a condition for asylum in Nigeria was that Taylor disengage from Liberian politics, he reportedly broke these conditions extensively.⁹² Members of Congress

⁹² By mid-2005, persistent claims were emerging that Taylor was violating the terms of his Nigerian asylum deal to refrain from political interference in West Africa, including that he had been involved in an attempt to assassinate Guinean president Lansana Conteh in January 2005, that he continued to back armed groups, and that he was attempted to influence the forthcoming post transition Liberian elections. Special Court investigators accused him of backing a coup plot in Ivory Coast (Timberg, 2005: A22; Farah, 2005: A19).

felt that the administration was not doing enough to press Nigeria to transfer Taylor to the Special Court. Administration officials, however, believed that Taylor's transfer could be a potential source of instability for Sierra Leone and Liberia. They were also reticent to renege on the commitment to Nigeria to honor its conditions for accepting Taylor and deference to Nigeria's views on the matter, given its central role as a regional peacekeeping and political mediating power.⁹³ This debate continued until 2006.

Members of Congress were consistent in their calls for Taylor's transfer to the Special Court. Just after Taylor left for Nigeria, Republican Rep. Ed Royce, Chairman of the House Subcommittee on Africa, called for Nigeria to hand over Taylor to the court (US House of Representatives, 2003: 12). In the Appropriations Act for fiscal year 2004, Congress reaffirmed its support for the SCSL and made funds available for 'assistance to the central government of a country in which individuals indicted by the SCSL are credibly alleged to be living' if that government cooperated with the court, 'including the surrender and transfer of indictees in a timely manner' (US Public Law 108-199, 2004: 206).

By June 2004, members of Congress and at least one State Department official explicitly stated that Taylor's prosecution was US policy. War Crimes Ambassador Pierre Prosper made the following statement:

Justice will not be complete until Charles Taylor finds his way to the [Special] Court [for Sierra Leone]. The US policy is that Mr. Taylor must be held accountable and must appear before the Court. I personally have shared this policy with President Obasanjo and Chairman Bryant and have asked them for action on this matter. While we understand the need to maintain stability in Liberia, the goal of the US is to work with Nigeria and Liberia to pursue a strategy that will see Charles Taylor face justice before the Special Court for Sierra Leone. We want to work toward this end, and today our Ambassador to Nigeria, John Campbell, is again

⁹³ See, for example, Ambassador Jeter's comments (US House of Representatives, 2004); White House spokesman's comments (US White House, 2005); and State Department spokesman's comments (US State Department, 2005).

communicating this message to the Nigerian President (US House of Representatives, 2004).

In response to a question about what the State Department was doing to convince Nigeria to transfer Taylor, Ambassador Prosper said that the Nigerian President had told Prosper that he ‘needs to keep his word’ of making Nigeria a temporary sanctuary, but that he would defer to the Liberian government after elections had taken place (US House of Representatives, 2004: 13). Prosper had asked the Nigerian President ‘to speed up the timetable’ and was also working on a joint strategy with the head of the Liberian transitional government (Ibid). Rep. Royce felt that Nigeria should feel justified in turning over Taylor since he had broken the conditions of his asylum by maintaining financial interests and cell phone contacts (Ibid: 29). Republican Rep. Frank Wolf told Prosper: ‘Taylor needs to be apprehended and brought to justice before this Administration leaves office, or else you will have failed in your effort (US House of Representatives, 2004: 18).

A year passed, but there was growing recognition that the best solution to the Taylor problem was prosecution before the Special Court. In May 2005, Presidents Bush and Obasanjo discussed Taylor’s status. Though few details of their exchange were reported, prior to the meeting, a White House spokesman said that Taylor should ‘be held to account for the crimes he has committed,’ and stated that the US and Nigeria were ‘engaged’ in the question of how to address the matter (US White House, 2005). He also expressed appreciation to Nigeria for facilitating Taylor’s departure from Liberia in 2003, which had helped bring peace in Liberia. Obasanjo also met with Secretary of State Condoleezza Rice on this trip. In a press conference about the meeting, a State Department spokesman said:

They discussed the situation of Mr. Taylor right now and I think we and the Nigerians both agree that he should not be interfering in any way in Liberia's internal affairs; and shouldn't undermine democracy there; and

that he should face justice. So we're in touch with the Nigerians on those topics. We'll stay in touch with them, as well as others, as we proceed forward (US State Department, 2005).

After these meetings, Obasanjo announced that he would turn Taylor over to a newly elected Liberian government if the new administration asked him to do so. However, it was generally agreed that it would be politically difficult for Nigeria to revoke the asylum it had extended to Taylor, and the Liberian elections were still some months away.

In an overwhelming show of support for the SCSL, Congress adopted a resolution on the same day as Obasanjo's talks with the Bush administration, which urged Nigeria to 'expeditiously transfer' Taylor to the Special Court.⁹⁴ The resolution, which passed the House by a vote of 421 to 1, and was unanimously endorsed by the Senate, noted that 'the Special Court for Sierra Leone has contributed to developing the rule of law in Sierra Leone and is deserving of support' (Ibid). Two months later, Rep. Diane Watson (California Democrat and member of the Congressional Black Caucus) sponsored an amendment to the Foreign Relations Authorization Act for fiscal years 2006 and 2007 which restated that it was US policy 'to seek the expeditious transfer' of Taylor to the SCSL.⁹⁵

Later that year, Congress increased pressure on Nigeria by conditioning future assistance on the surrender of Taylor to the SCSL. The Foreign Operations Appropriations bill for fiscal year 2006 stated:

assistance may be made available for the central Government of Nigeria after 120 days following enactment of this Act *only if* the President submits a report to the Committees on Appropriations, in classified form

⁹⁴ US H.Con.Res. 127, 2005. On 24 February 2005 the European Parliament unanimously passed a resolution calling for Nigeria to transfer Taylor to the Special Court.

⁹⁵ US H.Amdt. 480, 2005. Meanwhile, Court officials hoped that the congressional resolutions would bolster their efforts to win a Security Council Chapter VII resolution that would legally require Nigeria to transfer Taylor to Freetown for trial (Peskin, 2008: 249-250). In November 2005, the Security Council expanded UNMIL's mandate to include the ability to apprehend and detain Taylor in the event of a return to Liberia and to transfer him to the SCSL (UNSCR 1638, 2005).

if necessary, on: (1) the steps taken in fiscal years 2003, 2004 and 2005 to obtain the cooperation of the Government of Nigeria in surrendering Charles Taylor to the SCSL; and (2) a strategy, including a timeline, for bringing Charles Taylor before the SCSL (US P.L. 109-102, 2005: 67, emphasis added).

Congress also pressed the Bush administration to act more urgently on the issue. Rep. Watson said that the US had a 'duty' to ensure Taylor's transfer (US House of Representatives, 2006: 33). House Africa Subcommittee Chairman Chris Smith said that Taylor's extradition to the Special Court 'remains high on the agenda of the US Government' (Ibid: 9). In addition, a bipartisan group of 13 House and Senate Members wrote Secretary of State Rice noting: 'Should Mr. Taylor continue to evade justice, the international community may show reluctance to continue with its strong support for the reconstruction of Liberia and Sierra Leone' (Ibid: 30).

Upon taking office in January 2006, President Sirleaf said that the Taylor issue was not a priority (BBC, 2006). Her government was gripped by security concerns. Taylor loyalists were still armed and his close associates controlled key positions in the legislature. In a bid to win the second round of the presidential elections, she had sought and received the support of many of Taylor's allies. Newspapers alleged that Sirleaf had promised not to request Taylor's surrender in return for their support (Tejan-Cole, 2009: 217).

However, the Bush administration increased pressure on the Taylor issue, and Secretary of State Rice told Sirleaf that the US felt the right time had come for Taylor to be sent to Freetown to face justice (Ibid; US State Department, 2005; Cook, 2005: 13). Assistant Secretary Frazer said Taylor's prosecution would 'bring closure to a tragic chapter in Liberia's history' (US House of Representatives, 2006: 47). When it became clear to Sirleaf that the grant of much-needed development assistance from the US and others was linked to bringing Taylor to justice, she said,

‘We also are facing . . . pressure – I must use that word – from the UN, from the US, from the European Union, who are all our major partners in development, on the need to do something about the Charles Taylor issue’ (Lehrer, 2006).

Despite concerns that Taylor’s return would foster unrest, Sirleaf stated that ‘the fate of one Liberian should not hold a nation of three million people hostage’, and, on 5 March 2006, formally called on Nigeria to transfer Taylor to the custody of the Liberian government (Ibid). On 26 March 2006, Obasanjo informed Sirleaf that Liberia was free to take Taylor into its custody. Within 48 hours, however, Taylor allegedly tried to flee across the Cameroon border. A meeting had been planned in Washington between Presidents Bush and Obasanjo for the next day. Obasanjo was told that the meeting with Bush would be cancelled if Taylor remained at large (Tejan-Cole, 2009: 218). Taylor was soon caught by Nigerian authorities on 29 March 2006 and flown to Monrovia where he was arrested by UNMIL and transferred to the Special Court in Freetown.

Moving the trial to The Hague

The same day Taylor was surrendered, the Special Court president submitted requests to the Netherlands and the International Criminal Court (ICC) for the trial to be relocated to The Hague on the basis of stability concerns. However, some speculated a political deal involving Liberia, the US, the AU, and ECOWAS was the primary reason for transferring the trial to The Hague (Cruvellier, 2006). Allegations that President Sirleaf had handed Taylor over to the court with the precondition that his trial be held out of the region were subsequently confirmed by senior staff within the Special Court (Timberg, 2006: A15). The Netherlands and the ICC agreed to host the trial, and the UK agreed to provide detention facilities if Taylor was convicted.

Despite the concerns of several international NGOs and others that moving the trial from Sierra Leone would make the justice process less accessible to the communities most affected by the crimes, Taylor was transferred to The Hague on 30 June 2006 (ICTJ, 2006; HRW, 2006: 2).

US support for the move contrasted with its support for ‘local’ justice in Sierra Leone. War Crimes Ambassador Prosper had previously worked at the Special Court and had placed a heavy emphasis on location. In a prior interview, he had said:

We wanted it in Freetown. We wanted it in a place where the atrocities occurred. We wanted it in a place where the population could actually go feel it, smell it, touch it, be part of the process (Keleman, 2006).

SCSL attorney Abdul Tejan-Cole said that the continued reference to so-called security threats blurred together political and legal considerations: ‘The Special Court had indicted others who arguably posed a security threat equal to, if not more serious than, Taylor in terms of the likelihood of causing potential attacks on the court’s Freetown premises’ (Tejan-Cole, 2009: 219).

The move of venues also raised discussion about the US position on the ICC, and it was thought by some to signal a change in attitude. Human Rights Watch counsel Elise Keppler thought it was ‘a more pragmatic approach that could reflect the US prioritizing justice and accountability, and also recognizing the blowback and collateral damage of its policy on the International Criminal Court to date’ (Keleman, 2006). However, State Department legal advisor John Bellinger said people should not read too much into it:

The ICC would not be trying Charles Taylor, they would simply be providing their facilities--their bricks and mortar--to the Special Court for Sierra Leone to try Charles Taylor. So we have no problem with that...We don't have a general allergy to the ICC. We are concerned about the ICC's potential coverage of the US government. But we see a role for the ICC and international criminal justice in the world; that's the reason that we did not object to the Security Council Resolution that

referred the human rights violations and atrocities in Darfur, Sudan to the ICC (Ibid).

NPR reporter Michele Keleman said that the tentative embrace of the ICC may just have been a matter of convenience because the US wanted to find a place to house the Taylor trial (Ibid). Regarding funding, US officials said they expected other countries to help pay for the move, since the court relied on international donations and it would be costly to bring court officials, witnesses and Taylor to The Hague (Ibid). In 2009, the trial was moved from the ICC premises to the Special Tribunal for Lebanon, also based in The Hague.⁹⁶

The trial

Taylor made his initial appearance at the Special Court in Freetown in April 2006, where he pled not guilty to all charges. He was then transferred to The Hague in June. A year later, Prosecutor Stephen Rapp (who subsequently was appointed as the fourth US war crimes ambassador in September 2009) made his opening statement. However, the trial was delayed until January 2008 because Taylor boycotted the proceedings and dismissed his legal team. The Prosecution formally closed their case in February 2009 after having presented testimony from 91 witnesses. In May 2009, the Trial Chamber dismissed in its entirety a Motion for Judgment of Acquittal brought by the Defence. The Defence opened their case in July 2009, and concluded in November 2010 after calling 20 witnesses, including Taylor himself.

⁹⁶ Later that year, in September 2006, Taylor's Boston-born son, Roy M. Belfast Jr. (aka Charles McArthur Emmanuel and Charles 'Chuckie' Taylor, Jr.) pled guilty to a federal passport fraud relating to his official submission of false data regarding his father's identity. He had been arrested at Miami International Airport by US customs agents while attempting to enter the US from Trinidad on 30 March 2006, one day after his father was apprehended in Nigeria. Belfast, who reportedly had an extensive US juvenile criminal record, was sentenced on 7 December 2006, to 11 months in prison for fraud (Weaver, 2006; US Department of Justice, 2006; Anderson, 2006).

Between 2002 and 2009, the US has contributed over \$60 million – a third of the court’s budget, far surpassing the near 50 donors who have provided assistance. The following table lists these figures (Data obtained from Muck and Wiebelhaus-Brahm, 2011).

Figure 9: International assistance to the SCSL

| Donor | Amount (in USD) | Percentage |
|---------------|-----------------|------------|
| Germany | 5,687,760 | 3 |
| Canada | 14,652,246 | 8 |
| Netherlands | 24,499,843 | 13 |
| UK | 33,435,940 | 18 |
| US | 60,399,000 | 33 |
| UN Subvention | 16,700,000 | 9 |
| Others | 29,281,949 | 16 |
| Total | 183,012,181 | 100 |

Since then, the US has provided an additional \$20 million, which has meant it has funded nearly half of the court’s budget (Scheffer, 2011: 28; US State Department, 2010; See Appendix 5 for more data on US assistance to the court by year). A State Department official spoke about the significance of the court:

The trial of Charles Taylor is of enormous historical and legal significance as he is the first African head of state to be brought before an international tribunal to face charges for mass atrocities and gross violations of international humanitarian law. The Taylor prosecution delivers a strong message to all perpetrators of atrocities, including those in positions of power that they will be held accountable. It is imperative the international community prevents the Taylor trial from being suspended due to lack of financial resources, which is why the US rushed its FY2011 contribution to the Court. We hope other donor states will follow our lead and find ways to financially support the Court until it has finished its mandate and justice has been served (US State Department, 2010).

The US is a key member of the Court’s Management Committee, a group that oversees the tribunal’s efficiency. A special advisor in the war crimes office, Mark Stamilio, explained that despite the financial backing it committed, the US ‘is merely

part' of the committee.⁹⁷ While he noted the committee can only make recommendations and is not a ruling body of the court, Stamilio did assert that 'the court is very well-aware of donor fatigue,' and 'if they do not stick to a timeline, they know the court will hurt financially.' He added that the US contributed to the tribunal 'without strings attached,' although there were concerns over how efficiently the money would be spent. In June 2007, the US requested the court to provide a completion strategy for all ongoing cases, including the Taylor case, to be carried out in 18-24 months (Frank, 2007).

Although the Canadian Embassy in The Hague chaired the Management Committee between 2008-2010, former SCSL official Gregory Townsend said that they were 'disengaged' with the process. He continued:

The legal staff at the US embassy in The Hague as well as War Crimes Ambassador Stephen Rapp, however, gave fantastic support. The US actively monitored all the courts based in The Hague and elsewhere on a frequent basis. They asked specific questions, like why decisions were taking so long, etc. The Dutch Ministry of Foreign Affairs also played a very strong supporting role, especially for the courts based in The Hague (Gregory Townsend, interview, 12 January 2012).

A leaked State Department cable revealed concerns about the Taylor trial. Allegedly, Special Court Judge Julia Sebutinde slowed proceedings while she waited for her turn at the court's rotating presidency so that she could personally give the verdict in the case. A high-ranking US official stated, 'The best we can do for Liberia is to see Taylor is put away for a long time and we cannot delay for the results of the present trial to consider next steps.' The cable adds:

⁹⁷ Article 7 of the Agreement for and Statute of the Special Court for Sierra Leone, 2002 states: 'It is the understanding of the Parties that interested States will establish a management committee to assist the Secretary-General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested States. The management committee shall consist of important contributors to the Special Court. The Government of Sierra Leone and the Secretary-General will also participate in the management committee.' The Management Committee consists of the four major donors (US, UK, the Netherlands and Canada), two regional donors (Sierra Leone and Liberia), and the Office of the Legal Adviser at the UN.

All legal options should be studied to ensure Taylor cannot return to destabilize Liberia. Building a case in the US against Taylor for financial crime such as wire fraud would probably be the best route. There may be other options, such as applying the new law criminalising the use of child soldiers or terrorism statutes (Hirsch, 2010).

However, this view may change in light of the court's release of the verdict on 26 April 2012, which found Taylor guilty of aiding and abetting, as well as planning war crimes and crimes against humanity committed by Sierra Leonean rebel groups during Sierra Leone's 11-year armed conflict.⁹⁸ Taylor was cleared of charges of ordering war crimes, and of joint conspiracy in them.

In conclusion, the Special Court's decision to indict Taylor on the first day of the peace talks frustrated State Department officials, but was supported by members of Congress. The Bush administration was heavily involved in brokering the agreement for Nigeria to provide asylum for Taylor. Concerns about stability and diplomacy kept the Bush administration from pursuing Taylor's transfer to the Court, but this position eventually shifted under continual pressure from a bipartisan group in Congress and concerns about Taylor's continued destabilizing influence in Liberia. Once the Bush administration focused on the issue (although other actors were also involved), Taylor's transfer to the Special Court occurred quickly. The State Department was then involved in moving Taylor's trial to The Hague and remained the largest contributor to the Special Court throughout Taylor's trial, despite concerns about the process.

⁹⁸ The Special Court found Taylor guilty of the war crimes of terrorizing civilians, murder, outrages on personal dignity, cruel treatment, looting, and recruiting and using child soldiers; and the crimes against humanity of murder, rape, sexual slavery, mutilating and beating, and enslavement (SCSL Judgement, 2012).

4.3 The Truth and Reconciliation Commission

During the peace talks, justice for human rights violations committed during the conflict was one, albeit minor, aspect of the negotiations. Establishing a war crimes tribunal in Liberia failed to garner sufficient Liberian or international support so the decision to establish a Truth and Reconciliation Commission (TRC) was made as a compromise. The US participated as a member of the International Contact Group on Liberia (ICGL), as opposed to acting bilaterally, in this process. Once established, the TRC did not elicit the same kind of high-level involvement that the Taylor issue received, however, embassy officials provided considerable technical support to the commission's operations. At the end of its mandate, the US pressured the commission to submit its final report, but then evaded providing additional support for the implementation of TRC recommendations. This section explores the role of the US on the justice issue in the peace talks, TRC operations and its final report.

Justice in the peace talks

The issue of accountability emerged early in the peace negotiations, shortly after the ceasefire agreement was signed. Truth commission and Liberia expert Priscilla Hayner said that it first arose as a proposal for a war crimes tribunal, pushed by civil society representatives. Representatives of the rebel factions were also initially demanding justice for the Taylor government, however, after the Nigerian mediator, General Abubakar, reminded them that they could also be accused of war crimes, 'they were much more careful about their call for justice.' Some present at the talks remember the factions proposing an amnesty, but this was not pushed hard (Hayner, 2007: 15). West African Affairs Director Michael Arietti said that justice was an

important issue in the negotiations, ‘but not the most important’ (Michael Arietti, interview, 9 May 2011).

Several key international delegates, including from the US, insisted that an amnesty for serious crimes was not allowed under international law (Ibid). Hayner found that this position was based on an oversimplified understanding of the amnesty issue, but she remained unclear about the ultimate role international voices played in the conversation about amnesty.⁹⁹ The final language in the accord left the subject for future consideration by the transitional government (CPA, 2003: Article 34).

The general agreement to leave an amnesty aside (as well as the proposal for a special tribunal) in exchange for a truth commission without prosecutorial powers was made early in the talks and was not returned to in detail later. According to Hayner, civil society groups present at the talks proposed the establishment of a truth and reconciliation commission.¹⁰⁰ However, an ICGL member said that international actors present were responsible for the inclusion of a TRC in the Agreement:

It was really, primarily put in by the international community. I don’t think any of the parties to the fighting really wanted [a TRC]. So it was almost forced onto them. But they accepted it and it was part of the peace agreement (ICGL member, interview, 28 November 2009).

After the success of the South African TRC, the same ICGL member said that truth commissions had become ‘quite fashionable around that time.’ She said that international actors believed that a TRC would help address the fundamental problems that led to the turmoil in Liberia. Furthermore, prosecutions were seen as untenable due to the presence of rebel groups at the talks in Accra and ‘tribunal fatigue’ on the part of the international community (as the ICTY and ICTR proved to be much slower and more expensive than expected). Arietti said: ‘We were not

⁹⁹ Hayner, 2007: 17. For a description of the current state of the law on amnesties and other aspects of accountability, see Orentlicher, 2004/2005.

¹⁰⁰ Representatives of civil society and political parties also put forward a proposal for a TRC in 2002 (Position Statement, 2002: 3).

pushing for a tribunal...a TRC was seen as an acceptable alternative' (Michael Arietti, interview, 9 May 2011).

According to Hayner, the truth commission proposal was accepted fairly quickly, with discussion taking less than a week in the plenary session (Hayner, 2007: 15). Article 13 of the CPA established the TRC in order 'to respond to the ardent desire of the people of Liberia for genuine lasting peace, national unity and reconciliation' (CPA, 2003: Preamble). The provision states:

1. A Truth and Reconciliation Commission shall be established to provide a forum that will address issues of impunity, as well as an opportunity for both the victims and perpetrators of human rights violations to share their experiences, in order to get a clear picture of the past to facilitate genuine healing and reconciliation;
2. In the spirit of national reconciliation, the Commission shall deal with the root causes of the crises in Liberia, including human rights violations;
3. This Commission shall, among other things, recommend measures to be taken for the rehabilitation of victims of human rights violations;
4. Membership of the Commission shall be drawn from a cross-section of Liberian society. The Parties request that the International Community provide the necessary financial and technical support for the operations of the Commission.

The role of the US on the justice issue in the peace talks was minimal, yet still important. Due to their support of the Special Court in Sierra Leone and their focus on Taylor, the US was not interested in supporting another tribunal in Liberia. However, some form of accountability in the peace agreement was still desired. US officials opposed the inclusion of an amnesty in the accord, but saw a truth commission as an acceptable compromise.

Technical support to the TRC

To execute the dictates of the CPA, the head of the transitional government, Charles Gyude Bryant, constituted a nine-member panel of TRC Commissioners in January

2004. Civil society groups opposed the process because they felt it lacked clear objectives, a mandate, jurisdiction and legal status outside the CPA. They held a conference of Liberian stakeholders in April 2004 to consolidate perspectives on the TRC process and draft a TRC Act to submit as a proposal to the Legislature (TRC, 2009: 175).

Prior to this conference, USAID's Office of Transition Initiatives (OTI) began working with the Transitional Justice Working Group (TJWG), a consortium of Liberian human rights groups that had been created to press the government to carry out the terms of the peace accord. One grant managed by Creative Associates (OTI's implementing partner) provided for a nationwide survey to collect citizen views on transitional justice.¹⁰¹

The civil society proposal for a TRC Act became law in June 2005. An international observer closely engaged with the process felt that the powers of the TRC Act 'far superseded' the ability to implement it and that it had become a way for civil society groups to 'get back' at the warlords who crafted the CPA with 'an obvious bias to accepting impunity' (International observer 1, interview, 30 November 2009). International actors had encouraged civil society groups to draft a more realistic Act, however, the same observer stated:

No law here in Liberia is more a product of the people of Liberia than that particular Act. No internationals tampered with the content and therefore it is very originally Liberian (Ibid).

The Act gave a two-year mandate to the Commissioners to investigate human rights violations from 1979 to 2003; provide a forum to address impunity and allow victims

¹⁰¹ Creative Associates, 2004. TJWG and Greenberg Quinlan Rosner (a research and strategic consulting firm) led focus groups and the survey to gauge Liberian attitudes about justice and reconciliation. The study found, amongst other things, that Liberians wanted faction leaders and commanders to be prosecuted for war crimes and human rights abuses, and supported the creation of a special court made up of Liberian and international jurists to prosecute the combatants and commanders accused of war crimes (Feierstein and Moreira, 2004: 2).

and perpetrators to share their experiences; investigate the antecedents of the crises; conduct a critical review of Liberia's historical past; and compile a report of its findings (TRC Act, 2005: Article 4).

The TRC was officially launched in June 2006, but did not begin operating until October. Limitations of infrastructure, human resources, funding and other basic structural and organisational demands compounded what was already a large task of investigations, statement-taking and public hearings. Criticism of the Commissioners did not help public perceptions of the TRC.

TRC Commissioners and staff pointed to delays in funding as a principal explanation for its difficulties. A US official said that the funding constraints in Liberia were real, but that part of the problem was that donors had to wait for the TRC to complete basic financial reporting so that funds could be released (US official 2, interview, 25 January 2010). A more critical perspective was voiced from a staff member of an international NGO who felt that the TRC's challenges were 'a question of focus, unity of purpose and an ambitious mandate' (International NGO staff member, interview, 9 December 2010). By the beginning of 2007, international actors felt they needed to step in or the TRC would fail.

As the 'moral guarantors of the CPA', ECOWAS, the UN, the African Union and the ICGL (Nigeria, Ghana, US and UK) began to more actively support the TRC.¹⁰² An ICGL member said:

After a year, it became evident that little progress was going to be made...There was no proper administration, no permanent staff, no budget, nothing. So the ICGL, which was meant to meet monthly, decided to establish a joint working group with the TRC (ICGL member, interview, 28 November 2009).

¹⁰² Article XXXIII of the CPA called on ECOWAS, the UN, the African Union and the ICGL (Nigeria, Ghana, US and UK) 'to ensure that the spirit and content of this Peace Agreement are implemented in good faith and with integrity by the Parties.'

The TRC/ICGL working group was created in February 2007 and met intensely for several months. During this time, committees were set up to discuss the TRC’s work plan and budget, interpreting their mandate, organizational structure, and planning for statement taking and public hearings. Eventually, a new budget was adopted, renewed outreach took place, new statement-takers were hired, and international donors eventually began to contribute funds.

The ICGL intervention was a turning point, and the work of the TRC essentially began again. According to a member of the ICGL, the working relationship between the TRC and the ICGL was positive in part because they ‘scrupulously did not get involved in the content. This was *their* process’ (ICGL member, interview, 28 November 2009). A US official said, however, that there was ‘a lot of handholding from the international community’ (US official 2, interview, 25 January 2010). A senior member of the TRC staff said that although ‘donors were overbearing,’ he acknowledged that the working group helped to source funding and that ICGL technical assistance was effective (Senior TRC staff member, interview, 3 December 2009). Despite significant international involvement, however, the Liberian government provided nearly 60% of the commission’s resources. Contributing just 8% made Sweden the largest individual country donor, closely followed by the US with 6%. These figures are illustrated in the table below (TRC, 2009: 40).

Figure 10: International assistance to the TRC

| Donor | Amount (in USD) | Percentage |
|---------|--------------------|------------|
| Liberia | 4,427,466 | 59 |
| UNDP | 796,544 | 11 |
| Sweden | 576,213 | 8 |
| US | 439,148 | 6 |
| Others | 1,209,702 | 16 |
| Total | 7,560,635 | 100 |

By 2008, the TRC collected more than 17,000 statements and conducted public hearings throughout the fifteen counties of Liberia, as well as from Liberians living in the US, UK and Ghana. The US was not a major donor of the TRC, but the State Department contributed a small amount of funding to the US-based social venture organization, Benetech, which assisted the TRC in coding the majority of statements.¹⁰³ The Minnesota-based NGO, Advocates for Human Rights (AHR), along with Northwestern University's Center for Human Rights Law, coordinated the work of the TRC in the diaspora. AHR published a report based on an analysis of more than 1600 statements, fact-finding interviews, and witness testimony at public hearings held in the US (AHR, 2009). Other US-based NGOs, such as the Carter Center, supported certain aspects of the TRC, such as statement-taking with religious leaders, thematic hearings on the role of the media, and diaspora work, including statement-taking in Atlanta (Sean MacLeay, interview, 8 December 2009). The US embassy followed the TRC process closely throughout its operations, and there was at least one official whose main function was to report on the Commission.

The final report

The TRC was required to compile a report that included a comprehensive account of the activities of the Commission and its findings. The report examined the root causes and social effects of armed conflict in Liberia, and presented findings regarding violations of international human rights and humanitarian law and egregious domestic law violations. It laid out recommendations for public sanctions, including lists of alleged perpetrators of human rights violations and economic crimes whom the TRC recommended for prosecution or further investigation, and for

¹⁰³ In FY2006, USAID provided \$.5 million in support to the TRC (Cook, 2010: 57).

non-judicial public sanctions, such as a prohibition on holding public office for a period of thirty years (TRC, 2009). The latter included a list of 49 persons named for their role in ‘supporting, financially and otherwise, various warring factions.’ Other recommendations in the report related to diverse issues, including public integrity, corruption, human rights, economic empowerment, good governance, national identity, reparation, amongst others ‘intended to resolve past conflicts as part of a national progression towards lasting peace and reconciliation’ (TRC press release, 2009). Certain issues caused considerable debate among US, Liberian and other international actors following the process, particularly the way in which the report was released, the recommendation to sanction President Sirleaf and the ICGL statement about the report.

The final report was written and released in several stages. A preliminary report was submitted to the National Legislature in December 2008 (Volume I); an unedited version of Volume II was released in July 2009; and the edited version was released in December 2009. Since TRC operations extended into 2009, all versions of the report were written in a short time period.

The TRC mandate was supposed to expire in September 2008, but the TRC Act allowed for four, three-month extensions. Instead, however, the Legislature gave the TRC one, nine-month extension ending in July 2009. The US was concerned that anything submitted after the first three months might face legal challenges, so they pressured the TRC to submit a report by December 2008 (US official 1, interview, 10 December 2009). A staff member of the ICTJ said:

I didn’t really ever get a sense of what those legal challenges were, especially when the report only offered recommendations and a prosecutor could pursue prosecutions with or without a set of TRC recommendations. From a technical, though admittedly not political, standpoint, there was little chance that a report that came out at that time

was going to be of any value to the process (ICTJ staff member, interview, 2 December 2009).

Consensus among Commissioners to release Volume I of the report was not reached, yet the Chairman decided to do so anyway in December as suggested by the ICGL. One Commissioner said that this decision further divided the Commissioners (TRC Commissioner, interview, 10 December 2009). A US official said that the ICGL ultimately wanted to ensure that the TRC submitted a report and was unsure if delaying its release would have made a difference in the report's contents (US official 1, interview, 10 December 2009).

The TRC decision to recommend certain individuals for prosecution and public sanctions was surprising for many Liberians and international actors alike, and stimulated significant debate. The decision to include President Sirleaf's name on the list to be banned from public office for thirty years, however, was seen as 'the single greatest thing [to] influence how the report [was] handled' (ICTJ staff member, interview, 2 December 2009). The basis for the recommendation was not explained in detail in the report, but appears to have been rooted in the President's support for Taylor at the start of his effort to oust Doe.¹⁰⁴

A US official said that the recommendation came 'out of the blue' and felt that the TRC did not have the mandate to tell people they could not run for public office (US official 1, interview, 10 December 2009). Another US official said: 'It was unfortunate that Sirleaf was named in such a public way because it took away

¹⁰⁴ In early 2009, President Sirleaf testified to the TRC that she had not been party to any armed group during Liberia's civil wars. She said that while she was an early supporter of Taylor and provided funds to him in light of his role in opposing Doe, she later became disillusioned with Taylor and the National Patriotic Front of Liberia and had never joined it as a member. President Sirleaf attributed her initial support for the NPFL to being 'fooled by' Taylor, which she implied was a lapse in judgment for which she had 'to apologize to this nation' (TRC, 2009; Fofana, 2009). The TRC Chairman felt that naming the President in the report proved that the Commission had not been politically compromised. 'We didn't see Ellen as President and discuss what extra privileges should be accorded [to her]. The same way we invited everyone to appear, we invited the President' (TRC Chairman, interview, 9 December 2009).

from the real issues. The report named names, but didn't achieve reconciliation.' Nevertheless, 'the US didn't feel overly close to the process,' the official added, 'the US just doesn't want the report to be a destabilizing factor. There was so much progress since 2003. We don't want to move backwards' (US official, interview, 16 March 2010).

Some interviewees felt that the recommendation to sanction the President made it more difficult for the US and others to support the report and its recommendations:

Everybody that's in a position to support the recommendations is supporting this country because of her [Sirleaf's] Administration...If they [the US] come out in support of the report, it will be understood as coming out against her, something they just cannot do. On the other hand, if they condemn the report, then they are seen as coming out against impunity, something they also cannot do...they just can't touch it' (ICTJ staff member, interview, 2 December 2009).

Similarly, former Liberia Country Director of the American Bar Association Rule of Law Initiative Anthony Valcke said:

The TRC shot itself in the foot by mentioning Ellen. They equated alleged perpetrators with the President. The TRC Chairman felt they had to do it – and I agree – yet the TRC should have made a clearer distinction between personal and financial involvement. They could have done it more subtly (Anthony Valcke, interview, 7 December 2009).

President Sirleaf appeared to reject the recommendation when she questioned its constitutionality based on the TRC's failure to take into account the due process rights of those to whom the recommendation pertained. In addition, during her annual message to the Legislature in January 2010, she announced that she would seek re-election to a second term in 2011, as many observers had expected. In the same message, she proposed amendments to the Independent National Human Rights Commission Act of 2005 to enable it to work in collaboration with the Ministry of Justice in order to determine which of the recommendations that had been the

‘subject of great debate since the TRC Report was made public’ were ‘implementable or enforceable.’ She specifically mentioned the recommendations for a criminal tribunal, criminal and public sanctions and investigations into economic crimes (President Sirleaf, 2010).

Some interviewees felt that other recommendations fundamental to building a sustainable peace were being ignored because of the controversial ones. For example, one ICGL member talked about the importance in changing the Constitution and developing a ‘national vision’ (ICGL member, interview, 28 November 2009). A US official mentioned his support of the reparations fund for victims, alternative justice processes and the idea that perpetrators could ‘pay their way off the prosecutions list’ by giving money to the general budget (US official 1, interview, 10 December 2009).

The TRC Act states that ‘civil society organizations and moral guarantors of the CPA [i.e., the ICGL] shall have the responsibility to monitor, and campaign for the scrupulous implementation of all recommendations contained in the report’ (TRC Act, 2005: Article X). A member of the Transitional Justice Working Group (TJWG) said: ‘If the US speaks on the report, this will send a strong signal. They are the moral guarantors, along with other ICGL members’ (TJWG member, interview, 7 December 2009).

After the release of the unedited version of the final report in June 2009, the US embassy took the lead in drafting an ICGL statement that commended the work of the TRC and said, ‘It is now up to the Liberian people to decide how to implement the recommendations of the TRC, in accordance with Liberian law’ (ICGL, 2009; US official 1, interview, 10 December 2009). Civil society groups, including TJWG members and the Women NGO Secretariat of Liberia felt that international actors

should have taken a stronger position on the TRC report since they had been actively involved in the process since the CPA was signed in 2003.

ICGL members responded to the criticism in different ways. Some felt it was not their place to make a pronouncement on the report and that it was a sovereignty issue (i.e., US official 1, interview, 10 December 2009; International rule of law advisor, interview, 8 December 2009). Others acknowledged civil society concerns. One ICGL member said: ‘if we [the international community] don’t believe in the rule of law, then who is going to believe in it?’ (ICGL member, interview, 28 November 2009). Another international observer said that the ICGL would have to analyze all of the TRC recommendations in order to know how to proceed. He doubted, however, that there would be consensus among all the international donors on the recommendations (International observer 2, interview, 28 November 2009).

Shortly after the ICGL statement was released, Secretary of State Hillary Clinton made an official visit to Liberia where she reiterated US support and deference to the Liberian government:

I am very supportive of actions that will lead to the peace, reconciliation, and unity of Liberia. And I believe that President Sirleaf has been a very effective leader on behalf of...Liberia, and the US officially supports what this government is doing (US State Department, 2009).

Several members of Liberian civil society groups expressed disappointment about Clinton’s visit and felt that it was contradictory to the high levels of US involvement throughout the process. A community leader from Buchanan said: ‘Hillary Clinton should have said that the recommendations should be implemented’ (Civil society leader 1, focus group, 4 December 2009). A youth leader from Kakata spoke about his frustration with the role of the international community in Liberia:

I feel terrible about the role of the international community...[They] invested a lot of money into it...UNMIL, Europe and the US guid[ed] and monitor[ed] the whole process. No Liberian is neutral when it comes

to a Liberian process...[The international community] should implement it no matter how it goes. But UNMIL said, 'we will go by what the Liberians say.' And Secretary of State Clinton said, 'America will go by what the Liberian people say.' But who are the Liberian people? The majority of Liberian people do not have a voice. Our voices are not being heard (Youth leader 1, focus group, 26 November 2009).

Similarly, another youth leader said that the international community did not want to do anything to undermine the government after investing so heavily in it (Youth leader 2, focus group, 26 November 2009). There was also comparison between Liberia and Sierra Leone. Some felt that the international community should invest the same way in Liberia as it did in Sierra Leone with the Special Court, and not leave it 'up to Liberians' (i.e., Ibid). Several also raised the historic relationship between the US and Liberia as justification for greater involvement. One civil society leader said: 'The US must be a peacemaker for Liberia. Liberia is their brainchild' (i.e., Civil society leader 2, focus group, 4 December 2009).

Although some ICGL members felt that it was not their place to take a stronger stance on the report and its recommendations, others acknowledged a conflict between politics and human rights within Liberia and internationally:

You have two groups: those that are more political and see prosecution as having a negative impact on political and security dimensions; and those that are more supportive of the human rights principles and strongly believe that justice is part of reconciliation...What has made the decision more difficult, even on a personal level, is probably because you have the President on the list of those who should be sanctioned and banned from public office. Formally or informally, you cannot avoid taking into consideration these kinds of aspects. Which gives more reason why the international group is trying to be more neutral. That is why the position is up to Liberia...you have to look at the TRC process within the Liberian context of 2009 and looking to the future. That's why it's a bit difficult to know what to do (International observer 2, interview, 28 November 2009).

There was also an acknowledgement of resource constraints and the need to prioritize. 'It's all about choices,' a US official said, 'funds contributed to the Special Court for Sierra Leone 'could have gone to development' (US official 1, interview,

10 December 2009). Another international observer added that with limited resources and immense economic, social, political and justice challenges, ‘They are expecting too much from the donors’ (International observer 2, interview, 28 November 2009). ABA country director Anthony Valcke did not think there would be any US funding for the implementation of recommendations because ‘the US wants to put forth the idea that Liberia is on the road to recovery’ (Anthony Valcke, interview, 7 December 2009). The Liberian Government has done little to address the recommendations thus far. However, President Sirleaf did say the government would support one of the recommendations to set up ‘palava huts’ for less serious crimes, a traditional reconciliation measure where individuals can admit their wrongful acts and seek pardon from the people of Liberia (President Sirleaf, 2011).

This section explored the role of the US in the discussion about transitional justice in the peace talks, the establishment and operations of the TRC and the final report. During the talks, US delegates and others opposed an amnesty and a war crimes tribunal, but supported a TRC. USAID supported civil society groups in their effort to pass a TRC Act. Once the TRC was established, US embassy officials, alongside other ICGL members, provided technical support to the Commissioners on a wide range of operational issues, including their budget and work plan. As the two-year mandate came to an end, the US pressured the Commissioners to submit their final report by a certain date. Once all versions of the report were released, the US embassy took the lead in drafting the ICGL statement that said it was ‘up to the Liberian people’ to implement TRC recommendations. Secretary of State Clinton echoed this sentiment during her visit to Monrovia in 2009. These actions implied that the US would not assist with TRC follow-up or implementation of

recommendations, which has remained true for several years after the submission of the TRC report.

4.4 Explaining US Involvement

This chapter focused on US involvement in two transitional justice measures related to Liberia, namely the Taylor trial and the TRC. In the 2000s, US policymakers prioritized Liberia, heavily influencing events in the country, including the peace talks, UNMIL, Taylor's asylum and then arrest and transfer to the Special Court, as well as a broad range of reconstruction efforts, including a TRC. This section provides an overview of findings and offers some explanation and assessment of the US role.

The indictment and eventual trial of Charles Taylor garnered high-level interest in the US. This interest can be explained by concerns about stability and the symbolic nature of supporting the prosecution of the first African president to face trial for war crimes. The Bush administration's focus on Africa meant that Liberian regime change and reconstruction grew in importance. High-level interest in the Bush administration, including Secretary Rice, Assistant Secretary Frazer and the President himself, worked to broker Nigeria's offer of asylum to Taylor, which Taylor accepted based on the stipulation that he would not be extradited.

This decision was met with opposition by members of Congress who strongly supported Taylor's transfer to the Special Court for Sierra Leone. There was bipartisan support coming from members of the Congressional Black Caucus and House and Senate Africa Subcommittees. For three years, members of Congress pressured the Bush administration and the Nigerian government to transfer Taylor to the Court. They made statements in congressional hearings, issued resolutions, wrote letters to the State Department and conditioned assistance to Nigeria on surrendering

Taylor. Although not discussed, congressional advocacy was in part driven by sizable Liberian-American constituencies, evangelical Christians and the historical connection between the two countries.

Taylor's continued links with his networks in Liberia encouraged eventual support within the Bush administration for Taylor's transfer. Stability concerns also motivated US support of the move of Taylor's trial to The Hague, which overrode concerns about 'local' justice or opposition to the ICC.

Supporting Taylor's prosecution 'appealed to the moral instincts' of US policymakers and was aided by the perception that there were 'no good guys' in Liberia (Tom Malinowski, interview, 15 March 2010). President Sirleaf was an attractive heroine for high-level officials who prioritized African policy (Ibid). The trial of Taylor offered a symbolic opportunity for the US to support the historic prosecution of the first African head of state, despite, or perhaps because of, Liberia's deep ties to the US. The US likes an opportunity to 'be the hero' and 'bring down a villain'. The opportunity to support Taylor's prosecution struck an emotional chord among US officials, which was illustrated by their singular focus on Taylor for several years.

Although transitional justice was not a focus of the Accra peace talks, the issue was raised by civil society and international actors. State Department officials present at the talks opposed amnesty for war crimes, but did not push for prosecution. The reason given for this decision was that rebel factions at the talks would not sign an agreement calling for their prosecution. However, it was also clear that the US was unwilling to support another tribunal, especially considering its significant support of the Special Court and the Taylor trial. However, there was a sense that

some form of accountability should be included in the peace agreement, and for this reason, the truth commission proposal was viewed as an acceptable alternative.

The Liberian transitional government attempted to establish a truth commission, as required by the peace agreement, yet calls from civil society for a more transparent and inclusive process were effective. These groups (many of which formed the Transitional Justice Working Group - TJWG) drafted a TRC Act, which became law. TJWG efforts were supported by USAID's Office of Transition Initiatives (OTI). Considering OTI's mission to provide 'fast, flexible, short-term assistance targeted at key political transition and stabilization needs', it is apparent that this office felt that support of this transitional justice measure was a key need in Liberia.

Once the TRC was established, US embassy officials became the principal US government actors following the process. US officials worked with other ICGL members (instead of bilaterally) in the TRC/ICGL working group, which assisted the TRC on detailed aspects of its operations. The US contributed nowhere near what the Special Court or other aspects of Liberian reconstruction received, yet USAID and the State Department did provide small amounts of funding to NGOs that were supporting the Commission. Toward the end of the TRC's mandate, US embassy officials pressured the Commission to submit its final report, even though some felt that this pressure resulted in a substandard output.

After the TRC submitted its final report and recommendations, the US embassy took the lead in drafting the ICGL statement, which said that TRC follow-up was 'up to the Liberian people.' Although argued otherwise, it appears that the recommendation to sanction President Sirleaf was a factor in the ICGL response.

Because the US had firmly supported her election and presidency, US officials were unwilling to take a stronger stance on the report.

From the peace talks onward, it was clear that strong support for a transitional justice process inside Liberia would not be a priority. The US took a middle ground approach, supporting a TRC as a compromise between complete impunity and war crimes trials. Since the TRC did not garner particular interest among US officials, the embassy worked collaboratively as a member of the ICGL throughout TRC operations and after its completion. It is not likely that the US will assist in the implementation of TRC recommendations.

The Liberian case study offers a second illustration of US involvement in transitional justice. The indictment and trial of Taylor elicited strong financial and political support within Congress, the State Department and the Bush administration that saw it as a way to achieve stability and as a symbolic measure. The TRC received much less attention or financial support, with embassy officials involved in the measure mainly because of the attention it received inside Liberia, not because of individual interest. That being said, the US did provide considerable technical support to the TRC. This case study shows greater US interest in trials over truth commissions, especially if the trials target someone of symbolic importance that also coincides with geopolitical interests (i.e., regime change).

US aims were achieved with regard to transitional justice in Liberia. The US can claim that its involvement in supporting Taylor's trial has been key for increased stability in Liberia and the region, and has had significant symbolic value. Although the TRC recommendation to sanction President Sirleaf was controversial, by leaving the report 'up to the Liberians', the US was able to sidestep the issue and continue its support for the Sirleaf administration.

Within Liberia, the situation is not as clear. Taylor supporters remain in the country, and some have positions in government. President Sirleaf has to carry out a delicate balancing act to maintain peace. She challenged the constitutionality of the TRC recommendation to sanction her and others mentioned in the report, but has done little else to advance the implementation of other recommendations. Although much of the Liberian population is relieved that violence has decreased in part because of Taylor's removal from power and prosecution, and are generally positive about the TRC, competing views about transitional justice remain. Some still want war crimes trials inside Liberia; some want all TRC recommendations implemented immediately; and some want to 'let bygones be bygones' (Bird, 2010a). Many are concerned about their standard of living.

US involvement has both helped and hindered the development of transitional justice aims in Liberia. A former senior official at the Special Court for Sierra Leone said: 'An African head of state being tried in Europe is highly offensive on a symbolic level' (Cruvellier, 2006). Nevertheless, the absence of immunity for heads of state is an important precedent in international criminal law. Some argue that the US has some responsibility for violations in Liberia, and US involvement in transitional justice ensured that this responsibility goes unaddressed. Whether or not there is a basis for these claims, the US does not bear the greatest responsibility for violations committed by Taylor.¹⁰⁵ Taylor's responsibility is clear and warranted a trial. Discussion needs to continue about issues raised by the truth commission, however, at the very least, the commission initiated debate about the history of violence in Liberia.

¹⁰⁵ For more on third state responsibility for serious human rights violations, see Bird, 2010b.

The next chapter undertakes the third and final case study in this research, that of US involvement in the Justice and Peace Process in Colombia. This chapter will provide another opportunity to explore the forces that shape US foreign policy on transitional justice.

Chapter 5 US Involvement in the Colombian Justice and Peace Process

The last chapter examined the forces that shaped US foreign policy on the second case study of this project, that of the trial of Liberian President Charles Taylor and the Truth and Reconciliation Commission. This chapter undertakes the third and final case study of this project, which considers US involvement in the Justice and Peace Process (JPP) in Colombia.

Colombia continues to experience the longest-running armed conflict in the world today. There has been a great deal of fluctuation both in the intensity of the fighting, and the range and organisation of the actors involved over nearly half a century of hostilities. Huge numbers of Colombians, both civilians and fighters, have been killed since the violence began in 1963. One exhaustive study claims that nearly four million people were the direct victims of armed violence from 1964 to 2004. If one also includes those injured and direct family members of victims, the proportion of the population affected would be 40 to 50 percent (INDEPAZ, 2007). The conflict has internally displaced approximately three million persons in Colombia, and has resulted in over 80,000 refugees in Ecuador (UNHCR, 2009).

When Colombian President Alvaro Uribe entered into office, he made talks with the paramilitary umbrella group, the United Self-Defense Forces of Colombia (AUC), the foundation of his government's peace policy. The Colombian government and the AUC signed a peace accord that required paramilitary demobilization. It also opened debate about accountability for the violations committed by those who demobilized. After two years of negotiations in the Colombian Congress, the Justice and Peace Law (Law 975/05) was adopted in 2005, the first transitional justice law in Colombia's history. The law required the

establishment of a 'Justice and Peace Unit' (JPU), which would be responsible for taking the testimony of ex-combatants that perpetrated illicit acts. If a full 'confession' was made, those who participated in the justice and peace process would be offered reduced sentences of five to eight years. The law also called for the establishment of the National Commission for Reparation and Reconciliation (CNRR), which would be responsible for ensuring victim participation and reparation.

More than two years into the process, President Uribe extradited 14 AUC leaders to the US. This decision was very controversial as many felt it negatively impacted the justice and peace process by making access to the leaders much more difficult and taking away their incentive to participate in the process.

This case study focuses on the Justice and Peace Law and the institutions it created because they instigated much of the discussion and activism on transitional justice. It also represents some of the diversity of transitional justice measures since it concerns an alternative judicial unit and a commission on reparations and reconciliation, based in Latin America, while conflict continues. Although some believe transitional justice cannot take place in a country where no transition has occurred (Uprimny, 2007; Laplante and Theidon, 2006; ICTJ, 2011), this study views the JPP as a transitional justice measure since the Colombian government and civil society actors have adopted transitional justice terminology to describe the process.

The US has played an important, though under-examined, role in the Colombian justice and peace process. This chapter first looks at the US role in the negotiations of the Justice and Peace Law and then explores US assistance to the process, focusing on the Justice Department's support of the Justice and Peace Unit

and USAID's support of the CNRR. It then examines the extradition of paramilitary leaders to the US. It concludes with some ideas about the reasons for US involvement, as well as its impact on the process. The chapter draws on archival research undertaken in Washington, DC and Colombia, and 58 Colombia-specific interviews with officials from the US and Colombian governments, international organizations, as well as Colombian and international NGOs (See Appendix 2 for interview list). Before turning to the justice and peace process, a review of US foreign policy in Colombia provides useful background information.

5.1 US Foreign Policy in Colombia

The Colombian conflict has its roots in the assassination of the Liberal Party's presidential candidate Jorge Eliécer Gaitán in 1948, which sparked riots in Bogotá. The riots gave rise to *'La Violencia'*, a ten-year period of civil conflict in the countryside between supporters of the Liberal and Conservative parties, which resulted in between 200,000 to 300,000 deaths. *La Violencia* ended in 1957 with an agreement between the Liberals and the Conservatives to take turns to govern the country. Nevertheless, the conflict continued in rural areas, where peasant armies joined with leftist guerrillas to gain or retain possession of land. The 1960s saw the emergence of several non-state armed groups in remote areas of the country, in particular the National Liberation Army (ELN) and the Revolutionary Armed Forces of Colombia (FARC).¹⁰⁶

¹⁰⁶ FARC remains the largest and oldest insurgent group in the Americas. It claims to be a revolutionary, agrarian, anti-imperialist Marxist-Leninist organization of Bolivarian inspiration that represents the rural poor in a struggle against Colombia's wealthier classes. ELN was formed in 1963 by 'Catholic radicals and left-wing intellectuals', and ideologically was influenced by the Cuban Revolution (Hansom, 2009; Forero, 2005a).

This period witnessed close cooperation between the US and Colombia to develop the latter's internal security apparatus, ultimately yielding the most successful counterinsurgency operations of that time in the Western Hemisphere (Rempe, 2002: 4). The origin of modern US internal security policy in Colombia can be traced back to a CIA Special Team survey of 1959. The first tangible effort to assist Colombian military forces in their struggle against internal violence was a 'special impact shipment' of approximately \$1.5 million worth of military hardware in late 1961 to enable *orden público* (public order) missions. These efforts led to a vastly expanded internal security effort under Military Assistance Program support. Concerning the nature of the violence problem, a clear distinction emerged between criminally motivated violence and the more complex phenomena of violence posed by insurgent groups (Ibid: 31).

By the 1980s, FARC carried out an increasing number of kidnappings with the aim of exerting political pressure on the Colombian government, and began working with drug barons on drug production in order to finance its political and military operations. By the end of the decade, FARC was involved in most phases of coca production and trafficking.

Paramilitary groups initially emerged during this period to provide private security for important economic and political sectors in Colombia, who used them to protect their interests from non-state armed groups.¹⁰⁷ Despite the rise in these groups, FARC reached the peak of its military powers in the late 1990s. During this time, FARC and ELN expanded operations to such an extent that they influenced or controlled local government in over half the country's 1,000 municipalities (CRS,

¹⁰⁷ Carrillo-Suarez, 1999: 7. The emergence of paramilitaries was part of the State's counterinsurgency strategy, but the involvement of paramilitaries themselves in drug trafficking progressively located them outside the orbit of State control (Escobar, 2011).

2001: 1). In response, then-Governor Uribe in Antioquia promoted the establishment of civilian rural defense groups in 1994 called ‘*Convivir*’. Over 400 *Convivir* groups were created, until the Constitutional Court declared them unlawful in 1997. By that time, the *Convivir* groups had been accused of committing human rights abuses; some were also believed to have served as fronts for, or were otherwise linked to, paramilitary groups (CRS, 2002b: 3; US State Department, 1997: 462).

In addition to *Convivir* and other ‘self-defence’ groups, a number of paramilitary groups began forming. The *Autodefensas Campesinas de Córdoba y Urabá* (ACCU) was formed in 1994 in order to defeat non-state armed groups, recruiting new members and expanding its control of territory throughout the 1990s (ICG, 2007: 3). These various, scattered paramilitary groups consolidated in 1997 with the creation of an umbrella body – the *Autodefensas Unidas de Colombia* (AUC). The AUC’s foundational document stated that the group was ‘a politico-military movement. Based upon the right of legitimate defence the AUC had an anti-subversive character and claimed for transformations within the State but did not seek to threaten its integrity’ (Escobar, 2011). The AUC comprised nearly 4,000 fighters organised into military and vigilante units, death squads, logistic and intelligence units (ICG, 2007: 3). From 1998 to 2001, the AUC’s strategy mainly comprised of a terror campaign against the alleged ‘social bases’ of FARC and ELN, in collusion with the public forces. The focus was thus on civilians, and not on attempting to defeat non-state armed groups.¹⁰⁸ By 2002, it was estimated there were

¹⁰⁸ It has been argued that the AUC facilitated the paramilitaries’ transition from private drug-barons’ armies to political actors, and represented finding a ‘public objective’ to cover their ‘private goal’ of increasing territorial expansion (Cubides, 1995/1998/2005a/2005b). The AUC had access to a variety of financial resources, mainly through the cocaine and heroin markets, assisted by complex regional and/or local alliances with elites and organized crime. So, although the AUC allied itself with the Colombian government against other non-state armed groups, it was simultaneously at loggerheads with the State in the fight against drugs (Gutiérrez and Barón, 2006: 272).

approximately 12,000 fighters in the AUC,¹⁰⁹ which was operating in the majority of Colombia's provinces (Presidencia de la República, 2006: 8). The AUC had become increasingly involved in drug trafficking, eventually deriving 70% of its income from this activity (ICG, 2007: 3).

Colombia's cocaine production became a major source of heroin in the US. The Clinton administration declared drug trafficking a threat to national security and Colombia became the number one recipient of US military aid in the Americas (CRS, 2002a). Despite a sharp rise in military aid under his watch, Republicans called Clinton soft on 'narco-terrorists', and favoured spraying as the best way to fight coca cultivation (Jones, 2009: 354). Plan Colombia was announced in September 1999 and was initially meant to last three years. The plan increased US aid to Colombia from \$50 million to \$1 billion. 80% of the aid went to Colombia's armed forces, and most of that support for aerial spraying. Colombian military personnel received (and continues to receive) training in the US, or from US instructors in Colombia (US State Department, 2011). In the early 2000s, the US had 1,400 military personnel and contractors operating in Colombia (this limit set by Congress) (CorpWatch, 2011). However, the US was not authorised to use military force in Colombia, and all its activities required authorisation by the Colombian government.

When President Bush entered office in 2001, and even before 9/11, US policy was shifting from counternarcotics to counterinsurgency. Undersecretary of State for Political Affairs Marc Grossman said that Bush supported Plan Colombia 'without restrictions' (El Tiempo, 2001). He said, 'President Pastrana's government is engaged in a struggle that matters to everyone in this hemisphere' (Selsky, 2001). More directly, a senior Pentagon official said, 'We no longer view the FARC and

¹⁰⁹ ICG, 2007: 4.

ELN guerrillas as an internal threat to the security of Colombia, but as a threat to the security of the US' (Jones, 2009: 357). Another official agreed, 'it's time to drop the fiction of antinarcotics aid only. Americans are targets in Colombia' (Ibid). Under the new policy, said another, 'we are talking about more direct military-to-military support' (Ibid).

The 9/11 attacks helped justify this shift in security thinking and counterterrorism became the new US policy in Colombia. Shortly after 9/11, State Department counterterrorism coordinator Francis Taylor told Congress:

One can argue that modern terrorism originated in our Hemisphere. We date its advent from 1968...when revolutionary movements began forming throughout the Americas. In those early years, Latin America saw more international terrorist attacks than any other region. Today, the most dangerous international terrorist group in this hemisphere is the Revolutionary Armed Forces of Colombia (US House of Representatives, 2001).

US Marine commander James Jones explained: 'Counterterrorism was a more palatable mantle than counternarcotics for waging counterinsurgency, which many in Washington feared after Vietnam. And it was easy to make the case for drugs as a terrorist threat' (Jones, 2009: 358). With his peace process failing, Pastrana asked Bush in November 2001 to include Colombia in the global war on terrorism and allow use of US antidrug helicopters for counterinsurgency operations (Forero, 2001).

President Uribe's election in 2002 brought US and Colombian foreign policies closer together (Pardo, 2009: 38). Uribe came to be considered by the Bush administration as 'an unswerving caretaker for Washington's drug war in Latin America' (Forero, 2006). Uribe called his policy 'democratic security' and doubled defense spending and the size of the armed forces. He was a strong proponent of Plan Colombia and moved the country to the front lines of the global war on terror.¹¹⁰

¹¹⁰ Forero, 2002. Colombia was one of the few Latin American countries to support the war in Iraq.

That year, a Republican Congress approved what is referred to as expanded authority, permitting counter-drug funding to be used in the counter-terror fight. US Ambassador William Wood referred to this shift as a ‘real breakthrough’ in US policy in Colombia:

This has allowed our twin-goals - counter-drug, counter-terror - to match up with the Colombian government's twin goals - counter-drug, counter-terror - and has permitted a level of coordination and cooperation that we never had before (Wood, 2005).

In addition to counternarcotics and counterterrorism policies, Ambassador Wood mentioned a third goal for US policy in Colombia: ‘to assist Colombia to be the sort of firm ground for democracy, decency, development, and stability in an increasingly troubled region’ (Ibid). The US looked to Colombia to serve as a counterweight to Venezuela and to provide a favourable trade environment, especially for oil (Forero, 2006).

The focus, however, was clearly on drugs and terrorism, as evidenced by US foreign assistance to Colombia. Between fiscal year 2000-2008, the US provided over \$6 billion to support Plan Colombia, making Colombia a top foreign aid recipient with the largest US embassy in the world (2000 employees, 450 of which are military; and 32 US agencies) (Bouvier, 2005; Wood, 2005). Nearly \$5 billion went to the Defense and State Departments to reduce illicit narcotics and improve security.¹¹¹ Just over \$1 billion went to USAID and the State Department ‘to promote

¹¹¹ Under the direction of the White House Office of National Drug Control Policy (ONDCP), the Departments of State and Defense oversaw nearly \$4.9 billion to the Colombian military and National Police for Plan Colombia’s counternarcotics and improved security objectives (US GAO, 2008: 1). State provided most of this assistance, focusing on five major aviation programs for the Colombian Army, Air Force, and National Police. Most State assistance for Colombia is overseen by its Bureau for International Narcotics and Law Enforcement Affairs (State/INL), though the Bureau for Political and Military Affairs is responsible for FMF and IMET funds. State/INL’s Narcotics Affairs Section (NAS) in the US Embassy Bogotá oversees daily program operations. State’s Office of Aviation supports the NAS with advisors and contract personnel who are involved with the implementation of US assistance provided to the Colombian Army’s Plan Colombia Helicopter Program (PCHP) and the National Police’s Aerial Eradication Program. The Military Group in the US Embassy Bogotá manages both Defense counternarcotics support and State FMF and IMET funding (Ibid: 15).

social and economic justice'. The largest share of this nonmilitary assistance went toward alternative development, which was considered a key element of counternarcotics assistance (US GAO, 2008: 48). Other social programs included assistance for Colombia's demobilization, reparations and reconciliation agenda (examined in the following section), and funding contributed to the Department of Justice for judicial reform.¹¹²

High levels of military spending eventually drew widespread criticism, including from within the US government. A controversial report from the US Government Accountability Office (GAO) concluded that Plan Colombia's drug-reduction goals were not met, in part, because of a heavy reliance on aerial spraying (US GAO, 2008: 71). In response, a Democrat Congress reduced appropriations in 2008 for Colombian military and police programs and increased appropriations for nonmilitary programs.¹¹³ In describing the 2008 budget request, a House Report stated:

The Committee continues to have grave concerns with the current aid package that emphasizes hard-side assistance over development assistance...The Committee's funding plan emphasizes a more balanced strategy shifting aid from the military and strengthening civilian governance, humanitarian assistance, and rural development (US House Report 110-197, 2008).

Congress realigned the funding from a mix of 76% military/police aid – 24% aid for alternative development closer to a 55% (military/police aid) – 45% (alternative development) split. They also increased aid to strengthen the justice sector, providing more prosecutors and training for the Fiscalía (Attorney General's Office). Congress also initiated a plan to transition more of the military operations from US responsibility to the Colombian government, leading toward an eventual

¹¹² For the exact figures given to these agencies between 2000-2008, see Appendix 6 and US GAO, 2008.

¹¹³ US GAO, 2008: 3. This funding shift can be seen in the US State Department, ND. Exact figures are included in Appendix 6.

'nationalization' or 'Colombianization' of the military package. They requested a greater emphasis on interdiction, rather than the eradication, of drugs (Ibid).

The shift in funding from military to nonmilitary spending was accompanied by a slight increase in attention to human rights. In 2009, Congress started requiring the State Department to determine and certify that the Colombian government and Armed Forces were meeting statutory criteria related to human rights in order to receive the full balance of funds designated for assistance to the Colombian Armed Forces to be obligated.¹¹⁴ Some interviewees stated that although the certification was given fairly easily at the start, the process has become more rigorous.¹¹⁵ In addition, the 'Leahy vetting law' prohibits US military assistance to foreign military units that violate human rights with impunity (US Foreign Operations Authorization Act, 2001).

The State Department has assured that the US will 'remain a reliable partner in Colombia's efforts to accomplish its counternarcotics, counterterrorism, economic and social development, human rights and humanitarian assistance goals' (US State Department, ND). As of 2008, State anticipated that billions of dollars in additional aid would still be needed through at least 2013 'to help achieve a desired end-state where drug, security, social and economic welfare, and civil society problems reach manageable levels' (GAO, 2008: 71). Despite shifts in US policy, the GAO remained concerned that US efforts were not guided by an integrated plan that fully addressed

¹¹⁴ This determination and certification is pursuant to Section 7046(b) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2009. This law requires the State Department to certify that the Government of Colombia is prosecuting members of the armed forces who have committed human rights violations; severing links with paramilitary organizations or successor armed groups; dismantling paramilitary networks and returning illegally acquired land to their rightful occupants; and respecting the rights of Colombia's indigenous and Afro-Colombian communities.

¹¹⁵ For example, see State Department official, interview, 12 March 2010; See also US State Department, 2009/2010).

the complex mix of agency programs, differing agency goals and varying timetables for nationalization (Ibid).

To conclude, the Clinton administration adopted Plan Colombia, a program that dramatically increased assistance to the Colombian military to eradicate drugs primarily by aerial spraying. US policy shifted from a focus on counternarcotics to counterterrorism following 9/11, fostering a close relationship between the Bush and Uribe administrations. By 2008, with the Democrats in control of Congress and evidence that US drug eradication policy had been ineffective, the US realigned its funding allocation in order to provide a more equal split between military and nonmilitary spending. Nonmilitary spending went primarily to alternative development but also to human rights. Part of the human rights work involved attention and assistance to the justice and peace process, which emerged in the 2000s. The following section examines the role of the US in this process.

5.2 The Justice and Peace Process

On the day Alvaro Uribe was inaugurated as President of Colombia, FARC launched an attack on the presidential palace, killing 20 civilians. As a result, President Uribe began a vigorous campaign to defeat FARC and other non-state armed groups, receiving generous US support for his offensive.¹¹⁶ Due to this approach with the FARC, Uribe made talks with the AUC the foundation of his government's peace policy (Carrillo, 2009: 134). Considering the links between the AUC and the Colombian government, some were skeptical of Uribe's and AUC motives for engaging in the talks (Adam Isacson, interview, 2 March 2010). Nevertheless, in July

¹¹⁶ In 2004, President Uribe received generous US support for *Plan Patriota*, which created mobile military units to launch an offensive against FARC in its southern Colombian strongholds (Isacson, 2010; ICG, 2009).

2003, the Colombian government and the AUC signed a framework peace accord at Santa Fé de Ralito committing the paramilitaries to full demobilization by the end of 2005 (a deadline that was subsequently extended) (ICG, 2004).¹¹⁷

Due to the high level of human rights violations that had been committed by the AUC,¹¹⁸ it was apparent that some form of legal framework was needed to define the kind of judicial treatment that would be accorded to demobilized AUC members. Defining this legal framework took nearly two years and captivated the attention of the government, civil society and international actors. This section focuses on the role of the US in the negotiations. The majority of Colombian interviewees said the US was not involved in the negotiations, however, this section shows that although it was not as prominent as in other measures, the US role – particularly the threat of extradition of paramilitary leaders to the US – was crucial to debates of the law.

President Bush warmed to Uribe's talks with the AUC, even though the AUC, along with FARC and ELN, were on US terrorist lists.¹¹⁹ Although this complicated contributing funds for the demobilization process, one US official said: 'This is the first semi-serious show of intent on the part of one of these armed groups. I don't think it matters [that they are on the terrorist list]' (Jones, 2009: 362). The State Department's narcotics chief Robert Charles said: 'A window of opportunity has

¹¹⁷ In addition to whatever deals were offered by the Colombian government, the threat of extradition to the US was also viewed as an important motive for the AUC's sudden desire to negotiate its demobilization and reintegration (Carrillo, 2009: 150).

¹¹⁸ According to Colombia's Defensoría del Pueblo (Human Rights Ombudsman) and the Vice President's Human Rights Observatory, paramilitaries were responsible for the majority of 1,969 massacres, resulting in 10,174 deaths, recorded in the country between January 1994 and December 2003. By mid-2002, violations by paramilitary groups had declined and those attributed to the FARC—especially massacres—rose sharply (El Tiempo, 2004h).

¹¹⁹ President Bush designated the FARC and the AUC organizations as 'Significant Foreign Narcotics Traffickers' in May 2003 and as 'Specially Designated Global Terrorists' in October 2001. Eighteen AUC members were also added to a list of foreign narcotics trafficking 'kingpins', which applied economic sanctions under the Kingpin Act. A US Treasury press release stated: 'These Kingpin Act designations reinforce the reality that the FARC and the AUC are not simply terrorist/guerrilla organizations fighting within Colombia to achieve political agendas. They are part and parcel of the narcotics production and export threat to the United States, as well as Europe and other countries of Latin America' (US Department of Treasury, 2004).

opened that will not always remain open. President Uribe has taken a huge risk, and we must do everything in our power to facilitate these peace efforts' (Maseri, 2004).

The Bush administration got around terrorism-financing laws by providing support to the OAS Mission to Support the Peace Process (MAPP-OEA), an organization which the US said could receive funds without infringing on US laws.¹²⁰ The US supported the collective demobilization of over 32,000 AUC members. In addition, more than 20,000 members of the FARC, AUC, ELN and other illegal armed groups individually surrendered their arms. By April 2006, the High Commissioner for Peace announced that the demobilisation process was complete (ICG, 2011); however, it was not completely effective.¹²¹

As part of its obligations under the demobilization agreement, the Uribe administration introduced the draft Alternative Penalty Law in August 2003, which, under certain conditions, pardoned members of illegal armed groups already convicted of crimes who demobilized and agreed to a set of minimal conditions. This draft was heavily criticized in domestic and international arenas, including in the US, for being too lax and not dealing adequately with victims' rights to justice, truth and reparations (Carrillo, 2009: 135).

Just a month after the Colombian government presented the draft law, 57 members of the US Congress sent a letter to Uribe, urging him to sever all links with paramilitaries. The letter also raised concerns about possible impunity for human rights violations committed by the AUC:

¹²⁰ Center for International Policy, 2004. This announcement did not indicate resolution of the question whether the US could provide direct funding to the Colombian government or even NGOs if this were to benefit the AUC or its members (ICG, 2004).

¹²¹ Some paramilitaries did not demobilise; others demobilised, only to re-emerge some time later to take up arms once more, claiming that the Colombian government had broken its promises to them. Other demobilised paramilitaries later became involved with drug-trafficking organizations (ICG, 2007).

We have doubts about your government's willingness to prosecute AUC members, including Carlos Castaño and Salvatore Mancuso, for their gross violations of human rights and drug trafficking in Colombia. Recent public statements made by Colombia's High Commissioner for Peace Luis Carlos Restrepo indicate that your government may consider allowing these criminals to receive suspended sentences and pay reparations in lieu of jail time. We believe that such an exchange would amount to impunity for serious human rights violations and would erode the rule of law in Colombia, encourage further violence, and establish an undesirable template for future negotiations with the guerrillas. Instead, we encourage you to ensure that an eventual peace agreement with the AUC includes accountability for human rights violations, excludes the possibility of cash-for-justice swaps, provides for the rapid disarmament, demobilization, and reintegration of the AUC combatants, and requires that your government control disarmament and demobilization zones (US Letter to President Uribe, 2003).

While members of the US Congress were concerned about impunity for serious human rights violations, the US State and Justice Departments were primarily concerned that the law would exclude the possibility of extraditing top drug traffickers to the US. A letter was sent to the Peace Commissioner, asking that the draft Alternative Penalty Law not affect the extradition of paramilitary leaders accused of narco-trafficking (El Tiempo, 2003a). US Ambassador William Wood met with proponents of the draft law and 'insisted' that the benefits being debated not allow narco-traffickers 'to use the façade of the armed conflict in order to evade justice' (El Tiempo, 2003b).

AUC leaders were resolute about their patriotic service to the nation, and pledged never to serve jail time in Colombia or accept a peace deal allowing for their possible extradition to the US (Arnson, 2005: 5). The second in command of the AUC, Salvatore Mancuso, invited the US 'to participate directly' in the peace negotiations in an attempt to trade a promise not to extradite for information on the drug trade (El Tiempo, 2004b). Both Ambassador Wood and Assistant Secretary of State Roger Noriega rejected this request and reiterated US insistence on the

extradition of Colombians indicted in the US and on the need to bring gross violators of human rights and major drug traffickers to trial (Semana, 2004; Wood, 2004).

The Colombian government was divided on the issue. Some members of the Colombian Congress felt that a promise not to extradite was essential in order for the process to move forward. In a press release, however, President Uribe said, 'Extradition is not negotiable,' noting that 'if extradition was prohibited, Colombia would suffer international discredit.' But his statement also left open the possibility that extradition could be suspended in exchange for an individual's cooperation with the process: 'He who wants to avoid [extradition] has to show to the international community his good will and readiness to rectify' (Comunicado Casa de Nariño, 2004).

In May 2004, it was decided that AUC paramilitary commanders would not be detained or extradited if they moved to a zone subject to OAS verification in the northern province of Cordoba and complied with agreements within the peace process (BBC, 2004; El Tiempo, 2004e). Four days later, US Deputy Attorney General Mary Lee Warren submitted an extradition request to Colombian authorities for six paramilitary leaders based on DOJ information about their alleged narco-trafficking activity (BBC, 2004; El Tiempo, 2004f). Ambassador Wood said that there were not clear signs the AUC wanted to break its connections with drug trafficking. He said they were waiting for the AUC to comply with the government's requirements (El Tiempo, 2004g). Uribe suspended these requests as long as AUC leaders agreed to cooperate, and US pressure about extradition decreased.

Meanwhile, debate continued for another year within the Colombian Congress, which had rejected a 2004 modified version of the Alternative Penalty Law. USAID contributed some funding to Fundación Social, an organization that

advised the drafting of legislation by Senator Rafael Pardo and a multi-party group of Congress. Fundación Social provided members of Congress with tools and documents about transitional justice, victims' rights and international standards. Paula Gaviria, Director of Fundación Social, felt their impact was sizable in changing the discussion in the Colombian Congress about the law (Paula Gaviria, interview, 8 September 2010). The Pardo draft legislation was widely viewed as the most rigorous in terms of international standards and victims' rights (Carrillo, 2009: 143).

The Director of USAID's DDR program said that every provision of the law was discussed in USAID (Ileana Baca, interview, 31 August 2010). Gaviria mentioned that the relationship with USAID was positive and noted that during intense negotiations of the law from January to June 2005, USAID followed the process closely. Due to the detail of the requests for information being made, Gaviria had the sense that there must have been calls for information from the Ambassador or State Department (Paula Gaviria, interview, 8 September 2010).

Just before the final version of a modified law was presented by President Uribe in 2005, members of the US Congress continued to express their concerns. Republican Senator Richard G. Lugar said he was concerned that the law 'would leave intact the complex mafia-like structures' by failing to require commanders to disclose knowledge of the organization's operations or financing (Forero, 2005). The letter also said that paramilitary leaders requested for extradition in the US would receive extremely short sentences compared to the crimes committed (US Letter to President Uribe, 2005a). In another letter to Uribe, six Democratic Senators expressed similar concerns. They felt the terms agreed thus far could have an extremely negative impact on peace, justice and the rule of law in Colombia, in

addition to the fight against drug trafficking and terrorism (US Letter to President Uribe, 2005b). The House International Relations Committee said that State Department funding would be rejected unless a legal framework in accordance with human rights, truth, reparations and justice, as well as the extradition of paramilitary leaders, was adopted (El Tiempo, 2005a). Congress also eventually required the State Department to certify that the Colombian government severed links with paramilitary organizations and dismantled their networks before provision of financial assistance.¹²²

In June 2005, Law 975/05 was adopted and came to be known as the ‘Justice and Peace Law’ (JPL). The law mandated punishment for those individuals who committed war crimes or serious human rights violations, but offered reduced sentences of five to eight years if the ex-combatant gave testimony about his illicit acts. The law also required victims to be informed of judicial findings and allowed them to claim reparations from the perpetrator.

Adam Isacson, former Director at the Center for International Policy, found it ‘wasn’t easy’ to characterize the US approach to the talks with the AUC, but concluded that the approach was ‘ambivalent’ since the US had been the talks’ biggest foreign detractor at the same time that it was its biggest foreign financial supporter:

Washington adopted a tricky position of modest support and strong criticism, of moving toward helping to demobilize paramilitary fighters while simultaneously seeking to extradite their leaders on drug charges (Center for International Policy, 2004).

¹²² This determination and certification is pursuant to Section 7046(b) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2009. This law requires the State Department to certify that the Government of Colombia is prosecuting members of the armed forces who have committed human rights violations; severing links with paramilitary organizations or successor armed groups; dismantling paramilitary networks and returning illegally acquired land to their rightful occupants; and respecting the rights of Colombia's indigenous and Afro-Colombian communities.

Publicly, US officials repeatedly expressed their support for the justice and peace process of the Uribe government. However, US skepticism of the law was visible in letters from Congress and statements from the State and Justice Departments, although for different reasons. Congress was concerned with the human rights implications of the law, while the State and Justice Departments were concerned about maintaining the possibility to extradite.

These two approaches significantly impacted the negotiations. Congressional pressure and USAID support helped strengthen the final version of the Justice and Peace Law. The US was credited with lengthening the investigation time frame of AUC members, and ensuring a wider investigation and the loss of benefits if the member did not give all information known about the group structure (El Tiempo, 2005b). Meanwhile, the State and Justice Departments remained adamant that extradition agreements between the two countries be upheld. Even though the law passed without a promise not to extradite, AUC leaders were under the impression that this would not take place, even with DOJ's extradition requests during the negotiations. US pressure about extradition lessened, however, and the process moved forward.

Upon passage, the Justice and Peace Law was hailed by Colombian government officials as a way to lay the groundwork for removing one of the three illegal armed groups battling in Colombia. 'We are proud of this instrument,' said Luis Carlos Restrepo, the country's peace commissioner (Forero, 2005). Government officials felt the law reflected a potentially viable balance between victims' rights and political necessity (Carrillo, 2009: 135). However, the law continued to be heavily criticised. 'This law tries to simulate truth, justice and reparations, but what it really offers is impunity,' said Iván Cepeda, whose father, Senator Manuel Cepeda,

was killed by paramilitary gunmen in 1994 (Forero, 2005). Human rights groups condemned the law, stating it favoured the perpetrators of human rights violations over their victims. A *New York Times* opinion piece called it the ‘Impunity for Mass Murderers, Terrorists and Major Cocaine Traffickers Law’ (New York Times, 2005). Some concerns were addressed by Colombia’s Constitutional Court, which, immediately after ratification, reviewed and strengthened components of the law, increasing the criteria paramilitaries needed to meet to obtain reduced prison sentences and inserting language ensuring the rights of victims to participate in all stages of the criminal process (Triviño, 2006).

Although little thought had gone into the law’s implementation, institutions were being created. The Justice and Peace Unit (JPU) established within the Fiscalía (Attorney General’s Office) and the National Commission for Reparation and Reconciliation (CNRR) were two key bodies created to implement the Justice and Peace Law. In response to Uribe’s requests for international assistance, the US was one of the first foreign governments to support the law’s implementation. US support came primarily from the Department of Justice (DOJ) and USAID. The remainder of this section describes and assesses the involvement of these two agencies in the transitional justice measures created by the Justice and Peace Law.

Justice Department support of the Justice and Peace Unit

The US Justice Department has a long history of involvement in Colombia. Since the 1990s, the Office of Overseas Prosecutorial Development Assistance and Training (*OPDAT*) and *International Criminal Investigative Training Assistance Program* (*ICITAP*) have worked in Bogotá, helping to shift Colombia’s legal system from an

inquisitorial to an adversarial one.¹²³ Some referred to this shift as the US ‘exporting’ its legal system, while others more critically called it the ‘colonization’ of the justice system (Crandall, 2002). When asked why the DOJ got involved in the justice and peace process, one official said it was ‘fundamental to the development of the Colombian justice system.’ But he also placed DOJ’s involvement within the broader goals of US foreign policy:

Colombia is very strategic to the USG in terms of where it sits geographically but also politically, historically as a close ally of the US and from a law enforcement perspective given the criminal and terrorist organizations and years of being a central focus of cocaine trafficking (DOJ official 1, email communication, 8 September 2010).

More specifically, he spoke about DOJ’s longstanding relationship with the Fiscalía, and with the newly appointed director of the unit, Luis Gonzales Leon, whom the DOJ had worked closely with before his appointment as head of the Justice and Peace Unit (JPU). Failure to support the newly created unit within the Fiscalía, the official added, would have been ‘irresponsible’ considering it would be responsible for much of the law’s requirements. For example, in order to receive the reduced sentence offered by the Justice and Peace Law, special prosecutors in the JPU were mandated to take the testimony of ex-combatants about the illicit acts they perpetrated as a member of an illegal armed group.

Initially, DOJ was the only international actor working with the Justice and Peace Unit. DOJ’s approach was to look at the law from the optics of the accusatory system and to focus on obtaining information. DOJ therefore focused its assistance on helping build JPU capacity to aid in the investigation and prosecution of crimes committed by former paramilitary members (US State Department, 2009: 39). A

¹²³ USAID’s Justice Program in Colombia was also involved in this work from 1995-2005. The USAID Justice Reform and Modernization Program (2006-2010) was established to train judicial operators in the new accusatory system and create ‘justice houses’, virtual hearing rooms in remote, conflict prone areas, Public Defender Offices and support civil society organizations to promote justice reform and expand justice services (USAID, 2008).

DOJ official explained how paramilitaries ‘ran’ initial sessions with JPU prosecutors. To respond to this problem, DOJ arranged proffer sessions with prosecutors and investigators in order to help them to ‘think’ like prosecutors (DOJ official 1, interview, 6 September 2010). DOJ was also involved in training exhumation units, and arranged closed-circuit sessions with paramilitaries.

The greatest bilateral contribution to JPU came from the US. For fiscal years 2006-2010, Congress allocated about half of State Department INL funds (approx. \$45 million) to the Fiscalía, and \$7 million was specifically earmarked for JPU. DOJ donations contributed to JPU training, equipment and operational support (See Appendix 6 for exact figures).

The Justice Department influenced interpretations of the Justice and Peace Law and its implementation. DOJ’s emphasis on the judicial aspect of the law meant that issues relating to victims’ rights and truth-telling did not receive as much attention, despite provisions for these components in the law. A DOJ official felt that the law, by including judicial and truth components, had two aims that were in conflict with each other. He admitted that DOJ’s focus was on prosecutorial and investigative capacities, adding ‘if that happens to mean the prosecution of human rights abuses and the inclusion of victims, that’s not a problem.’ Although research has shown that judicial and truth-telling aims may be complementary (Hayner, 2001), the official said that ‘DOJ sees its role as different from a human rights agenda’ (DOJ official 1, interview, 6 September 2010).

According to the same DOJ official, the justice and peace process in Colombia is the first transitional justice mechanism the DOJ has been involved in, which may explain its unfamiliarity or unwillingness to consider the ways in which a legal process may also benefit victims. A DOJ official explained that DOJ’s role in

Colombia is unique, in part because JPL is ‘so unique’. He said that DOJ colleagues in Eastern Europe and Africa have asked DOJ-Colombia for advice on assistance, specifically about their work on plea bargaining and exhumations. He noted:

DOJ is underutilized in foreign assistance efforts and has a significant contribution to make given DOJ’s expertise and unique perspective in the area of criminal justice development. Our efforts in Colombia have clearly demonstrated that. The Department of State has traditionally looked to contractors rather than working with DOJ and using existing USG resources. What we have done in Colombia demonstrates a more effective foreign assistance approach with respect to justice development including your focus: transitional justice. As we discussed development of effective criminal investigation and prosecution capabilities are essential to any transitional justice effort (DOJ official 1, email communication, 7 September 2010).

He felt that DOJ’s relationship with Colombian prosecutors is an example of US foreign policy working right – since the two have worked ‘hand in hand’ for many years. JPU Director Luis Gonzales Leon confirmed that the relationship with the DOJ had been positive (Luis Gonzales Leon, interview, 3 September 2010).

USAID support of the National Commission for Reparation and Reconciliation

Like the Justice Department, USAID has also been active in Colombia for many years. It has supported government agencies and civil society groups, and views itself as a facilitator between the two (USAID official 1, interview, 18 August 2010). USAID created the Demobilization and Reintegration program within its Office for Vulnerable Populations in 2005. The program’s initial focus was on supporting the reintegration of demobilized ex-combatants (helping to implement Colombia’s Demobilization and Reintegration Law 782/2002) and to support conflict victims’ guarantees of truth, justice, judicial reparations and guarantees of no repetition, as part of the justice and peace process (helping to implement the Justice and Peace Law 975/2005). This section focuses on USAID support to the CNRR, since this was

the main institution created by the Justice and Peace Law to address the needs of victims.

The Justice and Peace Law created the CNRR to ensure victim participation in the judicial process, recommend criteria for reparations and advance reconciliation projects, along with a range of other tasks. The CNRR is comprised of government officials, as well as representatives of civil society and of the victims themselves. It was given an ambitious mandate that includes monitoring and reporting on key aspects of DDR and reparations processes.

USAID was the first international contributor to CNRR. When asked if and how USAID assistance had impacted the Commission, CNRR President Eduardo Pizarro said it had changed the Commission's priorities (Eduardo Pizarro, interview, 7 September 2010). USAID took the lead in supporting the Commission in the following ways during its first phase of work in this area from 2006-2010 (USAID, 2010):

- Design of a victims reparations fund
- Design of a victims database and asset identification database in order to monitor reparations
- Support for the regulatory framework for implementing reparations
- Support to field offices and their outreach activities to build a service network for victims
- Strengthening of judicial counseling and representation for victims
- Pilot reparations projects

USAID contributed nearly \$3 million for these activities with the greatest contribution for CNRR regional offices and a pilot project on collective reparations (See Appendix 6 for exact figures). Pizarro explained how USAID's confidence in the process generated a snowball effect where other international donors became involved (Eduardo Pizarro, interview, 7 September 2010). Nevertheless, in the initial

years of the Commission's operation between 2006-2010, US assistance far surpassed that of other donors, as depicted in the following table.¹²⁴

Figure 11: International assistance to the CNRR

| Donor | Amount (in millions of pesos) | Percentage |
|-------------|----------------------------------|------------|
| Canada | 1.818 | 7 |
| Spain | 3.111 | 12 |
| Netherlands | 4.820 | 19 |
| UNDP | 2.432 | 10 |
| Sweden | 2.997 | 12 |
| Switzerland | 983 | 4 |
| US | 7.247 | 29 |
| Others | 1.671 | 7 |

UNDP coordinates international assistance to the process, except for assistance from the US, since USAID chose to meet with Colombian government agencies separately. In order to determine its funding priorities, USAID holds consultative meetings every two months with a range of Colombian government agencies (Acción Social, CNRR, Fiscalía, Procuraduría, Ministry of Interior and Justice, etc.) responsible for implementing the justice and peace process. The organizations that implement USAID programs, the International Organization for Migration (IOM) and Management Sciences for Development, Inc. (MSD), also attend these meetings.¹²⁵

When asked why USAID does not coordinate its efforts with UNDP, an OAS official said it was because USAID knew more about the topic and wanted to maintain its autonomy (Daniel Millares, interview, 23 August 2010). USAID does, however, take part in an interinstitutional committee on transitional justice (created in 2008), led by the Colombian Ministry of the Interior and Justice.

¹²⁴ Data provided by CNRR Executive Director Catalina Martínez Guzmán, 4 September 2010.

¹²⁵ In an interview with IOM Project Coordinator María Mejía, I asked her why she thought IOM was chosen as the primary US operator. Mejía discussed IOM's long history in Colombia (nearly 60 years), their close relationship with the US and Colombian governments and their expertise in the field (i.e., experience with DDR in 20 countries and work on reparations) (María Mejía, interview, 9 September 2010).

A CNRR director said that USAID was the most flexible and comprehensive donor with a coherent approach at the political and technical levels (Catalina Martínez, interview, 26 August 2010). Acción Social's Director of International Cooperation Viviana Tamayo said that USAID shifted its funding approach based on consultative meetings with Colombian government agencies (Viviana Cañon Tamayo, interview, 20 September 2010). New initiatives between 2010 and 2013 were to focus on the following:

- Reconciliation – continue to support CNRR reconciliation work; assist regional, local and community initiatives; contribute to systemization and visibility of reconciliation initiatives
- Reparations (collective, judicial and administrative) – strengthen processes to search out and identify the remains of the disappeared (judicial reparations); assist Acción Social to accelerate adjudication of victims' applications (administrative reparations); formalize collective reparations measures undertaken in pilot sites (collective reparations)
- Restitution of Goods – support National Land Fund and Regional Commissions for Restitution of Goods
- Historical Memory – assist CNRR Area for Historical Memory
- Judicial Assistance to Victims – strengthen victims' defense through the National Ombudsman and by direct institutional support to victims' organizations
- Integrated Assistance to Victims – re-establish socio-economic security for victimized populations through income generation, training and psycho-social attention.

USAID was also responsive to the requests of international NGOs. For example, eight NGOs urged the head of the USAID Colombia office to assist the justice and peace process by providing more lawyers for the victims participating in the process and logistical support so they could access national and virtual hearings (NGO Letter to Susan Reichle, 2009).

In addition, USAID also funded civil society organizations working on the process. For example, MSD has given one-year contracts to organizations that work

with victims who are bringing cases before the JPU.¹²⁶ One grantee said USAID-MSD was the first donor with interest in the justice and peace process. His organization, País Libre, received MSD funding from 2007-2009 for their work accompanying victims through the justice and peace process and providing judicial representation (Edgar Gomez, interview, 7 September 2010). Sweden is now funding the work. Another grantee said that MSD had been an important facilitator between civil society and government agencies: ‘MSD presence helps make things happen at the Ministry of Interior’ (Angela Ceron, interview, 1 September 2010). The main criticism was that one-year grants were not renewed or took a long time to receive, which meant that these organizations had to stop services for victims. USAID-MSD grants also did not include funds for administrative costs, unlike most other donor grants.

Some NGOs that work on the justice and peace process refuse to accept US assistance because of US funding for Plan Colombia. The Colombian Commission of Jurists (CCJ), for example, does not accept US funds for reasons of security and credibility. CCJ President Gustavo Gallón explained that because US funds go to the military, those who accept them can become mixed up with the war and subject to guerilla attacks (Gustavo Gallón, interview, 10 September 2010).

Despite its concerns about the law, the US was one of the first foreign governments to support the justice and peace process and provided more funding than other international donors. Among US agencies, the Justice Department and USAID played the most active roles in the actual implementation of the law – from trainings to technical assistance to pilot projects. DOJ’s role in a transitional justice

¹²⁶ For example, MSD works with Fundación País Libre, Fundación Infancia, Corporación Nación, Corporación por Pública, Fundación Dos Mundos. These organizations provide psycho-social support and legal support for victims bringing cases before the JPU.

measure is unique since the agency does not typically carry out similar work elsewhere, but may do so in the future.

US assistance to the Justice and Peace Unit and the National Commission for Reparation and Reconciliation was continually discussed by Colombian government officials as critical to the development and operation of these institutions. Perhaps this is to be expected when international assistance is still needed, but JPU and CNRR staff generally found the US contribution to be effective, efficient and pragmatic. In addition, they felt that US donors wanted to know what funds were necessary to realize projects, but were not so strict that funds could not be moved around if necessary.

US involvement in the justice and peace process has allowed it to shape the process in a number of ways. The DOJ focused its assistance on the development of prosecutorial and investigative capacities and exhumations as opposed to victim participation. USAID emphasized particular programming on reparations, but was open to shifting funds based on Colombian government, international NGO and civil society recommendations.

This section also highlighted how the US was the first donor to support the institutions created by the Justice and Peace Law and how this influenced other donor contributions. CNRR and JPU staff discussed how donors specialized in certain areas. For example, a CNRR staff member spoke about how Spain (the second highest donor country to Colombia) funds institutions;¹²⁷ Sweden funds NGOs; Holland contributes to strengthening public policy; Switzerland focuses on historical memory; and Norway contributes to sexual violence (Catalina Martinez,

¹²⁷ Initially, there were concerns that the Justice and Peace Law constituted a challenge for the continuity of Spanish policy, as support for the Bogotá government could put at risk the more global objectives of Madrid (i.e. its defence of Human Rights and the respect for International Law) (Freres, 2005).

interview, 26 August 2010). A JPU staff member thought this division was done out of practicality, but also reflected each country's interests (Loreley Oviedo, interview, 3 September 2010). CNRR President Pizarro said donor specialties are chosen so their money is more visible (Eduardo Pizarro, interview, 7 September 2010). We now turn to the issue of extradition, which returned to dominate the debate during the first years of the Justice and Peace Law's implementation.

5.3 Paramilitary Extraditions to the US

Despite US assistance to the justice and peace process, the issue of extradition – so contentious during the negotiations of the law – did not disappear upon the law's passage. However, it was set aside for a while by the US and Colombian governments. Uribe suspended extradition as long as the leaders cooperated with the law, and the US stopped applying pressure about the requests. Suddenly, however, more than two years into the justice and peace process, 14 AUC leaders were extradited to the US in May 2008.

The Colombian government argued that the extraditions relieved the justice and peace process of the negative influence exercised by the paramilitary leaders, who, allegedly, not only continued to commit crimes from jail but had also contributed very little to the process of truth and reparations. Even worse, said the government, these commanders were trying to control the testimony of other former combatants who had taken advantage of the Justice and Peace Law (Woodrow Wilson Center and Fundación Ideas Para La Paz, 2009: preface).

Some believed that Uribe went through with the extraditions because AUC leaders were revealing sensitive information about the nexus between the paramilitaries and the state. The 'parapolitics' scandal had erupted in 2006, where

AUC leader Mancuso publicly claimed that the AUC had secured the electoral success of 35% of congressional members (Cook, 2007). By April 2008, just a month before Uribe announced the extraditions, nearly 100 government officials had either been sentenced or were being investigated for colluding with paramilitaries, including: 62 members of Congress, President Uribe's cousin and former President of Congress Mario Uribe Escobar, the army chief General Mario Montoya, former head of the Colombian Intelligence and Security Service (DAS) Jorge Noguera, and former president of the Superior Council of the Judicature José Alfredo Escobar Araújo (ICG, 2007: 5; Guardian, 2008). Post-demobilisation investigations and trials also found department governors, former and current legislators, and other senior government and military figures guilty of collusion with paramilitary groups (ICG, 2011).

Isacson said: 'It became far more convenient for Uribe to get them out of the country incommunicado' (Adam Isacson, interview, 2 March 2010). However, DOJ officials felt the argument that leaders had started talking had been distorted in the press, and they were actually talking very little (DOJ official 1 and 2, interviews, 6 September 2010/27 August 2010).

According to the same DOJ officials, the Justice Department had under 48 hours advance notice that Uribe was going through with the extraditions, and was not prepared to accept them. Nonetheless, US Ambassador William Brownfield pledged that the extraditions would not interfere with Colombia's efforts to hold paramilitaries accountable for their crimes in Colombia: The US would try to 'facilitate all access, all of the information, and all of the opportunities to the [Colombian] victims, the victims' representatives and to the [Colombian] prosecutors' (Brownfield, 2008).

However, some complained that since the extraditions, the paramilitary leaders' cooperation with Colombian investigators had ceased. A UC Berkeley report said that logistical difficulties were compounded by the absence of a written agreement between US and Colombia to coordinate judicial cooperation. In addition, the report discussed the limited access of Colombian prosecutors and judges to defendants in US custody and the rejection of efforts of Colombian victims by US prosecutors to divulge information about their crimes. The report also talked about how plea agreements that DOJ reached with the extradited defendants did not contain incentives for defendants to cooperate with Colombian law enforcement or to reveal details of their human rights crimes (UC Berkeley, 2010: 3).

Colombian and international NGOs expressed concern about the impact of the extradition on the justice and peace process. Paula Gaviria of Fundación Social said:

JPL is a domestic process, but it went out of the government's hands when the extraditions took place. JPL had no institutions or processes in place. When the leaders didn't comply with the requirements of the law – and the process got out of their hands, the government always had the option of extradition. It took this decision late and the result had huge consequences for thousands of victims. In addition, the impact on the collective imagination of Colombians was very negative. It sent the message: We're not capable of undertaking this process. [The decision to extradite] showed deeper problems of incapacity, fear and dependence on the US (Paula Gaviria, interview, 8 September 2010).

Gustavo Gallón, President of the Colombian Commission of Jurists, similarly stated: 'The US is far from Colombia legally, culturally and geographically' – now that the leaders are there, he said, there is no access to them (Gustavo Gallón, interview, 10 September 2010). Michael Reed, Colombia Director of the International Center for Transitional Justice, agreed: 'Extraditions have been an obstacle to peace – the FARC has slowed down demobilization, now that it has seen how the paramilitaries were betrayed' (Michael Reed, interview, 27 August 2010). They both felt that there should have been better sequencing, trying leaders for human rights abuses in

Colombia first and then for drug charges in the US. Luis Carlos Restrepo, Colombian peace commissioner, said: ‘US interest was always based on the extradition of AUC leaders’ (Luis Carlos Restrepo, email communication, 21 September 2010).

Some felt the extraditions had a positive impact on the justice and peace process. For example, CNRR President Eduardo Pizarro said: ‘The justice and peace process began the day the paramilitaries were extradited to Washington’ (Eduardo Pizarro, interview, 7 September 2010). Those in favour of the extraditions believed that the removal of these leaders from the country stopped them from interacting with their networks and made Colombia less dangerous.

In response to the debate, a DOJ official said: ‘On what basis do you say no to the biggest drug traffickers in the world?’ He expressed frustration with NGO criticism of the extraditions and felt that an ‘honest discussion’ should take place: ‘It’s clear that the only place that these leaders would serve a stiff sentence is in the US,’ since sentences would be close to 30 years in the US, as opposed to 8 years under JPL. The same official spoke about how the justice and peace process had not been taken seriously by paramilitary leaders:

Mancuso used to come to the justice and peace process with his Gucci shoes and a nice suit, and completely control the process. Now you seem him in his prison outfit. This is an important change.

The official felt that little discussion had taken place about how much information had been revealed in just a few years, after 30-40 years of conflict. He felt that US assistance had enabled the two countries to work together (DOJ official 1, interview, 6 September 2010).

According to a State Department human rights certification report, US and Colombian authorities began to identify legal procedures for ensuring that Colombian legal authorities would have access to the extraditees as needed. For

example, in order to facilitate JPU access to AUC leaders, they were moved to two locations: Miami, Florida and Great Neck, Virginia. JPU prosecutors were given access to leaders held in Miami for three days a week, 9-5, and five days a week, 9-5, to those in Virginia. In addition, DOJ paid for 10 JPU prosecutors to meet with DC prosecutors in April 2010 in order to inform them about JPL and the importance of paramilitary cooperation with the process (US State Department, 2009/2010).

The issue of offering incentives for continued participation in the justice and peace process is complicated by protections in US law, which do not obligate the leaders to participate in the process. However, the Colombian government has told the extradited paramilitaries that if they participate, any sentence given under the justice and peace process will run concurrently with their sentence in the US so that after they complete their sentences in the US, they will not face additional jail time when they return to Colombia (US State Department, 2009: 37). A DOJ official referred to Rule 35 of the US Federal Rules of Criminal Procedure and mentioned that leaders may be able to receive a reduced sentence if they cooperate with the justice and peace process (DOJ official 2, interview, 27 August 2010). However, this is at the discretion of the court, and because plea agreements are sealed, it will not be possible to know who cooperated with the process.

According to the State Department, as of July 2009, all 15 extradited paramilitary members had elected to resume participation in the justice and peace process.¹²⁸ On approximately 36 occasions, the DOJ facilitated the transmittal of approximately 10 voluntary confessions, and conducted interviews with about 12

¹²⁸ In March 2009, paramilitary leader Hebert Veloza Garcia, better known as 'HH', was extradited to the US on drug trafficking charges. Uribe postponed Veloza's original extradition date by six months so he could have more time to confess his misdeeds. But prosecutors say he got only halfway through the list (Kraul, 2009).

former paramilitary leaders, in cooperation with the relevant Colombian authority (US State Department, 2009: 37).

However, a news article in August 2011 stated the JPU officials were travelling to the US to interview extradited paramilitary leaders in order to see if those who stopped participating in the justice and peace process would continue their participation. Among the prisoners to be interviewed was Salvatore Mancuso, who had previously refused to cooperate with the process until the security of his family was guaranteed. Diego Murillo Bejarano, alias 'Don Berna', and Ramiro Vanoy, alias 'Cuco Vanoy', also discontinued their cooperation with the process claiming their families were not receiving the security promised to them (Mannon, 2011).

A DOJ official believed that the extraditions were helping the justice and peace process and wanted them to contribute to revealing the truth. He said: 'DOJ philosophy is that extraditions should be a vehicle of truth' and added, 'DOJ wants JPL to be a success. Our prosecution goal is transnational justice for human rights and drug cases' (DOJ official 2, interview, 27 August 2010).

Efforts that have been undertaken by DOJ are not well known and difficult to verify, and many remain disillusioned with the extraditions. Isacson said: 'We're all trying to figure this out. We're in new legal ground here and it's very hard to get information from DOJ' (Adam Isacson, interview, 2 March 2010).

One additional issue that arose from this situation was the banning of future extraditions of paramilitary leaders participating in the justice and peace process by Colombia's Supreme Court in August 2009. The court found that the extraditions of AUC members adversely impacted 'the rights of victims and the Colombian public' by leaving them 'without the possibility of knowing the truth and obtaining reparation for the crimes committed by paramilitary groups' (Supreme Court, 2009:

44). The court further reasoned that extradition would ‘violate Colombia’s international obligations to combat impunity with regard to crimes against humanity’ and undermine victims’ rights. It found that ‘recent experience’ proves that extraditions ‘paralyze’ the justice and peace process because extradited leaders were unable to continue their confessions from the US (Ibid: 38). The Supreme Court concluded that individuals should complete their confessions in Colombia before being extradited to the US. When the US requested the extradition of additional AUC leaders participating in the justice and peace process, in accordance with the Supreme Court’s ruling, Colombia denied these requests. (Superseding indictment, 2009a/2009b). A 2011 OAS study on the JPL, led by Judge Baltazar Garzon, recommended that extradited leaders serve the remainder of the sentences in Colombia (Mannon, 2011b).

5.4 Explaining US Involvement

This chapter examined US involvement in the negotiations of the Justice and Peace Law and its implementation between 2003 and 2011. The US supported President Uribe’s 2003 peace accord with the AUC and the demobilization of thousands of paramilitaries. Subsequent debate about a legal framework that would define the judicial treatment accorded to these paramilitaries stimulated significant debate within Colombia and abroad. This section provides an overview of findings and offers some explanation and assessment of US involvement in the justice and peace process.

The US had assisted with the demobilization and supported efforts to strengthen the Justice and Peace Law (JPL) as it was debated in the Colombian Congress. The US followed the Colombian negotiations of the law, but adopted a

‘tricky position of modest support and strong criticism’ (Center for International Policy, 2004). However, at the same time, the State and Justice Departments were insistent that any law not infringe on the ability to extradite top drug traffickers (that were also AUC leaders) to the US. The extradition issue was set aside for a while, and the JPL was passed in 2005.

The US was an early and important supporter of the law’s implementation. The two key institutions established by the Justice and Peace Law, the Justice and Peace Unit and the National Commission for Reparation and Reconciliation, were strongly supported by the Department of Justice and USAID respectively. These US agencies have long-standing relationships in Colombia and took on the challenges posed by the Justice and Peace Law earlier than other foreign donors. US assistance mainly involved financial and technical support to the JPL institutions and was viewed positively by Colombian officials working in these offices.

President Uribe’s decision to extradite 14 AUC leaders to the US in 2008 threw a wrench in the process. Some claim he did so to stop sensitive information from being revealed by paramilitary leaders about the nexus between the paramilitaries and the state. The Colombian government claimed the extraditions relieved the justice and peace process of the negative influence of leaders who had contributed very little to the process and continued to commit crimes from jail. Once the AUC leaders were in the US, NGOs complained about the negative impact on the justice and peace process. The Justice Department eventually arranged access for JPU prosecutors to interview AUC leaders, however it is unclear the extent to which these leaders have been willing to participate, especially considering the lack of incentive for doing so.

The Colombian case study offers a third illustration of US involvement in transitional justice. The US paid some attention to the negotiations and implementation of the Justice and Peace Law, but it did not capture high-level attention within the US government. JPL negotiations did, however, highlight the tension in the US between geopolitical interests and concern for human rights. This tension was illustrated by the Justice and State Departments' position that extradition agreements be maintained on the one hand, and Congress' concerns about impunity as well as USAID's support for the strengthening of the Justice and Peace Law on the other hand. This tension remained, even though the extradition issue was put aside for a few years as the Justice and Peace Law was operationalized.

The US was an early and consistent supporter of the JPL institutions and 'opened the door' for other international involvement and assistance. The active role of the Justice Department and USAID in this case is distinct from the other two cases, offering a different and broader understanding of the US approach to transitional justice. Although the Justice Department does not typically engage in transitional justice issues and the needs of victims, it is apparent that the requests made by the JPU (and perhaps pressure by Colombian civil society and international NGOs) may have impacted their decision to allow JPU access to extradited leaders. Ultimately, however, this case study shows that US interests regarding drug trafficking took precedence over other issues.

It is not clear whether US aims were achieved with regard to transitional justice in Colombia. The US can claim that its involvement enhanced the justice and peace process and the JPP did not stop the extraditions of several top drug traffickers. However, in response to the negative impact of these extraditions on the JPP, the Colombian Supreme Court banned future extraditions of paramilitary leaders

participating in the justice and peace process. The effect of this decision remains to be seen.

Within Colombia, views on the US role have been mixed. Colombian government officials who have worked with the US on the JPP were generally positive about the relationship and felt it was pragmatic and efficient. Civil society groups expressed the same sentiment. The controversy revolved around the extradition issue where many felt the US could have done more to support the Justice and Peace Law, either by refusing to accept the paramilitary leaders or doing more to provide access to the leaders in the US, incentives for their participation and greater transparency about the process.

Excluding the extradition issue, US involvement has helped transitional justice aims in Colombia. Although there are many problems with the Justice and Peace Law and its implementation, it is a product of debate within Colombia, among government officials and civil society. It is a new approach to transitional justice that grapples with the thin line between amnesty and accountability. It also attempts to deal with justice issues in a situation where conflict continues. Although the process may ultimately negatively impact future discussions of accountability for other actors in the conflict, the Colombian case poses interesting questions for the field. US support of the effort (i.e., trying to strengthen the law during the negotiations and supporting the law's implementation in practical ways) – without dictating the process – provides a different lens through which to view US involvement in transitional justice. This concludes the three case studies. The next chapter compares the cases in order to draw conclusions about US foreign policy on transitional justice.

Chapter 6 Comparing Cases of US Involvement in Transitional Justice

The past three chapters examined the forces that shaped US foreign policy in three cases of transitional justice. The first case explored US involvement in the Extraordinary Chambers in the Courts of Cambodia (ECCC), a court established in 2004 to prosecute the crimes of senior Khmer Rouge leaders committed from 1975-1979. The second case focused on US involvement in two measures involving Liberia: the trial of former Liberian President Charles Taylor by the Special Court for Sierra Leone (SCSL) and the Liberian Truth and Reconciliation Commission (TRC). The Special Court indicted Taylor on the first day of the 2003 peace talks for crimes committed in Sierra Leone since 1996. The TRC Act was passed in 2005 to investigate human rights violations committed in Liberia between 1979 and 2003. The third case looked at US involvement in the negotiations of the Colombian Justice and Peace Law (JPL), which when passed in 2005, established the Justice and Peace Unit (JPU) to investigate and prosecute paramilitary crimes, and the National Commission for Reparation and Reconciliation (CNRR) to support victims' rights and reparation.

The case studies provided a wealth of material about US foreign policy on transitional justice. Through systematic comparison of the cases, this chapter synthesizes the data in order to highlight key findings of the research and draw conclusions about what US involvement entails, why the US is involved and its impact. First, I establish that the US has provided critical financial, technical and political support throughout the lifespan of transitional justice measures. Second, I argue that individuals and interests are two crucial factors for understanding US involvement. Third, I assess the impact of US involvement, concluding that it has

been positive overall, but inconsistent and controlling, especially during the negotiations and establishment of measures.

6.1 Establishing US Involvement

This study establishes four categories of US involvement in transitional justice: financial, technical, political support (or opposition) and cooperation with other actors. Other forms of involvement may exist, but the case studies illustrate that the US is often involved in these ways.

Figure 12: Four categories of US involvement in transitional justice

| Financial support | Technical support | Political support | Cooperation |
|-------------------------------|--|--|--|
| Direct or indirect assistance | Technical assistance, i.e., staff training | Advocacy or opposition of a measure, i.e., legislation | Level of collaboration with other actors, i.e., domestic, international or transnational |

Financial involvement can be understood as the level of assistance contributed either directly to a transitional justice measure or indirectly through another organization (i.e., UN agency, NGOs). Technical involvement can be understood as any assistance of a technical nature to a measure, i.e., assistance in drafting a measure’s statute, staff training, advice, etc. Political involvement can be understood as political support or opposition to a transitional justice measure. Some may view financial and technical involvement as ‘political’ as well, but this indicator is thought to focus on more overt forms of political support, i.e., legislation passed in favour of a measure, pressure for the measure to be carried out in a particular way, etc. Cooperation can be understood as the level of collaboration between the US and other actors involved in a transitional justice measure.

These four categories provide significant insight into how the US is involved in transitional justice. In this section, a number of indicators for each category are explored across the three cases in order to establish what US involvement in transitional justice entails. Preliminary analysis about reasons for US involvement is offered, but explored more thoroughly in the following section.

Financial support

The US provided financial support to all of the measures explored in this study. This support included direct and indirect assistance, and was often contributed early in a measure’s establishment and consistently throughout its operations. There was a case where funding was blocked, but then lifted. Criminal prosecutions also received higher levels of funding than non-judicial measures. The following table illustrates these indicators across the three cases with a subsequent discussion of examples from each case and preliminary analysis.

Figure 13: US financial support of transitional justice

| | Cambodia | Liberia | | Colombia |
|--|----------|---------|-----|----------|
| | ECCC | Taylor | TRC | JPP |
| Direct assistance to transitional justice measure | x | x | | x |
| Indirect assistance (i.e., to NGOs) | x | | x | x |
| Early contribution | | x | x | x |
| Funding blocked | x | | | |
| Higher level of funding to criminal prosecutions over other measures | n/a | x | | x |

In the Cambodia case, Senators Mitch McConnell and Patrick Leahy co-sponsored a bill that imposed restrictions on US support for the tribunal.¹²⁹ In September 2008, the US pledged its first donation of \$1.8 million to the UN side of the court. In April

¹²⁹ US Cambodia Democracy and Accountability Act, 2003. Japan donated almost 50 percent of all international contributions to the court, with other major donations coming from France, Germany, the United Kingdom and Australia. Japan and the European Union are the major donors to the Cambodian side of the budget (ECCC, ND).

2010, the US pledged an additional \$5 million. The US indirectly supported the court by contributing over \$7 million from 1997-2005 as well as a \$2 million ‘Endowment Fund’ in 2006 to the to the Documentation Center of Cambodia, an NGO, which the US helped establish, involved in documenting Khmer Rouge crimes.¹³⁰

In the Liberia case, the US was the largest donor to the Special Court for Sierra Leone, providing over \$85 million to the court, surpassing donations from other governments (US State Department, 2010). Congress never blocked funds to the court, but did threaten to block funding to Nigeria if it did not work to transfer Taylor to the Special Court (US P.L. 109-102, 2005). The US contributed much less to the Liberian TRC, with indirect assistance to the Commission via funds for NGOs assisting the process (i.e., four grants totaling \$224,000 from USAID’s Office of Transition Initiatives to local human rights groups that formed the Transitional Justice Working Group, and a State Department grant to Benetech for help with the coding of TRC statements). The US contributed funds early in the establishment of both measures.

In the Colombia case, financial support to the justice and peace process was initially complicated by the fact that the United Self-Defense Forces of *Colombia* (the paramilitary group known as the AUC that was the recipient of the law’s benefits) was on the US list of foreign terrorist organizations. However, the Bush administration said the OAS Mission to Support the Peace Process (MAPP-OEA) could receive US funds without infringing on terrorism-financing laws (Center for International Policy, 2004). The US became one of the first foreign state governments to contribute to the institutions created by the Justice and Peace Law. From 2006-2010, the Department of Justice (DOJ) contributed over \$7 million to the

¹³⁰ Kyriakou, 2005. With State Department grants in the mid-1990s, the Yale Cambodian Genocide Program established the Documentation Center of Cambodia, which became an independent organization in 1997.

Justice and Peace Unit (JPU) and USAID contributed nearly \$3 million to the National Commission for Reparation and Reconciliation (CNRR).¹³¹ DOJ funds were contributed directly to the JPU, whereas USAID's implementing partners, the International Organization of Migration and Management Sciences for Development, oversaw the disbursement of USAID funds.

Thus, the US provided direct or indirect assistance to all the measures examined in this study, and was typically one of the first foreign state governments to contribute to a measure. The level of direct and indirect assistance varied across the three cases with the SCSL receiving by far the highest level of funding, the ECCC receiving the second highest, the JPP receiving the third highest and the TRC receiving the least funding.

The SCSL received the most financial support because it garnered individual attention, provided an alternative model to the International Criminal Court (ICC) and stopped Taylor from contacting his network in the region. The Liberian TRC did not receive individual attention or affect US interests in a significant way, and therefore it received only minimal and indirect financial support. The refusal to fund the ECCC was about congressional distrust of Hun Sen, and less about the court. US funding of the Colombian JPP had more to do with long-term involvement in the country than particular interest in transitional justice.

Differing levels of financial support also show a US preference for criminal prosecutions over non-judicial measures. Of course, criminal prosecutions are more expensive to carry out, but the contrast is still notable. Since it is familiar to the US system, US policymakers conceptually understand criminal processes and are

¹³¹ DOJ data available from DOJ Justice and Peace Presentation, 15 April 2010. USAID data provided by Catalina Martínez Guzman, Executive Director, CNRR, 4 September 2010.

therefore more likely to approve funding requests.¹³² Other transitional justice measures are not as well understood and do not garner the same level of attention or funding.

In addition, it is interesting to note where US funds were contributed. For example, US funds were contributed through the UN for the two tribunals, which reflects its willingness to participate via the route established for international donors. This may be because it was heavily involved in the establishment of the courts. The US contributed to NGOs supporting the TRC, as well as for the documentation of violations in Cambodia, which reflects insignificant interest with regard to the Liberian TRC, and initial opposition in Congress to support the Cambodia court. In Colombia, US support was given primarily to the government, and not through the UNDP, even though this was the body designated to coordinate international donations. US technical support for transitional justice measures is next explored.

Technical support

The US provided technical support to all of the measures explored in this study. This support included direct technical involvement in a measure's establishment, operations and completion, as well as indirect technical involvement via financial support for certain organizations. The following table illustrates these indicators across the three case studies with a subsequent discussion of examples from each case and preliminary analysis.

¹³² Chandra Sriram has noted that Western governments prefer legal accountability because it is familiar to Western court systems (Sriram, 2007: 589).

Figure 14: US technical support of transitional justice

| | Cambodia | Liberia | | Colombia |
|--|----------|---------|-----|----------|
| | ECCC | Taylor | TRC | JPP |
| Direct technical involvement in measure's establishment, operations and completion | x | x | x | x |
| Indirect technical involvement via financial support for certain organizations | x | | x | x |

In the Cambodia case, before a tribunal was even requested by the Cambodian government, the State Department commissioned two attorneys to prepare a legal analysis of the potential culpability of members of the Khmer Rouge on charges of war crimes, genocide and other crimes against humanity. The US also supported the creation and operations of Yale University's Cambodia Genocide Program and the Documentation Center of Cambodia, which carried out extensive documentation of Khmer Rouge violations that was then given to the court as evidence. War Crimes Ambassador David Scheffer and others were then involved in drafting various versions of the ECCC Law and suggested the hybrid structure of the court, as well as the 'supermajority' voting requirement.¹³³ Scheffer also played a key role in limiting the court's personal jurisdiction clauses to senior leaders of the Khmer Rouge responsible for serious violations, which excluded both lower-level officials regardless of the seriousness of their crimes and the highest leaders if their crimes were not serious (Heder, 2009: 190). Once the court was established, US officials were involved in several trainings for court officials, and advocated for international standards to be upheld. For example, in May 2006, Scheffer briefed the press and the Cambodian

¹³³ War Crimes Ambassador David Scheffer prepared a concept paper proposing a special trial chamber and special appeals chamber in the Cambodian courts with participation by international judges and prosecutors. He suggested that the Cambodians would be in majority but that there would be a need for a broad majority for decisions. The implication was that the international judges could not be ignored and at least one of them had to be behind a decision. For instance, for a decision at trial court there would be a need for support by four of the five judges, in the Appeals by five of the seven. This was called a 'supermajority' vote requirement. Senator John Kerry presented this proposal to Hun Sen.

national judges on international standards of due process applicable to the ECCC. He also helped resolve a dispute between the Cambodian and international judges over the court's internal rules. The US was also involved in discussions about the court's legacy.

The US was a driving force behind the establishment of the Special Court for Sierra Leone. The US played a key role in getting Taylor transferred to the court and followed his trial closely as a prominent member of the Court's Management Committee. The US continually urged for the trial's completion.

With regard to the TRC, the State Department supported the inclusion of a TRC in the peace agreement and USAID's Office of Transition Initiatives financially supported civil society groups in their efforts to draft a TRC Act, however US officials were not involved in drafting the Act or determining the commission's structure.¹³⁴ Once the TRC was operational, the US Embassy was heavily involved in working with the TRC Commissioners as a member of the TRC-ICGL working group.¹³⁵ The ICGL worked closely with the TRC for several months on detailed aspects of TRC operations such as interpreting their mandate, organizational structure, workplanning, planning for statement taking and public hearings and advocacy of international standards. The State Department indirectly supported the Commission through its support of Benetech, an organization that assisted the TRC

¹³⁴ USAID's Office of Transition Initiatives four grants contributed to the following activities: One grant for \$90,000 for training and other capacity building for the Transitional Justice Working Group (TJWG); One \$65,000 grant to the same group for a perception survey and qualitative research in four counties on what people thought of justice at the time and what they wanted out of a TRC; One \$36,000 grant to the same group for another quantitative survey in all 15 counties to complement the qualitative survey; One \$33,000 grant to the same group to help them put together an advocacy campaign around justice issues, so their thoughts could reach the general public (John Gattorn, email communication, 21 July 2011).

¹³⁵ ICGL stands for the International Contact Group on Liberia - a coalition of donor and West African regional governments formed in September 2002 to coordinate a comprehensive, regionally-focused resolution to the second civil war that burgeoned beginning in 2000, of which the US was a key founding member. Article XXXIII of the CPA called on ECOWAS, the UN, the African Union and the ICGL (Nigeria, Ghana, US and UK) 'to ensure that the spirit and content of this Peace Agreement are implemented in good faith and with integrity by the Parties.'

in coding its statements. As the deadline approached for the TRC to submit its final report, embassy officials pressured the TRC Chairman to submit the final report by a certain date.

In the Colombia case, the US followed the negotiations of the justice and peace law, urged the Colombian government to ensure accountability for human rights violations and contributed funding to an organization that advised the drafting of legislation. US pressure during the negotiations influenced at least some changes to the law, including lengthening the investigation time frame and scope, and the loss of benefits if a participant failed to give information known about group structure, etc. (El Tiempo, 2005). The Justice and State Departments also came out strongly against discussions about prohibiting the extradition of paramilitary leaders to the US, and are therefore likely to have influenced the decision to exclude this prohibition from the law. Once the law was passed, the DOJ and USAID were directly and indirectly involved in training staff in the Justice and Peace Unit and National Commission for Reparation and Reconciliation, and advocated for international standards in both bodies.¹³⁶

It was surprising to see the technical involvement of US officials in detailed aspects of all of the measures, particularly in drafting their founding laws and influencing their structure. This level of involvement pointed to a pragmatism among US officials that wanted to get measures established, make sure they were operational and then close them down. This was linked to the fact that they were

¹³⁶ DOJ's approach was to look at the law from the optics of the accusatory system and to focus on obtaining information. DOJ therefore focused its assistance on helping build JPU capacity to aid in the investigation and prosecution of crimes committed by former paramilitary members (State Department, 2009: 39). DOJ officials also arranged proffer sessions with prosecutors and investigators, helping them to 'think' like prosecutors, and was involved in training exhumation units and arranging closed-circuit sessions with paramilitaries (DOJ official 1, interview, 6 September 2010).

significant donors and wanted their money used efficiently. It also had to do with the sheer number of officials with diverse areas of expertise that engaged with a measure at different points in its establishment and operations. In more abstract terms, US technical involvement also allowed the US to export its ideas about the rule of law and justice to a particular measure, and to ensure that measures were carried out in a way that fit with these views. US political support to transitional justice measures is explored next.

Political support

US political support fluctuated over the course of each measure’s establishment and operations. The US opposed early efforts to establish the measures explored in this study, but then changed course and advocated for their establishment. The US passed legislation, made statements and used financial assistance to support or oppose measures. Others garnered very little attention. In some cases, the US advocated for certain individuals to hold positions in the process. The following table illustrates these indicators across the three case studies with a subsequent discussion of examples from each case and preliminary analysis.

Figure 15: US political support of transitional justice

| | Cambodia | Liberia | | Colombia |
|---|----------|---------|-----|----------|
| | ECCC | Taylor | TRC | JPP |
| Early opposition to and later pressure for a measure’s establishment | x | x | | x |
| Use of legislation, statements and/or financial assistance to support or oppose a measure | x | x | x | x |
| Advocacy for certain individuals to hold a position in process | x | x | | |

With regard to the Cambodia case, one US official felt that the political intervention had been more important than a financial contribution: ‘The US hasn’t spent a dime,

but political backing has been essential in Cambodia' (US official 3, interview, 23 February 2010). The US opposed early efforts to indict the Khmer Rouge for genocide or other crimes against humanity (Stanton, ND). However, after a number of congressional debates, resolutions and petitions,¹³⁷ Congress eventually passed the Cambodian Genocide Justice Act in 1994, which made it US policy to support efforts to bring to justice members of the Khmer Rouge, set up a new office that would be responsible for supporting investigations, and develop a proposal for the establishment of an international criminal tribunal. The US then applied pressure (which some felt had become political interference)¹³⁸ on the Cambodian government, and especially the UN, at several points during the many years that it took to negotiate the establishment of a tribunal.¹³⁹ Once the ECCC was established, congressional support fluctuated with resolutions and bills that opposed and supported it. Americans did not hold high-level positions at the court, however, the US did advocate for former War Crimes Ambassador Clint Williamson to serve as UN Special Expert to provide support to the ECCC in 2010. Scheffer was subsequently appointed to this role.

Although there was no discussion of accountability in the 1990s as Taylor committed widespread human rights violations in Liberia, there was discussion about

¹³⁷ US House of Representatives Joint Resolution 602 and US Senate Joint Resolution 347, 1988; US Public Law No. 100-502, 1988; US House of Representatives, 1991

¹³⁸ One critique of a UN draft agreement which offered several concessions based on UN and CPP demands stated that the trial would be subject not only to political interference by Hun Sen, but also by 'precisely those foreign powers that had been pressuring the UN all along,' especially France and the US, which would not hesitate 'to sabotage justice at every turn if there is any political reason to do so' (UN Non-Paper, 2000: 34).

¹³⁹ For example, Under Secretary for Political Affairs Tom Pickering pressed Hun Sen to endorse a 'special chamber' in the Cambodian courts which would have a majority of international judges (Scheffer, 2008: 229); Several US Senators urged Kofi Annan to send a negotiating team to Cambodia, and argued that the team 'should be dominated by high-powered political deal-makers, not legal 'purists' (UN Non-Paper, 2000: 4); Congress adopted a concurrent resolution urging the President to encourage the National Assembly of Cambodia to ratify the agreement between the UN and Cambodia to establish the ECCC and to provide support for the establishment and financing of the tribunal, consistent with the Cambodian Genocide Justice Act (US House of Representatives Concurrent Resolution 399, 2004).

military intervention. However, this did not take place due to a lack of consensus among US agencies (Kansteiner, 1996). In 2000, some members of Congress wanted Taylor removed from power and support for the establishment of the Special Court was in part aimed at achieving this goal. David Crane's appointment as Chief Prosecutor was strongly supported by the US. Once the Special Court was established and unsealed an indictment against Taylor, however, State Department officials opposed the decision since they had negotiated a deal with Nigeria to provide Taylor with asylum (Hayner, 2007: 10). Some members of Congress felt differently, and pressured the Nigerian government to transfer Taylor through a range of resolutions and threats to limit US assistance (i.e., US P.L. 108-199, 2004: 206; US H.Con.Res. 127, 2005; US H.Amdt. 480, 2005; US P.L. 109-102, 2005: 67). Congress also pressed the Bush administration to act more urgently on the issue (i.e., US House of Representatives, 2006), which it eventually did in discussions with the Liberian and Nigerian governments (US State Department, 2005; Cook, 2005: 13). A leaked cable revealed that US officials were considering Taylor's prosecution in the US after his trial finished at the Special Court to prevent his return and ability to destabilize Liberia or the region (Hirsch, 2010).

During the Liberian peace talks, the US was opposed to amnesties for war crimes and a war crimes tribunal, but supported the establishment of a TRC. The US embassy did not apply pressure to establish the TRC, but did support its operations as a member of the TRC-ICGL working group. Once the TRC submitted all versions of the report, the US distanced itself from the report and its recommendations through an ICGL statement that said it was Liberia's responsibility to take future steps in implementing report recommendations.

Initial versions of the Colombian justice and peace law provoked criticism from the US Congress who raised concerns about impunity for human rights violations committed by the AUC.¹⁴⁰ The Justice Department did not want the law to affect the extradition of paramilitary leaders accused of drug trafficking to the US, and submitted a request for the extradition of several leaders.¹⁴¹ Despite concerns about the law, the US publicly expressed support for the justice and peace process and was an early donor to the process.

This section illustrated that the US opposed early efforts to establish several measures, but then changed course and applied pressure for their establishment. The US passed legislation, made statements and used financial assistance as a way to support or oppose a measure. In some cases, the US advocated for certain individuals to hold positions in the process.

Reasons for fluctuating political support are many. When a measure had clear political implications for the US, its support depended on whether the measure would help or hinder US interests. Sometimes the US had committed to a measure's establishment and would focus on this, no matter the cost. In addition, US support or opposition was affected by the relationship with the country where the measure was being established. In many cases, political support or opposition depended on individuals who took an interest in a particular measure. US cooperation with other actors on transitional justice measures is next explored.

¹⁴⁰ For example, see Letter to President Uribe, Organized by Rep. Tom Lantos, 2003; Letter to President Uribe from Senator Lugar, 2005; Letter to President Uribe from several Democratic senators, 2005; Juan Forero, 2005; El Tiempo, 2005.

¹⁴¹ For example, see BBC News, 2004; El Tiempo, 2003/2004.

Cooperation with other actors

US cooperation with the range of actors involved in transitional justice varied across the three cases. These actors include: the country establishing a measure (i.e., the government, civil society groups); other international actors (i.e., other foreign state governments, the UN, international NGOs); and US domestic actors (i.e., NGOs). The following table illustrates whether or not the US cooperated with these actors across the three case studies with a subsequent discussion of examples from each case and preliminary analysis.

Figure 16: US cooperation with other actors on transitional justice

| | Cambodia | Liberia | | Colombia |
|--|----------|---------|-----|----------|
| | ECCC | Taylor | TRC | JPP |
| TJ country (i.e., the government, civil society groups) | x | x | x | x |
| International actors (i.e., foreign state governments, UN, international NGOs) | x | x | x | |
| US domestic actors (i.e., NGOs) | x | | | |

In the Cambodia case, the US refused to support early Australian government proposals (in 1986 and 1991) for an international tribunal to judge the crimes of the Khmer Rouge (Stanton, ND). When this position changed, however, the US cooperated extensively with the Cambodian government and the UN during the negotiations of the ECCC and saw itself as playing an intermediary role between the two in order to reach an agreement. Although War Crimes Ambassador Scheffer said that the US was not willing to step in as an alternative to the UN and could not support or take part in any trial which was not approved by the Secretary-General, the US put significant pressure on the UN to engage with Hun Sen and make concessions (South China Morning Post, 2000c; UN Press Briefing, 2000). The UN's reduced demands 'were further undercut' by calls from the US and Japan to be 'even more flexible and creative' in defining minimum standards for judicial independence

and fairness.¹⁴² When the UN-Cambodia negotiations fell apart, the US participated in the ‘Group of Interested States’, which discussed possibilities for an international effort to revive them (UN GA Resolution 57/228, 2003). After the tribunal was established, some US and UN officials cooperated in order to break the gridlock on US funding of the court. US cooperation with Cambodian civil society typically involved meetings with Youk Chhang, the Director of DC-Cam. Some civil society groups expressed frustration that DC-Cam received the majority of US attention and funding. Embassy officials also met often with the international NGO, the Open Society Justice Initiative, on tribunal issues.

In the Liberia case, the US worked with the Liberian and Nigerian governments as well as ECOWAS on Taylor’s arrest and transfer to the Special Court. The US also worked with the International Criminal Court and the Netherlands on his move to The Hague. During the trial, the US worked with other foreign state governments (primarily the UK and the Netherlands) on the Court’s Management Committee, and communicated regularly with senior court officials to determine how the US could support its efforts. The US did not work in any significant way with Liberian or American civil society on the Taylor issue, although several organizations pressured the US to transfer Taylor to the court.

With regard to the Liberian TRC, the US worked primarily as a member of the ICGL, interacting with the TRC Commissioners and international NGOs like the International Center for Transitional Justice, Carter Center, Benetech and Advocates

¹⁴² Associated Press, 2000c. Cambodia expert and former ECCC international staff Stephen Heder criticized US pressure on the process: ‘This was part of a larger pattern of pressure on the UN by the US and other governments with diplomatic interests to pursue vis-à-vis the Royal Government of Cambodia (RGC). Most importantly, after obtaining UN acquiescence to a severely limited personal jurisdiction, they also forced it to agree to involve itself in assisting with what the UN was certain would be much less than fair trials, as the CPP’s control over the Cambodian court system via its domination of the RGC was sufficient to ensure that the extraordinary chambers would not adhere to international standards of judicial independence and impartiality. They have further limited the court’s prosecutorial reach by insisting that the budget for investigations, trials and defense be kept low’ (Heder, 2009: 191).

for Human Rights. The US worked less with Liberian and American civil society, but did assist the Transitional Justice Working Group (a group of local Liberian human rights groups) in their efforts to improve the TRC Act. After the release of the TRC report, the ICGL statement and a visit by Secretary of State Hillary Clinton made clear that the US would not be involved in TRC follow-up, and supported Liberian government decisions on the matter.

In the Colombia case, the US cooperated primarily with the Colombian government agencies in charge of JPP institutions. The US chose not to work with UNDP, the designated agency to coordinate international support to the justice and peace process. Instead, the US worked bilaterally with the Colombian government. USAID assistance was directed to the Colombian government and civil society groups, and DOJ assistance was contributed directly to the JPU. The US did not collaborate with American civil society on the justice and peace process in a significant way.

The US has cooperated with a range of actors on transitional justice measures, including the government and civil society actors within a country establishing a measure, international actors such as the UN and INGOs and to a much lesser extent, American organizations. Although the US cooperated significantly with TJ governments, in some cases, the emphasis on ensuring government agreement led its promotion of measures that were flawed. The US cooperated with international actors in some instances, but not in others. At times this was because the US was less interested in a measure (i.e., Liberian TRC), and at other times, it was because the US did not want to be slowed down by international cooperation (i.e., Cambodia and Colombia). However, the US did rely on some international NGOs for information about a measure or their technical expertise (i.e., Cambodia and Liberian TRC).

Cooperation with civil society groups, both within the country establishing a measure and within the US, was less prevalent. Primary attention was given to the government establishing a measure. That being said, the US did financially support some local civil society groups and would request their insight throughout the process.

This section explored US involvement in three cases of transitional justice. US involvement was broken down by its financial, technical, political support and cooperation with other actors. A number of indicators were identified based on the case study research and then compared across the three cases in order to highlight trends in US involvement. The research establishes the following:

1. Financial support: Although the amount varies and is at times blocked, the US typically provides early and consistent financial assistance to transitional justice measures. The US provides greater financial support to criminal prosecutions than other measures.
2. Technical support: The US is involved in detailed, technical aspects of a measure's establishment and operations.
3. Political support: US political support fluctuates over the course of a measure's establishment and operations. The US first opposes efforts to establish a measure, but then changes course and applies pressure so it is established. The US passes legislation, makes statements and/or uses financial assistance as a way to

express support or opposition to a measure. The US advocates for certain individuals to hold positions in the process.

4. Cooperation: The US cooperates most strongly with the government that establishes a measure, and less so with local civil society groups. The US may or may not work with other international actors including foreign state governments, international organizations and NGOs. The US does not interact significantly with US domestic actors.

Categorizing US involvement in this way helps to demonstrate the many different ways in which the US has engaged in the field. These findings also provide an empirical basis for the following discussion about why the US has been involved.

6.2 Explaining US Involvement

Several explanations for US involvement in transitional justice surfaced in this study, but two factors emerge as most important: individuals and interests. Specific individuals and the institutions they represent have been critical in shaping US foreign policy on transitional justice. In addition, the research sheds light on the role that interests play in explaining US involvement. This section draws upon theoretical approaches proposed by foreign policy scholars (which were briefly explored in chapter 1) since the highly complex cases examined in this study require a range of tools to adequately understand US foreign policy on transitional justice.

Individuals

The importance of individuals is a key finding of this research, since even one individual who took an interest in a measure could have a significant impact on US foreign policy making on transitional justice. This explanation combines behavioural and bureaucratic models of explaining foreign policy in finding that the different views of various sectors of government matter, but that one must also consider the role, personality and values of individuals.

Presidential administrations ‘set the tone’ for US policy on the field. Members of Congress determined financial support, but also political support or opposition in the form of statements, resolutions and conditions on funding, and even technical involvement. The State Department engaged in a range of different activities related to transitional justice, although the office or bureau varied from measure to measure. Depending on the measure and country, USAID and DOJ provided specialized expertise. Individuals within these agencies were crucial to defining US foreign policy on transitional justice.

Within the case studies, members of Congress and State Department officials played key roles in the Cambodia and Sierra Leone tribunals, whereas USAID and DOJ were central to the Colombian justice and peace process. The Liberian TRC failed to receive notable attention by individuals. The following table shows which case studies garnered individual interest by government agency.

Figure 17: Individual interest in transitional justice by agency

| | Cambodia | Liberia | | Colombia |
|------------------|----------|---------|-----|----------|
| | ECCC | Taylor | TRC | JPP |
| Administration | | x | | |
| Congress | x | x | | |
| State Department | x | x | | |
| USAID | | | | x |
| DOJ | | | | x |

Other US actors such as the National Security Council, Department of Defense, Central Intelligence Agency and Federal Bureau of Investigation have also been involved in transitional justice, but did not play a prominent role in the cases explored in this research. This discussion draws on examples from the case studies in order to illustrate how individuals help explain US foreign policy on transitional justice.

Presidential administrations

Presidential administrations have taken different approaches to transitional justice, which affected individual measures established or operating during their term. The Clinton administration was supportive of justice initiatives, and US support for criminal tribunals and the establishment of the war crimes office came from high levels in his administration, particularly Secretary of State Madeleine Albright, who championed the issue and made it part of her legacy in office.

The Bush administration was less interested in issues of international justice, but initiated the shift toward a focus on national systems. High levels within his administration, including President Bush himself, Secretary of State Condoleezza Rice and Assistant Secretary of State Jendayi Frazer were heavily engaged with the Taylor issue and played a key role in his transfer to the Special Court. This can be explained by their prioritization of African policy, and Liberia in particular. The Cambodia tribunal, Liberian TRC and Colombian JPP failed to attract noteworthy attention in the Bush administration.

The Obama administration was seen to represent a shift from his predecessor on transitional justice-related issues. SCSL and ECCC support remained steady. Secretary of State Hillary Clinton vocalized support for Liberian President Sirleaf,

avoiding mention of the TRC. The Colombian JPP did not garner the administration's attention.

There is continuity across the last three administrations' approach to transitional justice. Although to differing degrees, each has maintained involvement in this area since the 1990s. Both the Bush and Obama administrations considered eliminating the war crimes office, but they ultimately decided to retain it.¹⁴³ Each administration has provided greater attention to criminal prosecutions over other TJ measures. The approach of each administration has also been connected to, and arguably responsible for, at least in part, developments in the field (i.e., from support to ad-hoc tribunals in the 1990s to a focus on hybrid models, national systems and the ICC in the 2000s).

Congress

Due to its foreign policy oversight and appropriations responsibilities, Congress played an important role in transitional justice. However, many FPA scholars and even congressional staff overlook the role of Congress (and political parties).¹⁴⁴ One staff member of the House Foreign Relations Committee thought that Congress was unimportant for this study (Congressional staff member, interview, 16 April 2010). Interestingly, however, Congress took strong positions on transitional justice measures. Even more surprising was the involvement of Congress members in detailed, technical aspects of a measure's establishment. Congressional involvement showed how important the support or opposition of even one member of Congress could be.

¹⁴³ David Scheffer, interview, 12 March 2012. Regarding the ICC, Clinton did not recommend ratifying the ICC. Bush then advanced policies that opposed the court, but, by his second term, he reversed some of these policies and began to support the court. Obama continued a more active engagement policy with the ICC. For more information, see the ICC discussion in chapter 3.

¹⁴⁴ See, i.e., Freedman, 1976, Caldwell, 1977, Alden and Aran, 2012.

Senator Chuck Robb sponsored the Cambodian Genocide Justice Act, which made it US policy to investigate Khmer Rouge crimes. During the many years it took to establish the Cambodia tribunal, Senator John Kerry (a Democrat from Massachusetts and member of the Foreign Relations Committee) was heavily involved in the negotiations, flying to Phnom Penh several times to talk with Hun Sen about specific technical issues regarding the tribunal's establishment. When the tribunal was established, Senator Mitch McConnell (Republican from Kentucky and member of the Appropriations Committee) almost single-handedly blocked US funding of the court for several years.¹⁴⁵

In the Liberia case, Senator Judd Gregg expressed early interest in a Special Court as a way to remove Taylor from power. After the Special Court's indictment, members of Congress (particularly from the Congressional Black Caucus and House Africa Subcommittee including Reps. Watson, Payne and Royce) applied pressure on the Bush administration and Nigeria for several years to transfer Taylor to the court.

In the Colombian case, several members of Congress (i.e., Rep. Tom Lantos, a Democrat from California, and other members of the House International Relations Committee; Senator Richard Lugar, Republican from Indiana and then-Chair of the Senate Foreign Relations Committee; several senior Democrat Senators, including Patrick Leahy, Joe Biden, Chris Dodd, Edward Kennedy and Russ Feingold) opposed early drafts of the justice and peace law and urged President Uribe to ensure accountability for human rights violations. Once the justice and peace law was passed, Congress specifically earmarked funds for the Justice and Peace Unit.

¹⁴⁵ In 2001 McConnell announced his opposition to the tribunal and called on the Bush administration to reverse the US policy of support for genocide justice in Cambodia. According to several interviewees, his opposition stemmed from a 1997 grenade attack of a rally of an opposition party (the Sam Rainsy Party), in which 13 Cambodians were killed and an International Republican Institute (IRI) staff member, Ron Abney, was injured. IRI and Abney said they were "confident" that Hun Sen was responsible for the attack (Wells-Dang, 2004). McConnell's chief of staff, Paul Grove, was a former IRI representative in Cambodia and Asia director at IRI in Washington and convinced McConnell to block funding to the court unless Hun Sen no longer held power.

Bipartisan congressional involvement from members of the House and Senate Appropriations Committees and Foreign Relations Committees entailed financial and political support (or opposition) of transitional justice with a focus on criminal prosecutions. Congressional pressure influenced shifts in the position of the administration, State Department and other state governments. This pressure can be attributed in part to its oversight responsibilities as members of certain committees. However, individual members of Congress took particular interest in certain measures, even engaging in detailed technical aspects of their establishment. Often this was based on personal interest in the measure or country in question.

State Department

The State Department has an obvious role to play in transitional justice. A number of offices and bureaus in the agency have been involved including the embassies, regional bureaus, Office of War Crimes Issues, Office of the Legal Advisor and the US Mission to the UN (USUN).

US embassies are the first point of contact between a country establishing a measure and other US government actors.¹⁴⁶ Political and legal advisors and even US Ambassadors were involved in the establishment and operations of measures. For example, US Ambassador to Cambodia Kent Wiedemann spent a significant amount of time on tribunal negotiations. US Ambassador to Colombia William Wood met with proponents of the draft justice and peace law and insisted that the law not affect the extradition of paramilitary leaders accused of narco-trafficking. In Liberia, embassy officials participated in the TRC-ICGL working group, and monitored TRC operations closely.

¹⁴⁶ US embassies work to improve political, economic, and cultural relations between almost every country worldwide and the US.

Regional bureaus follow transitional justice developments.¹⁴⁷ At times, high levels within a bureau became engaged. Otherwise, the country desk officer monitored the measure, staying up-to-date via reports from the US embassy. For example, Assistant Secretary of African Affairs Jendayi Frazer was a strong advocate for the US role in Liberia and eventually supported Taylor's transfer to the Special Court. The Cambodian Genocide Justice Act established an Office of Cambodian Genocide Investigation within the Bureau of East Asian and Pacific Affairs. This office provided grants to Yale University's Cambodian Genocide Program (CGP) to conduct research, training and documentation relating to the Khmer Rouge regime.

The War Crimes Office has a specific mandate related to TJ and each ambassador has been involved in various TJ activities. Steve Smith's argument that the actual role assumed by individuals holding positions of authority comes into play here since the war crimes ambassadorship is directly responsible for US foreign policy on transitional justice (Hollis and Smith, 1986). Although Smith downplays the role of personality, this study finds that both role and personality are important.

The first war crimes ambassador David Scheffer was a pivotal figure in transitional justice, aided by Albright's high-level support. He said he was 'successful' in building the ICTY, ICTR, SCSL, ECCC and ICC during his term, but 'failed' to establish tribunals in five other contexts in which he exerted significant effort.¹⁴⁸ He continued his engagement with the Cambodia court and other transitional justice measures after his term as Ambassador ended.¹⁴⁹

¹⁴⁷ Regional bureaus advise and guide the operation of the US diplomatic missions within their regional jurisdiction.

¹⁴⁸ Scheffer said: 'I spent an enormous amount of time in DRC, Burundi, Sudan, Chechnya and Iraq – all for the purpose of building war crimes tribunals in those five jurisdictions [for violations committed in the 1980s and 1990s], and I failed in each one of these. I was very involved in building five tribunals, and five others that never got built' (David Scheffer, interview, 12 March 2012).

¹⁴⁹ Before working for Madeline Albright, David Scheffer received B.A.s from Harvard and Oxford University, and a LL.M. from Georgetown University Law Center. He began his legal career at the

The second ambassador, Pierre Prosper, was involved in the Special Court, but much of his time was spent on the ICC and Guantánamo detainees.¹⁵⁰ Prosper said:

My portfolio as war crimes ambassador changed dramatically [from the work that Scheffer had undertaken]. I was very busy on detainee issues. I met with the White House Council on 19 September 2011 and helped coordinate the inter-agency approach. It was all hands on deck. People forget that we were scrambling. It made sense that my office covered these issues (Pierre Prosper, interview, 22 April 2010).

Although Prosper's focus was dictated to a large extent by the changes that took place after 9/11, he also believed in the need to prioritize national processes and consider other measures as alternatives to criminal prosecutions.

Punishment is up to discussion, debate and creativity. We conflated accountability and punishment. We ignored the South African model. We ignored the TRC ... We started to push hybrid processes because you can tailor them to domestic needs ... You must look at traditional approaches such as gacaca or TRCs because that is what communities will understand. There are too many perpetrators to jail everyone. The Clinton administration was focused on a judicial approach. But the Bush administration embraced other options, despite the reluctance of others who were focused on the ICC ... We need to build more rule of law locally. I am an idealist in the other way. We should never have international tribunals (Ibid).

The third ambassador, Clint Williamson, was in office during a transition period in US policy in this area, noting that he worked 'under the radar' and tried to return to

international law firm Coudert Brothers, working for a time in their Singapore office. He also served as counsel to the US House Committee on Foreign Affairs.

¹⁵⁰ Prosper received his undergraduate degree from Boston College and his law degree from Pepperdine. Prosper was a Deputy District Attorney for Los Angeles County, California from 1989 to 1994. From 1994 to 1996, he was an Assistant US Attorney for the Central District of California in Los Angeles. From 1996 to late 1998, Prosper served as a war crimes prosecutor for the ICTR. Appointed lead trial attorney, Prosper successfully prosecuted the matter of the Prosecutor against Jean-Paul Akayesu, the first-ever case of genocide under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. In the 14-month trial, he won additional life-sentence convictions for crimes against humanity and broke new ground in international law by convincing the Tribunal to recognize rape committed in time of conflict as an act of genocide and a crime against humanity. Prosper served as a career prosecutor at the US Department of Justice where he was Special Assistant to the Assistant Attorney General for the Criminal Division in 1999. From 1999 to 2001, Prosper was detailed to the State Department where he served as the Special Counsel and Policy Adviser to the previous war crimes ambassador, David Scheffer. Prosper was nominated by President George W. Bush on 16 May 2001 to become the second war crimes ambassador. After being confirmed by the US Senate, he was sworn in on 13 July 2001. He served until October 2005.

more ‘traditional’ activities of the war crimes office (Clint Williamson, interview, 21 April 2010). This statement seems to indicate his support for the reversal of some of the policies instituted during Bush’s first term. After his term ended, he was appointed as UN Special Expert to the Cambodia court (a position Scheffer was subsequently appointed to as well). In the Cambodia case, Williamson helped lift the congressional block on US funding to the tribunal.¹⁵¹

The fourth ambassador, Stephen Rapp, has engaged with the tribunals, the creation of commissions of inquiry in Cote d’Ivoire, Kyrgyzstan, the ICC and other transitional justice measures. Rapp has also taken on the role of clarifying and explaining US positions to various transitional justice issues, particularly US support for the ICC.¹⁵²

¹⁵¹ Clint Williamson holds a bachelors degree from Louisiana Tech University and a law degree from Tulane University Law School in New Orleans. Williamson served as a Trial Attorney in the US Department of Justice Organized Crime Section and as an Assistant District Attorney in New Orleans, LA. From 1994 to 2001, he worked as a Trial Attorney at the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague, Netherlands. While at the ICTY, he supervised investigations and field operations in the Balkans, compiled indictments, and prosecuted cases at trial. Among the cases handled by Ambassador Williamson were those against Slobodan Milosevic and the notorious paramilitary leader Zeljko Raznatovic, aka “Arkan,” as well as cases arising from the Yugoslav Army attacks on Vukovar and Dubrovnik, Croatia. From late-2001 through 2002, he served in the UN Department of Peacekeeping Operations as the Director of the Department of Justice in the UN Mission in Kosovo, overseeing the justice and prison systems. From 2003 to early-2006, he served as the Director for Stability Operations on the NSC staff. During his tenure at the White House, he was instrumental in developing the proposal for creation of a standing US Government post-conflict response capability, which was realized with the establishment of the Office of the Coordinator for Reconstruction and Stabilization in the State Department in mid-2004. While with the NSC, Ambassador Williamson served a rotation in Baghdad, Iraq in 2003 as the first Senior Adviser to the Iraqi Ministry of Justice. In this capacity, he was responsible for re-instituting judicial operations and ministry functions in the aftermath of the US invasion. Immediately prior to his appointment in the Department of State, Ambassador Williamson served as the Acting Special Assistant to the President and Senior Director for Relief, Stabilization, and Development at the NSC. Williamson was confirmed as the third war crimes ambassador in June 2006 and served until September 2009.

¹⁵² Rapp received his B.A. degree with honors from Harvard University in government and international relations. He attended Columbia Law School and received his J.D. degree with honors from Drake University. Rapp was the US Attorney in the Northern District of Iowa from 1993 to 2001, where his office won historic convictions under the firearms provision of the Violence Against Women Act and the serious violent offender provision of the 1994 Crime Act. Prior to his tenure as US Attorney, he worked as an attorney in private practice and served as Staff Director of the US Senate Judiciary Subcommittee on Juvenile Delinquency and as an elected member of the Iowa Legislature. From 2001 to 2007, Rapp served as Senior Trial Attorney and Chief of Prosecutions at the ICTR, personally heading the trial team that achieved convictions of the principals of RTLM radio and Kangura newspaper—the first in history for leaders of the mass media for the crime of direct and public incitement to commit genocide. In 2007, Rapp succeeded Desmond de Silva to become the

The war crimes ambassadors are therefore not career civil servants, but have come to the position with specialized, and often prosecutorial, experience in international criminal tribunals. They therefore have brought a different perspective to the position and a different network, since their former colleagues are tribunal staff. The following table illustrates the profiles of the war crimes ambassadors.

Figure 18: War crimes ambassadors' profiles

| Experience | Scheffer | Prosper | Williamson | Rapp |
|------------------------|--|--|--|-------------|
| Law degree | LLM | JD | JD | JD |
| DOJ | | x | x | x |
| Congress | x | | | x |
| NSC | x | | x | |
| Private practice | x | x | | x |
| Academia | x | | | |
| International tribunal | | ICTR | ICTY | ICTR/SCSL |
| UN | UN Special Expert to Cambodia Tribunal | UN Committee on the Elimination of Racial Discrimination | DPKO/UNMIK; UN Special Expert to Cambodia Tribunal | |

Past tribunal experience has brought the ambassadors credibility when interacting outside US government. For example, an ICTY advisor said that the war crimes ambassadors have been the ICTY's first point of contact in the US and the ICTY's strongest supporter. He said that other states should have a similar office because someone with 'horizontal knowledge of war crimes issues is important.' In addition, he added that the war crimes office has 'convinced' other countries and US government actors to support the tribunal. Since they are former colleagues, he said, 'we see each other as part of the same team. We have the same line of thinking.'

third Chief Prosecutor of the Special Court for Sierra Leone, where he directed the prosecution of former Liberian President Charles Taylor and others alleged to have violated international criminal law during the Sierra Leone Civil War. During his tenure in Sierra Leone, his office won the first convictions for recruitment and use of child soldiers and for sexual slavery and forced marriage as crimes under international humanitarian law. Rapp was appointed Ambassador-at-Large for War Crimes Issues by President Barack Obama, and confirmed by the US Senate in September 2009.

There is friendship and respect of one another. They are good advocates of our work' (Frederick Swinnen, interview, 13 January 2012). Despite this specialized expertise, the war crimes office does not necessarily hold the same influence within the State Department as the regional bureaus or other agencies (David Scheffer, interview, 12 March 2012).

The Office of the Legal Advisor has also been involved in transitional justice measures when deemed necessary due to its role to advise on international law.¹⁵³ For example, Bush's legal advisor, John B. Bellinger III, was involved in moving Taylor's trial to The Hague. Obama's legal advisor, Harold Koh, has followed the tribunals as well. The US Mission to the UN gets involved when transitional justice measures are supported by the UN. Several Court Management Committees (i.e., for the SCSL), for example, are based in New York with participation by USUN officials.

This discussion illustrates that the State Department plays several roles in transitional justice because of the different mandates of various agency offices and bureaus. US embassies are typically the first point of contact since they are based at the location where a measure is established. They engage with measures in many different ways and monitor them closely. Some measures drew the attention of Ambassadors or officials from regional bureaus, but this occurrence had more to do with concerns about the measure's impact on US interests than with their personal interest in a measure. War crimes ambassadors take the lead on criminal tribunals, providing technical support to measures and serving as an interlocutor between

¹⁵³ The Office of the Legal Adviser furnishes advice on all legal issues, domestic and international, arising in the course of the State Department's work. This includes assisting Department principals and policy officers in formulating and implementing US foreign policies, and promoting the development of international law and its institutions as a fundamental element of those policies. The Office is organized to provide direct legal support to the State Department's various bureaus, including both regional, geographic and functional offices.

tribunals and other US government actors. Legal Advisors seem to project a viewpoint that lies between regional bureaus and the war crimes office. Individual attention within the USUN was less documented in this study but it is clear that these officials are knowledgeable and important to US involvement in transitional justice measures that involve the UN.

USAID and DOJ

USAID played a minor role in the Liberian TRC, and an important role in the Colombian case. USAID's Office of Transition Initiatives (OTI) provided initial support to civil society efforts to establish a TRC. OTI has received significant attention at State as a successful model to facilitate transition and promote stability (QDDR, 2010). USAID's Colombia office established an Office for Vulnerable Populations, which provided assistance for various aspects of the work of the National Commission for Reparation and Reconciliation (CNRR). Ileana Baca heads this office and has worked in Colombia for over ten years. US involvement is impacted by her long-term relationships with Colombian government agencies.

DOJ's Office of Overseas Prosecutorial Development Assistance and Training (*OPDAT*) and the *International Criminal Investigative Training Assistance Program (ICITAP)* have provided technical assistance to the Justice and Peace Unit responsible for investigating and prosecuting crimes committed by former paramilitary members under the Justice and Peace Law. These offices trained JPU prosecutors, helped with exhumations and provided supplies. A DOJ official said that because of the longstanding relationship between the DOJ and the Colombian Attorney General's office, failure to support the newly created Justice and Peace Unit within this office would have been 'irresponsible' – especially considering JPU

responsibility for much of the law's requirements (DOJ official 1, interview, 27 August 2010).

DOJ was also involved in the justice and peace process because of the extradition issue. DOJ made their concerns known to the Colombian government, and the US Deputy Attorney General submitted extradition requests for several paramilitary members during debates of the law. Several years later President Uribe decided to extradite 14 paramilitary leaders to the US that were participating in the JPP. Faced with JPU requests and NGO criticism (a situation unfamiliar for DOJ officials), the DOJ eventually undertook efforts to provide JPU access to AUC leaders, although the effect of these efforts remains unclear. Considering its legal focus, one would not have expected DOJ's involvement in transitional justice or the interest in additional involvement in measures elsewhere.

Transitional justice measures captured the attention of presidential administrations, Congress, the State Department, USAID, DOJ and other agencies. Bureaucratic politics explanations are useful in considering the role of *all* of these actors, with its attention on how different institutional settings influence the different prisms through which officials and politicians view foreign policy issues, which result in distinctly different views (Allison, 1971). It is also equally important to look at actors responsible for decision making (i.e., President and Congress) and those responsible for implementation (State, USAID, DOJ), as both groups play key roles in US foreign policy (i.e., Krasner, 1972; Lindblom, 1959).

The cases illustrate that individual, and often personal, interest mattered in US foreign policy-making on transitional justice. US support or opposition for a measure could be determined by even one individual who made the issue a priority.

Behavioural approaches which focus on the psychological and cognitive factors, personality, perception, biases and role of individual decision makers are thus useful in explaining US foreign policy on transitional justice (i.e., Sprout, 1956, Jervis, 1956, Boulding, 1959, Hollis and Smith, 1986). In addition, ‘policy entrepreneurs’ like Madeleine Albright and David Scheffer were crucial in initiating greater US involvement in transitional justice (Barnett, 1999).

The level of individual interest in a measure impacted levels of support for transitional justice. For example, the Liberian TRC received the least individual and institutional attention, as well as the least financial, technical and political support. The criminal tribunals explored in this study received high-level congressional and State Department attention, and subsequently were the object of significant US support. This finding supports Rosati’s research which recognizes that different circumstances mean that different actors exert varying degrees of influence on foreign policy (Rosati, 1981). He argues that the executive will be involved in situations where a higher level of threat is involved (i.e., Taylor); the bureaucracy will dominate in foreign policy issues of moderate importance (i.e., Cambodia tribunal and Colombian extradition issue); and local dominance should be expected on low priority issues (i.e., Liberian TRC and Colombian JPP).

Interests

A second factor critical to understanding US involvement in transitional justice is the role that interests play. There is a tension within US foreign policy on issues like transitional justice between a notion of interests that focuses on narrow rational, material, strategic interests concerning security and the economy, and broader interests encompassing values and identity. US involvement in transitional justice is

best explained by a conception of US interests that encompass strategic concerns *and* values. This explanation draws on several notions of interests in the foreign policy literature.

US involvement in transitional justice has provided a tool to pursue its rational, material, strategic interests. For example the US has used transitional justice as a way to support, oppose or remove the leadership of a country. It has been used as an alternative to the ICC. It has been used as way for the US to promote stability in a country or region or as an alternative to a military response. It has been used as a way to exert control. If a measure threatens to directly affect US interests, the US is quick to get involved.

The case studies provide examples. On the issue of a country's leadership, in Cambodia, Senator McConnell blocked funding to the court due to his distrust of Hun Sen. In Liberia, Senator Gregg supported the creation of a Special Court as a way to remove Taylor from power. When the TRC recommended that President Sirleaf be sanctioned for her past support of Taylor, the US embassy and others distanced itself from the TRC due to its strong support of her presidency. In Colombia, the Bush administration assisted the justice and peace process in part because of its support of the Uribe administration.

On the ICC issue, several interviewees stated that the US promoted the hybrid structure of the Special Court as an alternative model to the ICC (i.e., interviews with SCSL and ICC officials; also see Cerone, 2007: 305-306). The US needed to be seen as supporting some form of international justice, especially alongside such strong opposition to the ICC, and the hybrid model of the Special Court offered a way in which the US could claim continuing support for transitional justice efforts.

On the link made between transitional justice and stability, Rep. Diane Watson said that the US had a ‘duty’ to ensure Taylor’s transfer since he ‘remains a major source of instability’ in West Africa and said that ‘today's war criminals such as Slobodan Milosevic and Saddam Hussein are behind bars’ while ‘Taylor lives in freedom on a Nigerian estate’ (US House of Representatives, 2006: 33).

Two of the cases threatened to directly impact US interests. During the negotiations of the Justice and Peace Law in Colombia, the US insisted that the law not prohibit the extradition of paramilitary leaders that were also drug traffickers, and submitted extradition requests for several leaders to make this point clear. On the issue of a tribunal for Cambodia, the US Congress framed future discussions of the eventual measure by establishing that a court should prosecute those most responsible for crimes committed between 1975-79 (CGJA, 1994). War Crimes Ambassador Scheffer acknowledged that limiting the court’s focus in this way was at least in part due to the Nixon administration’s secret aerial bombings of Cambodia during the Vietnam War (Scheffer, 2002). These two examples show that US involvement was triggered by the possibility of a transitional justice measure affecting its interests.

US involvement in transitional justice has also promoted US values. Transitional justice clearly intersects with ideas about American identity, values and self-perception. The US has deeply rooted beliefs in justice and equality dating back to the country’s founding.¹⁵⁴ It views itself as the bearer of these ideals. Also embedded within American identity is a legalistic culture that holds the rule of law in high esteem.¹⁵⁵ Beth van Schack, who has recently taken a position in the US War

¹⁵⁴ For example, see Tocqueville, 1836; Bryce, 1888; Brogan, 1960/1972; Huntington, 1981; Slaughter 2007.

¹⁵⁵ For a critique of the dominance of legalism within the field of transitional justice, see McEvoy, 2007.

Crimes Office, said: ‘We’re so proud of our legal system. It’s one of our biggest exports – legal ideas and laws and lawyers ... It really is our contribution to the world ... We see ourselves as being a place where justice happens’ (Beth van Schack, interview, 31 October 2009). John Ciorciari similarly said:

The backdrop of US foreign policy is that America is promoting values. Trials are a good institutional mechanism for this—not only for advancing the cause of justice, but also because they are useful political processes. A foreign power can come in and support them. There are substantive merits (like reducing impunity), but trials also feel right. US foreign policymakers usually view themselves as the good guys. In criminal trials, there are winners and losers. Fighting to be on the right side gives policymakers a sense of mission and connects to US founding myths and principles (John Ciorciari, interview, 10 March 2010).

Professor Anne-Marie Slaughter, professor and former State Department official, said: ‘We take law seriously. We take it deeply seriously’ (Anne-Marie Slaughter, interview, 23 May 2012).

The US prides itself in its promotion of justice, as well as the legal institutions it has created and the standards it abides by. The combination of these two notions made (and continues to make) transitional justice an attractive field to US policymakers. Accountability for human rights violations touches on firmly held American beliefs. The US has therefore been involved in transitional justice because it believes in it. When coupled with a sense of responsibility as a superpower, US involvement in transitional justice makes sense.

The case studies provide some examples. The idea of a Cambodia tribunal elicited such strong support that Congress created an office within the State Department just to investigate and support prosecution of Khmer Rouge crimes. Statements by War Crimes Ambassador Scheffer also illustrated a strong belief in the importance of accountability for the violations committed. Regarding Cambodia, he stated, ‘We have a supreme responsibility to those who perished in Cambodia to

bring the leading perpetrators to justice’ (Scheffer, ND). Prosecuting Taylor drew a similar reaction. Members of Congress pressed the Bush administration and Nigeria to act on the issue for several years. Although the US was unwilling to support another war crimes tribunal in Liberia, they were also not willing to support amnesty and agreed to a truth commission as a compromise. Members of Congress urged the Uribe administration in Colombia not to pass a law that would permit impunity. USAID and DOJ support also showed a commitment to the justice and peace process.

Interviewees also spoke about how the measures were very ‘American.’ Jaya Ramji-Nogales, a member of the Board of Advisors to DC-Cam said, ‘the ECCC was a very American response’ (Jaya Ramji-Nogales, interview, 2 November 2009). Thun Saray, the director of the *Cambodian Human Rights Action Committee (CHRAC)*, said, ‘the idea for the ECCC came from the West’ (Thun Saray, interview, 19 July 2010). Similar comments were made about the Special Court for Sierra Leone.

Transitional justice may also be seen as a way to export US ideas about law and justice. One US official said, ‘There was a need in Cambodia for education about accountability and rehabilitation. Cambodians had esoteric notions of justice that were foreign to Northern Europe and the US’ (US official, interview, 4 August 2010). In the Colombia case, the US had been heavily involved in helping to shift Colombia’s legal system from an inquisitorial to an adversarial one.¹⁵⁶ Some referred to this shift as the US ‘exporting’ its legal system, while others more critically called it a ‘colonization’ of the Colombian justice system (Crandall, 2002). A US official explained that US involvement in the justice and peace process was ‘fundamental to

¹⁵⁶ USAID’s Justice Program in Colombia was also involved in this work from 1995-2005. The USAID Justice Reform and Modernization Program (2006-2010) was established to train judicial operators in the new accusatory system and create ‘justice houses’, virtual hearing rooms in remote, conflict prone areas, Public Defender Offices and support civil society organizations to promote justice reform and expand justice services. See USAID, 2008.

the development of the Colombian justice system.’ Within Congress, there was a recognition that the past emphasis on drug eradication had failed and a more balanced mix between military and non-military spending was necessary. This shift involved an increase in aid to strengthen the justice sector in Colombia, which included aid for the justice and peace process. DOJ and USAID involvement in the JPP focused on the issues they cared about most. For example, the DOJ focused on prosecutorial and investigative capacities in the JPU and less on victims’ rights and truth-telling. USAID initially focused on the reintegration of demobilized ex-combatants, but then shifted its focus to reparations and other activities for victims.

Material and non-material interests are thus both important to US foreign policy-making on transitional justice. However, policymakers have a difficult time reconciling the two. US involvement in TJ is typically framed as advancing US material interests, regardless of whether or not this argument is coherent. Scheffer said:

There’s an instinct in Washington that you *have* to say it’s in the national interest. When we sent 100 soldiers to Uganda in October 2011 to track Joseph Kony, the White House statement was all about why sending these soldiers was in our national interests. It was not - ‘we’re doing this for the larger principle of international justice’. They just wouldn’t frame it that way. There’s a real instinct within the White House and the NSC to speak in the language of national interests *all the time*, and not sound goosey fruity with [talk about] international justice, which someone will misinterpret as the god forbidden global governance argument (David Scheffer, interview, 12 March 2012).

Transitional justice advocates also use this argument in order to gain US support. The argument that transitional justice is in US national interests ‘plays *really* well to disarm the critics in Washington ... Although this approach is seen cynically internationally, it’s a necessary statement to make in the Washington environment’ (Ibid). Scheffer reconciles material and non-material interests by talking about US ‘global’ interests:

I think the US has to mature in its projection of these issues by saying: How do we meet our global interests in supporting international justice? Global interests can extend beyond narrow national interests, and include the projection of our values through the rule of law ... I would like to think we have a broader perspective on the world, which can talk about our global interests that assist other countries and the values of accountability, which also indirectly benefit the US and its position in the world (Ibid).

Professor Slaughter supports value-based arguments,¹⁵⁷ but said, ‘you don’t have to since a straight interest-based calculus is so convincing.’ For her, accountability can change the domestic balance of power in ways that elevate voices and institutions that are much more in US interests than a military response. In addition, since these issues are ‘no longer between us and the third world’, but ‘south on south’, ‘there is no question that we’d rather be able to send somebody to a court than send in the troops.’ She added, ‘standing for accountability for genocide, crimes against humanity, war crimes and ethnic cleansing...is a huge source of our power in the world. It’s not the only source, but it is a huge source of power’. However, she does distinguish between the export of domestic and international law. ‘We export domestic law’, she said, but are ‘suspicious of international law, much more so than the Europeans. We are willing to take it seriously in some key areas’, but ‘political reasons’ for US interests in TJ are stronger than its interests in exporting law (Anne-Marie Slaughter, interview, 23 May 2012).

Ultimately, the US should be able to embrace a nuanced notion of interests, which recognizes that both strategic considerations *and* values promote US interests. The foreign policy literature contains a wealth of material on this discussion. Rationalist conceptions of the national interest and the maximization of utility remain relevant; however, there have been efforts to reconcile this approach with non-rational approaches (i.e., Simon, 1997; Mintz, 2004). The ethical foreign policy

¹⁵⁷ See Slaughter, 2007.

literature also attempts to conceptualize a broader notion of interests (i.e., Brown, 2001; Chandler, 2007; Chang, 2011; Smith and Light, 2001; McElroy, 1992). In addition, the constructivist view that the ‘national interest’ must be seen through the prism of ideas also helps explain US interests in transitional justice (i.e., Weldes, 1999). It provides a way to explain how the growing global norm of transitional justice, as well as American identity, shapes US interest (i.e., Hopf, 2002). It also helps explain US influence on the evolution of transitional justice (explored in chapter 2).

Individuals and interests were recurring themes throughout the study that help explain US foreign policy on transitional justice. Sometimes these factors converged making US involvement in a measure more consistent. For example, the Special Court for Sierra Leone garnered support from a wide range of US officials – from President Bush to Secretary of State Rice and other high level State Department officials to several members of Congress. Part of the reason for individual interest was because the Court intersected with diverse US interests: It helped remove Taylor from power and promote regional stability, and it allowed the US to support a justice model that it preferred to the ICC. This convergence helps explain strong US backing of Taylor’s trial by the SCSL. Of course, US support still fluctuated even with this convergence. For example, for several years, the administration was not ready to support Taylor’s transfer to the court, after it had brokered a deal for his asylum in Nigeria.

Other times individuals and interests were in tension with one another, resulting in more contradictory US involvement. For example, in Colombia, the justice and peace law elicited different views among members of Congress and the

Justice and State Departments. Congress urged President Uribe to ensure accountability for human rights violations in the Justice and Peace Law, while the Justice Department insisted that the law not affect extradition. When the process was under way, a DOJ official explained that US involvement in the justice and peace process was ‘fundamental to the development of the Colombian justice system’ – but did not see how the extradition issue was viewed by some as negatively affecting this same system.

In some cases, one factor was more important than the other. For example, US involvement in the Cambodia case was primarily driven by individual interest in seeing a tribunal for Cambodia established (i.e., Scheffer). Beth van Schack attributed this interest to timing. Since the genocide in Cambodia

was the first post-Holocaust genocide, there was an idea that we need to close these historical loops ... I think today, there is no way they would get an ECCC at all. Unfortunately, I don’t know if they would get a truth commission either ... Now with the ICC, we have a more forward-looking approach and [there is the sense that] we’re not going to waste our time with historical justice anymore (Beth van Schack, interview, 31 October 2009).

Once the tribunal was under way, it was primarily Senator McConnell who blocked funds to the court, but was later convinced to permit US funding. War Crimes Ambassadors Scheffer and Williamson’s interest in the court remained even after their term as ambassador came to an end, as evidenced by their appointment by the UN as special experts to assist the court in recent years, and Scheffer’s ongoing assistance to the court.

When neither factor was at play, US involvement was minimal. For example, the Liberian truth commission received the least individual attention and did not intersect with US interests in a significant way. The US supported the establishment of the commission as a compromise between a war crimes tribunal and complete

amnesty. The embassy supported TRC operations, but when the report posed a possible threat to US support of President Sirleaf, the US distanced itself from the TRC.

Of course, additional factors also play a role, such as the influence of the transitional justice trend, as well as the bilateral relationship between the US and the country establishing a measure. However, these factors were not as important as the role of individuals and interests. The case studies illustrate that a convergence of these two factors will elicit the strongest and most consistent support, while a disjuncture between the two will result in more contradictory involvement. Sometimes one factor will be more important than the other, and when neither factor is at play, minimal US involvement should be expected. We now turn to assess the impact of US involvement in transitional justice.

6.3 Assessing US Involvement

This study establishes what US involvement in transitional justice entails, categorizing it into four areas: financial, technical and political support and cooperation with other actors. The range and level of US involvement in detailed aspects of the measures explored in this study was surprising. Although the amount has varied and funding was sometimes blocked, the US contributed financial assistance to all of the transitional justice measures. The US also provided technical assistance to their establishment and operations. And it offered political support to all of the measures. The US also cooperated with a range of actors within and outside the country establishing a measure.

Secondly, this study has detected two factors key to explaining US foreign policy on transitional justice: individuals and interests. Individuals have been critical

in defining the US approach. Transitional justice has also intersected with both strategic and value-based interests, which has made the field appealing to policy makers. When a measure receives individual support and offers a way to pursue US interests, US (financial, technical and political) support of transitional justice is likely to be strongest. When individuals oppose a measure and it clashes with American interests, US support will fluctuate and be more contradictory.

Establishing and explaining US involvement in transitional justice provides an opportunity to comment on the impact of the US on the field as a whole. This exercise involves generalizations, but is still worthwhile after undertaking a close examination of US foreign policy. Overall, US involvement has had a positive impact. The US has been a strong advocate of individual measures and the field as a whole. The US is often one of the first donors to support a measure (which has encouraged additional donors to contribute) and typically provides vital funding for the functioning of a measure. The range of US actors involved and the expertise they bring to measures is valuable. The pragmatic approach taken by the US helps move processes along, from establishment through to completion. US officials tend to be knowledgeable of and cooperate with many of the actors involved in a measure, often facilitating communication between groups. Even if US involvement appears more hands-off, it typically will be playing a ‘behind-the-scenes’ role in major and minor decisions made about a measure. The US steps in at crucial moments when various challenges arise, and attempts to solve problems. Its political support of measures has a significant impact on a measure’s establishment and operations.

That being said, the US wields inordinate control over measures, particularly in their establishment phase. Measures are established, at least in part, because the US ‘wants’ it and in the way the US wants it. Once they are established, however,

US support fluctuates. This fluctuation has to do with the range of individuals and interests that characterise US foreign policy in this field. Individual whims in combination with competing interests can result in contradictory policy. Measures that intersect with US interests or capture individual attention receive higher levels of funding and support (i.e., the removal of Taylor from office; the compromises made on the Cambodia court; and the general emphasis on criminal prosecutions over other measures). Measures that clash with individual, domestic, regional or international US interests receive support that is more inconsistent. For example, restrictions can be in response to problems within the measure, or to broader regional concerns or to distrust of a country's leadership. Often US support or opposition is unrelated to a particular measure, having more to do with other interests.

The difficulty with US involvement is that, although often well meaning, the US can disregard and overlook views because it is singularly focused on moving a process forward in the way it considers best. US officials cooperate with the actors it feels are most efficient and knowledgeable about a process, and may be antagonistic towards those they disagree with. Meticulous US involvement in a measure's founding law, structure and jurisdiction can, at worst, result in flawed measures. US involvement can therefore be unreflective in its engagement and susceptible to tunnel vision.¹⁵⁸ US pressure on transitional justice measures is a decisive factor with consequences that can strengthen or weaken transitional justice measures. When this political support or opposition is unrelated to a measure's aim, US involvement is detrimental to the field.

In response to a question about whether the US should not be so involved, David Scheffer said, 'No. I always felt that we should be deeply involved.' But he

¹⁵⁸ For more on 'tunnel vision', see, Janis and Mann, 1977.

then shared a thought that had occurred to him during his ambassadorship as he was flying between Kigali and Burundi:

David, what are you doing? Are you the new colonial master? Are you colonizing the judiciary? Are you saying you must have a criminal tribunal to hold these people to account? ... You're not taking their territory or extracting minerals. But you are colonizing them with justice. Do you have the right to do that? That was the first time that [idea] had *really* struck me. I'll never forget that because I wanted to keep that focus and be a little bit more humble about what I was doing ... You have sovereign governments that have a stake in what you're doing. You can't just brush them aside ... because we are intruding on their turf with this international concept of justice (David Scheffer, interview, 12 March 2012).

Nevertheless, Scheffer said he would not retreat from what he did in the 1990s, and wished he had pushed harder in some places. This comment reflects recognition of the power involved in the transitional justice enterprise.

For an international actor to wield such control over transitional justice is problematic. Transitional justice has a range of aims, but excluded from this list should be the interests of foreign state governments. This is unrealistic, however, since donor governments will continue to assist policies that intersect with their strategic and value-based interests. It is possible, however, to better link transitional justice goals and American goals. The focus should therefore be on the purpose of establishing a transitional justice in the first place: to provide some form of accountability after widespread and systematic human rights violations have been committed. Unfortunately, this is not a short-term effort. Consistent support throughout a measure's lifespan, and after, is needed if transitional justice aims are to be met. And even then, challenges remain. Top-down efforts 'blinded by universality' and bottom-up approaches 'taken in by particularity' may similarly be counterproductive and based on flawed assumptions.¹⁵⁹ Although the US has

¹⁵⁹ Meierhenrich, 2010: 326. See also, Golub, 2006; and Upham, 2006.

effectively promoted transitional justice for the most part, a better balance must be struck between constructive engagement and obstructive control. The next chapter concludes the study by reflecting on the wider implications of this research and areas for future study.

Chapter 7 Conclusion

This study has provided an empirical and systematic account of the forces that shape US foreign policy on transitional justice, offering an important contribution to scholarship, and feasibly, policy and practice. The research has found that US involvement entails financial, technical and political support and cooperation with other actors. It has highlighted the importance of individuals and interests, and concludes that the impact of the US on transitional justice has been generally positive but controlling and inconsistent.

These findings have specific implications for US foreign policy on transitional justice, and more general relevance for the literature on foreign policy and the field of transitional justice. With regard to the US, although US involvement remains very reliant on individuals, it can be argued that these individuals have contributed to the mainstreaming of transitional justice throughout government. In addition to the institutional activity already explored in this study, there have been several recent developments which signal the field becoming more firmly rooted within government agencies.

For example, within the Senate, Senator Dick Durbin chairs a Subcommittee on Human Rights and the Law, created in 2007, which considers the enforcement and implementation of human rights laws.¹⁶⁰ Three laws, introduced by Senator Durbin, ensure that perpetrators of certain human rights violations cannot enter the US. They include the Genocide Accountability Act (2007), Child Soldiers Accountability Act (2008) and the Trafficking in Persons Accountability Act

¹⁶⁰ Since subcommittees can change fairly often, according to one official, Senator Durbin has tried to make the work non-partisan so the subcommittee remains when administrations change (US official, interview, 8 January 2010).

(2008).¹⁶¹ Senator Durbin has secured \$3.3 million for the prosecution of human rights crimes in DOJ.

Within DOJ, the Human Rights and Special Prosecutions Section (HRSP) investigates and prosecutes human rights violators for genocide, torture, war crimes, and recruitment or use of child soldiers, and for immigration and naturalization fraud arising out of efforts to hide their involvement in such crimes. HRSP works closely with the Department of Homeland Security and the Department of State, among other agencies, to identify such individuals and prevent them from entering the US.

Within the State Department, the Office of War Crimes Issues was re-named the Office of Global Criminal Justice in 2012, and has a revised mandate:

The Office of Global Criminal Justice (GCJ), formerly the Office of War Crimes Issues (WCI), led by Ambassador-At-Large Stephen Rapp, advises the Secretary of State and Under Secretary for Civilian Security, Democracy and Human Rights and formulates U.S. policy on prevention and accountability for mass atrocities. The office coordinates U.S. Government support for international and hybrid courts that are currently trying persons responsible for genocide, war crimes, and crimes against humanity committed in the former Yugoslavia, Rwanda, Sierra Leone, and Cambodia. It also works closely with other governments, international institutions, and non-government organizations to establish and assist international and domestic commissions, courts and tribunals to investigate, judge, and deter atrocity crimes in every region of the globe. The Ambassador-at-Large coordinates the deployment of a range of diplomatic, legal, economic, military, and intelligence tools to help expose the truth, judge those responsible, protect and assist victims, enable reconciliation, and build the rule of law.

Several changes were made to the office's mandate. First, the global criminal justice ambassador now reports to an Under Secretary, instead of directly to the Secretary of State. Although this could appear as a demotion, Scheffer said that it further entrenches the issue within the State Department, and that it would be very difficult to eliminate the office in the future, as has been threatened in the past (David

¹⁶¹ The Crimes Against Humanity Act (2009) was introduced, but not passed into law. A US official said that policymakers do not understand crimes against humanity, and war crimes are seen as too political, making these areas more difficult to address in Congress (US official, interview, 8 January 2010).

Scheffer, interview, 12 March 2012). Secondly, the mandate has widened to include atrocity prevention and other transitional justice measures such as truth-seeking and reconciliation, in addition to prosecutions.

In April 2012, President Obama announced his ‘comprehensive strategy to prevent and respond to atrocities.’ This effort signals the highest level of the transitional justice institutionalization to date. A White House press release stated:

President Obama recognizes that in order to counter atrocities more effectively, the U.S. government must prioritize this effort, strengthen and expand the tools available to us, and establish a level of organization that matches our commitment (US White House, 2012).

In 2010, Obama created a White House position dedicated to preventing and addressing war crimes and atrocities. In August 2011, he issued Presidential Study Directive 10 (PSD-10), declaring the prevention of mass atrocities and genocide to be a ‘core national security interest and core moral responsibility’ of the US, ordering the creation of a whole-of-government Atrocities Prevention Board (APB), and directing the National Security Advisor to lead a comprehensive review to assess the US government’s anti-atrocity capabilities, and recommend reforms that would fill identified gaps in these capabilities (Ibid).

The APB will include representatives of the Departments of State, Defense, Treasury, Justice, and Homeland Security, the Joint Staff, USAID, the US Mission to the United Nations, the Office of the Director of National Intelligence, the Central Intelligence Agency and the Office of the Vice President – all of whom are at the Assistant Secretary level or higher and have been appointed by name by their respective Principals. The APB will meet at least monthly to oversee the development and implementation of atrocity prevention and response policy, and additionally on an ad-hoc basis to deal with urgent situations as they arise. The Chair of the APB will be the NSC Senior Director for Multilateral Affairs and

Human Rights (who is currently Samantha Power). To ensure senior-level visibility into the work and progress the APB is making, the Deputies will meet at least twice a year, and Principals once a year, to review the work of the APB, and the Chair will report on this work annually in a memorandum to the President. After six months of operations, the Chair will begin preparation of a draft Executive Order for consideration by the President that will publicly set forth the structure, functions, priorities and objectives of the Board, provide further direction for its work, and include further measures for strengthening atrocity prevention and response capabilities as identified in the course of the Board's work.

In addition to the APB, President Obama directed his administration to take a range of steps to strengthen the US government's ability to foresee, prevent and respond to genocide and mass atrocities. For example, the intelligence community will be required to conduct a 'national intelligence estimate', which estimates the global risk of mass atrocities and genocide, and increase their collection, analysis and sharing of information relating to atrocity threats and situations. Diplomatically, the US will update US training programs for UN peacekeepers to focus on enhanced techniques for civilian protection, including prevention of sexual and gender-based violence, and strengthen UN and regional capacities to prevent and respond to atrocities.

The Defense Department will develop operational principles and planning techniques specifically tailored around atrocity prevention and response; incorporate mass atrocity prevention and response within geographic combatant commands; and organize exercises to test operational concepts. DOJ, Homeland Security and State are developing proposals to prosecute perpetrators of atrocities found in the US, and

permit the more effective use of immigration laws and immigration fraud penalties to hold accountable perpetrators of mass atrocities.

President Obama signed an Executive Order that authorizes sanctions and visa bans against those who commit or facilitate grave human rights abuses via information technology ('GHRIVITY sanctions') related to Syrian and Iranian regime brutality. The President's visa ban on human rights abusers denies perpetrators of serious violations of human rights or humanitarian law, or other atrocities, entry to the US. New tools also include: A State and USAID rapid response deployment of civilians with specialized expertise in crisis situations; lessons learned reports; USAID awards for innovative technologies that strengthen US capacity for early warning, prevention and response with respect to mass atrocities; and Treasury Department blocking of money to abusive regimes.

The creation of 'alert channels' within departments and agencies will allow individuals to share relevant unreported information about mass atrocities with the APB—including analysis or reporting that a superior may have blocked from being disseminated—without adverse professional consequences. Comparable procedures within the National Security Staff is supposed to ensure that information about atrocity threats and situations, reaches the President.

With specific relation to US foreign policy on transitional justice, the White House press release states that

The US government will support national, hybrid, and international mechanisms (including, among other things, commissions of inquiry, fact finding missions, and tribunals) that seek to hold accountable perpetrators of atrocities when doing so advances US interests and values, consistent with the requirements of US law (Ibid).¹⁶²

¹⁶² The press release also makes specific mention of technical support to criminal prosecutions: State, DOJ, and Homeland Security will develop options for assisting with witness protection measures and providing technical assistance in connection with foreign and international prosecutions. The administration will also work with Congress to expand State's authority to make reward payments for information that leads to the arrest of foreign nationals indicted for

This statement reflects the early discussion about a wider conception of interests, which recognizes strategic considerations *and* values. Obama's 2012 initiative represents the most visible and high-level policymaking on transitional justice thus far. Efforts within Congress, DOJ, the State Department, intelligence agencies, Homeland Security, Defense Department, USAID and, significantly, a new interagency mechanism within the National Security Council – the Atrocity Prevention Board – represent the mainstreaming of the field throughout the US government.

Whether or not these efforts will result in more effective US foreign policy, or will survive changes in administration, is yet to be seen. Professor Anne-Marie Slaughter, who led the QDDR at the State Department as the Director of Policy Planning, warns that this is still a new and fragile system:

I don't think [transitional justice] should be treated as a given. If we really want to institutionalize [it], we still have a ways to go. The most obvious [indication] is that the US is not a member of the ICC. But there are a lot of other counterattacks: they're expensive; they don't make sense; why should you go to all this trouble to try one person, etc.

She argues that the efforts to institutionalize transitional justice are 'not just because attitudes are changing toward transitional justice per se, but because transitional justice is one tool in a toolbox that we desperately need to address 21st century problems' (Anne-Marie Slaughter, interview, 23 May 2012).

There are interesting shifts and contradictions in the development of US foreign policy on transitional justice. On the one hand, the US has served as the field's greatest advocate and has provided crucial support, but, on the other, it has served as a fierce opponent. This paradox is present in much of US foreign policy and is not unique to transitional justice policy. Nevertheless, these inconsistencies

war crimes, crimes against humanity or genocide by international, hybrid or mixed criminal tribunals (US White House, 2012).

affect transitional justice measures in many ways, as evidenced in this study. From its championing of international criminal tribunals to its opposition toward the ICC, to recent efforts to mainstream the field, and everything in between, the US is coming to terms with a field it has done much to create. In many cases, transitional justice goals and US interests are easily compatible. Often, they clash. Tendencies to control the process coupled with conflicting interests can lead to an inconsistent approach. More effective and worthwhile involvement in transitional justice will result with greater attention to these contradictions and the consequences they produce.

This study also has relevance for the literature on foreign policy. The complexity of the cases explored in this research illustrated that a range of theoretical tools are needed to explain the foreign policy of a state such as the US on a topic like transitional justice. A combination of behavioural and bureaucratic explanations of foreign policy supports the importance of individuals identified in this research as crucial to explaining US foreign policy on transitional justice. In addition, a mix of rational and constructivist approaches contributes to the study's finding that US interests in transitional justice reflect strategic interests and values. The findings of this study therefore appear to coincide with scholars who offer explanations of foreign policy that are inclusive of a range of theoretical tools.¹⁶³

This study also has relevance for the field of transitional justice. Most importantly, it has illustrated that the field has been and continues to be influenced by the US, regardless of the measure, the transition type or the region where it is established. Transitional justice scholars cannot therefore afford to overlook the role

¹⁶³ Ole Holsti, for example, points to the importance of examining bureaucratic constraints, domestic influences and the external environment (Holsti, 1970). Freedman and Caldwell argue that cognitive factors, values, the type of state in which bureaucrats operate (democratic/authoritarian), interest groups, congress and the public all impact foreign policy making (Freedman, 1976; Caldwell, 1977).

of the US in their research. Transitional justice advocates should also consider the US role when negotiating, establishing and implementing measures.

In addition, the diverse case selection of this study, which includes distinct measures, transition types and geographic regions, offers a novel way to think about transitional justice, which is inclusive of a range of measures, a wide conception of transition, and attention to region. The time frame of the research also explores a new phase of transitional justice, after the initial intrigue with international criminal tribunals in the 1990s. Transitional justice in the 2000s is a period where accountability for human rights violations is still very much on the global agenda, but shifted to include hybrid and domestic criminal prosecutions, as well as an increased focus on national systems and non-judicial measures.

This study raises a number of possibilities for future research. For example, it would be interesting to study other cases of US involvement in transitional justice, and compare findings with the present research. Additional cases could include measures, transition types and geographic regions not examined in this study. Further case studies or a large-N study could help test the conclusions drawn here. A comprehensive impact assessment of US involvement would also be worthwhile in order to better evaluate the extent to which the US achieved its goals for transitional justice, its impact on various groups within a country that established a measure, or its impact on the short and long-term goals of the measure. Research on the impact of the war on terror on US involvement in transitional justice would be an additional area to explore. A study focusing on the impact of the Obama administration would also be interesting.

This study only looked at US involvement in transitional justice. However, similar research carried out with international organizations, such as the UN, and

NGOs, like the International Center for Transitional Justice, could provide a broader account about the impact of international involvement in the field. Research on the evolution of transitional justice with a comprehensive examination of the range of international influences would also be worthwhile.

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Appendices

Appendix 1 Methods

This appendix reviews key methods literature and its application in the design of my research. I first discuss and justify the use of comparative case studies, as well as case selection, process tracing and structured, focused comparison. Second, I discuss the use of semi-structured interviewing, including when to interview, interview sampling, how interviews were conducted and how they were used. I then look at research ethics, critical reflections on my experience as the researcher and specific challenges of fieldwork in transitional settings. This discussion thus provides insight into how the research was carried out.

1. Comparative case studies

Case data are authoritative; they record what happened, not what could or might have happened. Case studies vary from purely historical studies that seek to establish the relevant facts of the encounter to analytical studies chosen to illustrate specific theoretical propositions (Gerring, 2007: 3). Skocpol and Somers find that whatever the level of conceptual sophistication, a case study writer never stops being a diligent historian if he/she does a good job, and that feel for the case allows the writer to get behind the data to give it context and meaning and achieve a Weberian understanding of its dynamics (Skocpol and Somers, 1980/1994). If the theory fits the historical data, a presumptive explanation is provided; if not, an alternative explanation is needed. Although social scientists ‘can never be caught inescapably in theories, mechanisms and regularities’, general regularities in events, contexts and behavior do occur, to be expressed in concepts and illustrated through data (Zartman, 2005: 6).

The case study provides an intimacy of analysis that is almost never available to large-N analysis. It draws on—and indeed insists on—deep background knowledge of the cases being examined. And it facilitates what Brady and Collier call ‘causal-process analysis,’ in contrast to the ‘data-set observations’ that are the basis of correlational and regression analysis (Brady & Collier, 2004: 277). John Gerring defines a case as ‘a spatially and temporally delimited phenomenon observed at a single point in time or over some period of time’ and a case study as ‘the intensive study of a single case for the purpose of understanding a larger class of similar units’. He notes that a case study research design may refer to a work that includes several case studies (Gerring, 2006: 211).

It then must be decided how many case studies to undertake, i.e., a single case, two cases or more. George and Bennett explain how several kinds of no-variance research design can be useful in theory development and testing using multiple observations from a single case. These include the deviant, crucial, most-likely and least-likely research designs, as well as single-case study tests of claims of necessity and sufficiency. Several influential works in comparative politics have used such single-case research designs to good effect.¹⁶⁴

However, for my purposes, a single case would have produced knowledge about US involvement in one type of transitional justice measure (i.e., criminal prosecutions or truth commissions), but would have been of limited utility in producing knowledge about the focus of this research, which was to understand US involvement in the *field* of transitional justice (i.e., across measures). Furthermore, things that happened once, however engrossing as a story, have no way of telling us whether they represent regularities or exceptions. The only way to test and reinforce

¹⁶⁴ George and Bennett, 2005: 32-33. See, Ronald Rogowski, 1995 who cites Arend Lijphart, William Sheridan Allen and Peter Alexis Gourevitvh.

concepts' and theories' claims to normal regularity rather than exceptionality is to look at a number of cases, not just one (knowing that the generality can never be proved or expected to be universal). Comparative case studies exhibit the advantages of in-depth analysis of reality while overcoming the weaknesses of focusing on one case alone (Zartman, 2005: 7).

Comparative case studies bridge idiosyncrasies and combine depth of understanding with the breadth of multiple instances. By focusing on the basic question of how outcomes are obtained, case studies can show causal links; they shed light on process and allow an exploration of the dynamic path from components to results, thus satisfying the need of both analysts and practitioners (Zartman, 2005: 4). Thus, this research employs multiple case accounts to allow for the development of a deeper understanding of the details and idiosyncrasies of the cases, so that the fit between the generalizations and the data could be explored, explained and understood.

Sidney Tarrow argues that comparing a few cases (two or three) has been under-theorized. He finds that most scholars either see paired comparison as a 'case study plus one' or as a degenerate version of large-N comparison. He first argues that paired comparison is distinct from single-case studies in several ways. Its distinctiveness can be understood through an analogy with experimental design. It is similar to experimentation in its ability to compare the impact of a single variable or mechanism on outcomes of interest. Paired comparison also eliminates the possibility that the dependent variable can have occurred even in the absence of the independent variable, thus significantly increasing the inferential power of the design over the single-case study. And by permitting dual (or triple) process tracing, it reduces the possibility that a supposed determining variable is as critical as it might seem from a

single-case study alone. Finally, as Becker (1968) argued, paired comparison can add confidence in a ‘building-block strategy’ that moves from a single-case to a multicase analysis. Paired comparison can also correct generalization from single cases (Tarrow, 2010: 232-244).

According to Tarrow, comparative case studies (or paired comparison) also differ from large-N comparisons. Proponents of large-N comparisons believe that use of large data sets can establish firm generalizations and regularities that combine case data in order to carry out statistical significance tests. This research uses aggregate data on the largest number of cases possible either to test deductive propositions or generate inductive findings through correlation or factoring. Despite careful coding, it needs to group large numbers of diverse cases together into types, and is more interested in showing statistically significant correlations than in finding causality or in explaining the category of exceptional cases (Ibid).

However, there are a number of challenges to this approach. First, in seeking to compress events into statistics, the data moves far away from the subtleties of reality, as coders make sharp judgments on the nature or category of complex events, and many events do not lend themselves to binary or even plural statistics (Zartman, 2005: 10). Such analysis can only handle data that are quantitatively, objectively measurable and explain only that for which it has data, and in the interest of precision it must make inflexibly quantitative definitions (Ibid: 11). Second, they hide the reasoning and details that support the choices made. Third, direct data are often not available, only indicators, or proxies, which are often far away from the effect they are proxying. Fourth, what cannot be measured or proxied, despite its explanatory power, is not analyzed. Fifth, data become no longer data but are

squeezed into generalizations. Finally, there is little process in this analysis, so the dynamic of the process is lost (Ibid: 11-12).

Of course, there are challenges to comparative case study research as well. Case studies exchange feel for precision and thrive on it; their strength is an understanding of the situations they analyze. However, case study data can suffer from loose formalization, necessarily small number of cases, and deference to case idiosyncrasy (Zartman, 2005: 12). Additional challenges include insufficient degrees of freedom, nonrepresentativeness, atheoretical case selection, and ignoring scope conditions.¹⁶⁵

Yet the balance of advantages and weaknesses, inevitable in any method of analysis, as Zartman states, places case studies in the midst of a search for breadth and depth, for data and theory. He concludes: ‘Empirical soundness, including a feel for the subject, harnessed to a concern for usefulness through accurate generalizations and concepts, can be achieved – perhaps even best achieved – through comparative case studies (Zartman, 2005: 13). For these reasons, a comparative case study research design was selected for this research. This method provided a clear analytical strategy for working through complex empirical and historical materials using the leverage afforded by the differences and similarities of comparable cases.

Case selection

After deciding on comparative case studies as the method of this research, it was then necessary to select cases for analysis based on the type of data to be drawn from them. Zartman states that limited space and the need to establish an argument

¹⁶⁵ Tarrow, 2010: 246. For additional critique of the reasoning in comparative studies based on a small number of cases, see Lieberson, 1991.

signifies that cases are unlikely to be chosen at random, and instead chosen based on their saliency and relevance. Saliency involves importance in the general discourse of the topic. Relevance concerns applicability to the conceptual issues involved. The more cases can be chosen to focus on variations relevant to the conceptual issues and hold other features constant, the more explanatory factors can be isolated and identified, a condition termed structured, focused comparisons. Negative cases can be useful as a control, but comparing why something did not happen with why it happens significantly increases the difficulty in holding constant the elements to be analyzed (Zartman, 2005: 7-8).

Patton defines purposeful case sampling as cases that are selected because they are ‘information rich’ and illuminative, that is, they offer useful manifestations of the phenomenon of interest. Case selection is then aimed at insight about the phenomenon, not empirical generalization from a sample to a population. The logic and power of purposeful sampling derive from the emphasis on in-depth understanding, as opposed to probability sampling, which derives its logic and power from generalization. Information rich cases are thus selected in order to learn a great deal about issues of central importance to the purpose of the research (Patton, 2002: 40, 46).

One of the most common critiques of case study methods is that they are particularly prone to ‘selection bias’, but not, as George and Bennett argue, in the same way as in statistical research. Selection bias in statistical terminology is commonly understood as occurring when some form of the selection process in either the design of the study or the real-world phenomena under investigation results in inferences that suffer from systematic error. In statistical studies, selection bias always understates the strength of the relationship between the independent and

dependent variables (DVs), which is why statistical researchers are admonished not to select cases based on the DV (George and Bennett, 2005: 23).

In contrast, case study researchers sometimes deliberately choose cases that share a particular outcome. Cases selected on the DV can help identify which variables are not necessary or sufficient conditions for the selected outcome (Dion, 2003: 95-112; Collier, 1995: 464). In addition, in the early stages of a research program, selection on the DV can serve the heuristic purpose of identifying the potential causal paths and variables leading to the DV of interest. Later, the resulting causal model can be tested against cases in which there is variation on the DV. Ideally, researchers would like to have the functional equivalent of a controlled experiment, with controlled variation in independent variables and resulting variation in DVs, but the requisite cases for such research designs seldom exist (George and Bennett, 2005: 23-24).

A related issue is whether the researchers' foreknowledge of the values of variables in cases – and perhaps their cognitive biases in favor of particular hypotheses – necessarily bias the selection of case studies. According to George and Bennett, selection with some preliminary knowledge of cases, however, allows much stronger research designs (Ibid: 24).

The most damaging consequences arise from selecting only cases whose independent and dependent variables vary as the favored hypothesis suggests, ignoring cases that appear to contradict the theory, and overgeneralizing from these cases to wider populations. This selection bias can understate or overstate the relationship between independent and dependent variables. Case researchers may therefore bias their sample with regard to a wider set of cases about which they are trying to make inferences – unless they carefully limit the scope of their findings to a

well-specified population that shares the same key characteristics as the cases studied (Ibid: 24-25).

Zartman and Patton also provide guidance into understanding my case selection. The cases selected are both salient and relevant for considering US involvement in transitional justice since they vary in key dimensions to the field (distinct measures, transition types and regions). They are similar in the timeframe in which they were established, providing knowledge about a different time period than much of the transitional justice literature which has focused on the 1990s. This framework limited the choice of cases, and those ultimately chosen were thought to be able to provide ‘useful manifestations of the phenomenon of interest.’

To a certain extent, the cases are meant to be ‘illustrative’ of a range of ‘typical’ transitional justice measures. While considering case selection at the start of the research, I contemplated looking at the Iraqi Special Tribunal, for example, but decided that this was an atypical example that would be more difficult to relate to the field as a whole. I selected cases that were less controversial and more illustrative of the field, which varied on certain dimensions and were operational during a similar timeframe. They may or may not be the most relevant for explaining US foreign policy on transitional justice, but they do provide adequate variation and similarity to produce new knowledge about the topic.

In addition, my past professional experience in the field of transitional justice helped me select cases. In 2003-2005, I was a research apprentice at UC Berkeley’s War Crimes Studies Center, where I conducted research for Professor David Cohen and travelled to East Timor to monitor war crimes trials for a key NGO. As a recipient of a Berkeley public service fellowship, I then worked at the International Center for Transitional Justice (ICTJ) for a year, which significantly strengthened my

knowledge of the field. Following this work, I was hired as a consultant at UNICEF to continue work on a joint ICTJ-UNICEF project. Part of this work involved a trip to Liberia in summer 2006 to pilot a handbook for children's involvement in truth commissions at a TRC training for statement-takers. I returned to Liberia in November-December 2009 to carry out a preliminary impact assessment of the TRC for Benetech and the State Department's Bureau of Democracy, Human Rights and Labor. Some of the interview and focus group data obtained during this visit is used in the Liberia case study with authorization by interviewees and focus group participants.

Process tracing and structured, focused comparison

Once cases were selected, I then undertook a structured, focused study of each case, which was guided by process tracing. The study was 'structured', as George and Bennett recommend, in that I formulated general questions that reflected the research objective and asked these questions of each case under study to guide and standardize data collection, thereby making systematic comparison and cumulation of the findings of the cases possible. These questions were carefully developed to reflect the research objective and theoretical focus of the inquiry. The use of a set of general questions was necessary to ensure the acquisition of comparable data across the three cases. The study was also 'focused' in that it dealt only with certain aspects of the cases examined: US involvement in the establishment and operations of measures. As a single researcher, I was better able to achieve structured and focused comparative case studies (George and Bennett, 2010: 67-69).

Within each case, process tracing was undertaken in order to understand how and why the US was involved in the establishment and operations of transitional

justice measures. With process tracing, causation is established through uncovering traces of a hypothesized causal mechanism within the confines of one or a few cases (Bennett and Elman, 2007: 183). Cases may provide a variety of evidence of the operation of causal mechanisms, none of which is directly comparable, some of which may be more important than other pieces, and all of which taken together may allow analysts to draw conclusions about the adequacy or inadequacy of an explanation (Bennett & Elman, 2006). Process tracing can involve both the inductive and deductive study of events and sequences within a case. Inductive examination may reveal potentially causal processes that the researcher had not theorized a priori. Deductively, theories can suggest which intervening events should have occurred within a case if the theory is an accurate explanation of the case. Depending on the theory under investigation, some of the hypothesized steps in the case may be tightly defined necessary conditions, and others may be defined more loosely as having several substitutable processes that could have taken place at a particular juncture (Bennett and Elman, 2007: 183).

The 'step-by-step' approach to process tracing has been criticized as a form of story telling which does not necessarily aid in producing causal analysis. However, Bennett and Elman cite many examples of process tracing in IR research, which they find share a set of common features that constitute best practices in process tracing. These include: explicit attention to and process tracing on alternative explanations and on the hypothesis or explanation of most interest to the researcher; sustained focus on the question of 'what else must be true' of the process through which the outcome arose if a proposed hypothesis explains the outcome; and relentless empirical research on these hypothesized processes, using a wide variety of sources (often including archived documents, contemporary news accounts, secondary

histories, biographies or memoirs, and interviews) with due attention to the potential motivated and informational biases of each source (Bennett and Elman, 2007: 183).

Process tracing and structured, focused comparison helped uncover what mechanisms explained US involvement in transitional justice. Causation was not established, but an inductive examination supported an exploratory research design that helped reveal potential explanations. Once individuals and interests surfaced as two important explanations for understanding US foreign policy on transitional justice, I was able to pay explicit attention to these variables and use a wide variety of sources to understand how they played out in each case.

As discussed by George and Bennett, the first step in studying each case was to gather accessible academic literature. This preliminary step of immersing oneself in the case led to the construction of a chronological narrative that helped me understand the basic outlines of the case. I relied on chronological narrative as an organizing device for presenting the case study materials in order to enable readers not already familiar with the history of the case to comprehend the analysis. George and Bennett find that striking the right balance between a detailed historical description of the case and development of a theoretically focused explanation is a familiar challenge, which proved true for my research. However, it was deemed necessary to include this narrative since a significant portion of research time was spent trying to uncover what actually happened, since there were competing explanations or undocumented reasons for US involvement in my cases. Once the gaps in the existing historical accounts were identified, I went to original sources, including archival materials, newspapers, local daily media accounts, government, IGO and NGO documents, and importantly interviews. In this way, a level of ‘triangulation’ - in which a systematic approach to evaluate data is integrated with

information from different types of sources - was achieved (Davies, 2001: 79). Information was then cross-referenced both between and within the data types employed (Ibid: 78). I faced the challenge of assessing the evidentiary value of these primary sources, which often required continually going back to fill gaps in the narrative. The fact that my research entailed recent and contemporary US foreign policy also meant that it was likely that important data was not available and could not be easily retrieved for research purposes, e.g., important discussions among policymakers that take place over the telephone or within internal e-mail and fax facilities-the results of which are not easily acquired by researchers.

2. Semi-structured interviewing

In addition to extensive background research of US government documents, UN and NGO reports, academic sources, and the media, my thesis drew on 187 semi-structured interviews conducted with members of key stakeholder groups in the US and the case study countries.¹⁶⁶ Interview lists and statistics are included in the following appendix, but the purpose for choosing this method of data collection, sampling, how and when interviews were conducted, and how the data collected was used are first described here.

Interviewing was a key method of collecting qualitative data for this research. David Richards mentions some of the advantages of interviewing: 1) they can help in interpreting documents, particular if you gain access to the authors of a relevant document; 2) they can help interpreting the personalities involved in the relevant

¹⁶⁶ Fieldwork in Washington DC from January-April 2010 was possible because of financial support from the Marshall Commission. While in DC, I was accepted as a Visiting Researcher at Georgetown University. Fieldwork in Liberia was undertaken while carrying out an assessment of the TRC (described above). Fieldwork in Cambodia was possible due to funding from LSE's International Relations Department. Fieldwork in Colombia was possible due to funding from the Abbey Santander Grant.

decisions and help explain the outcome of events; 3) they can provide information not recorded elsewhere, or not yet available (if ever) for public release; 4) they can help you establish networks or provide access to other individuals, through contact with a particular interviewee (the snowball effect); 5) they can help you understand the context, set the tone or establish the atmosphere of the area you are researching. Typical problems with interviews include issues of access and reliability (Richards, 1996: 200-201).

Dexter's discussion of elite specialized interviews is particularly relevant for my study. He defines them as interviews with any interviewee who is given specialized, non-standardized treatment. This treatment includes: 1) stressing the interviewee's definition of the situation; 2) encouraging the interviewee to structure the account of the situation; 3) letting the interviewee introduce to a considerable extent (an extent which will of course vary from project to project and interviewer to interviewer) his notions of what he regards as relevant, instead of relying upon the investigator's notions of relevance (Dexter, 1970: 18). This approach contrasts with standardized interviewing, where the investigator defines the question and the problem and is only looking for answers within the bounds set by his presuppositions. In elite interviewing, the investigator is willing, and often eager to let the interviewee teach him what the problem, the question, the situation, is – to the limits of the interviewer's ability to perceive relationships to his basic problems, whatever these may be (Dexter, 1970: 19).

This approach is typically adopted with the influential, the prominent and the well-informed more than with the rank-and-file of a population. Dexter offers several reasons for this. Firstly, he finds that the well-informed are unwilling to accept the assumptions with which the investigator starts; they insist on explaining to him how

they see the situation, what the real problems are as they view the matter (Ibid). Secondly, in an elite interview, an exception, deviation or unusual interpretation may suggest a revision, a reinterpretation, an extension or a new approach, as opposed to a statistical handling of a deviation in a standardized interview. Dexter shows how in interviewing members of a state legislature, most of the members may give this or that answer; but it may well be that only a few members give the insightful answers because they are the ones who both know and can articulate how things are actually done. Obviously some test is desirable in order to believe what they say rather than what the majority says. This test may simply be that of comprehensibility, plausibility and consistency (Ibid).

Interviewing was deemed a key technique for data collection in my research since it aided document and personality interpretation, provided information not available elsewhere, helped me establish networks and access to other individuals and helped me understand the context of US foreign policy in general and in the three case studies. Elite specialized interviews were necessary given most interviewees held specific positions in different key stakeholder groups, where the greatest benefit resulted from an open-ended 'discussion' about the topic in which the interviewee could explain how he or she viewed US involvement in transitional justice. Specialized, non-standardized treatment of interviewees allowed room for the interview to go in the direction the interviewee felt best and although I prepared extensively prior to each interview, I was able to then draw on this knowledge when needed, but focus on close listening to what the interviewee actually said. Limitations involve difficulty in gaining access to some individuals, and interviews conducted with those where information turned out not to be significantly relevant for the study.

When to interview

Dexter states that interviewing is the preferred tactic of data collection when it appears likely that it will get better data or more data or data at less cost than other tactics. He thus encourages reflection as to what is the most promising and least costly technique for obtaining the desired information (Dexter, 1970: 23). In many cases, he finds, elite interviewing will turn out to be preferable, but should be undertaken when the following conditions are approached: 1) alternative techniques have been seriously considered in terms of the research issues; 2) the research issues have tended to determine the selection of techniques, rather than the reverse; and 3) the inferences drawn from the interviews can be subjected to some sort of independent criticism, or, preferably, vigorous test (Phillips, 1966).

Dexter argues that scholars who rely on interviews as their chief source of data typically have a good deal of independent knowledge about the topic. They spend their free time socially and professionally with people in the field, participate in events, read extensively on the topic, make observations during these encounters and, importantly, interviews with individuals with different views are checked and rechecked against each other – all factors which greatly affect the research. In topics where the researcher has less acquaintance with the relevant problems, it is more challenging to identify a pattern or framework with the data. For interviews to be valuable, the interviewer should have a good deal of relevant previous experience which enables him to interpret what he hears and ask meaningful supplementary questions, or the interviewer will be able to observe and/or take part in the group life of the object of study so that he comes to know what is meaningful to ask and to record (Dexter, 1970: 24-26).

Dexter also discusses the utility of exploratory or trial interviews in order to find out how much one knows or can quickly pick up about the background and the situation. When it is apparent that the interviewer does not have enough background to make sense out of the interview, then one should quit or postpone the effort. The interviewer must have some capacity to catch the interviewee's meanings, to perceive the framework within which he is talking, if he is to get much out of the interview. Otherwise, he is merely recording verbal behavior; he lacks the capacity to 'listen with the third ear'. Dexter thus stresses the importance of getting a good deal of background and listening carefully to the interviewee's frame of reference. He states: 'a large part of listening with a third ear is noting and adapting to a frame of reference different from one's own.' He concludes his first chapter by stating that 'the experienced person in any field knows that things happen in a subtle, confused, foggy, complex way, which cannot be stated or codified simply; the person without practical experience and without much contact wants to sharpen and simplify' (Ibid: 28-29).

Considering my previous professional experience, independent knowledge and range of contacts in the field of transitional justice, interviewing was the preferred tactic of data collection. This background proved essential in interpreting interviews and asking meaningful questions. Exploratory interviews were held in each case, which enabled knowledge gaps to be quickly identified and filled before further interviews were conducted. I was able to perceive underlying issues based on how an interviewee reacted and responded to certain questions, even if he or she did not directly respond to the question asked. The interviewee's frame of reference was always considered, as evidenced by interview preparation and listening with an empathetic 'third ear'.

Although it was decided that interviews would be the most relevant data collection method, alternative techniques could have been considered for this research. In addition, although different interviewees were used to check and correct one another, the inferences drawn from the interviews could have been subjected to more extensive testing. However, some of these weaknesses may be overlooked given the length of time given to complete the thesis, and my independent knowledge of the topic, which allowed me to interpret what I heard and ask meaningful follow-up questions.

Interview sampling

A combination of purposive, snowball, quota and opportunistic sampling techniques was used to find and select interviewees. In quota sampling, the researcher selects interviewees based on their membership in a particular group (Potter, 1996: 107). Because I wanted to obtain a variety of views on US involvement in transitional justice, I identified several key stakeholder groups relevant for my research, including the US government, case study governments, transitional justice measures, international organizations, NGOs, academia and the media. A cross-section of views from key stakeholder groups was taken in order to ensure a mix between case study country actors and international actors. A mix between government and non-governmental actors was also achieved. Additionally, within each stakeholder group, a variation of views was sought. For example, within the US government, officials from the State Department, USAID and Congress were interviewed. Interviews with a range of national and international NGOs were conducted. In addition, different perspectives within these groups were sought. Across each case study, roughly equal numbers within each group were interviewed.

Within these groups, purposive, maximum variation and snowball techniques were used. In purposive sampling, the researcher selects the sample on the basis of knowledge of a population, its elements and the purpose of a study (Babbie, 2010: 193). The people in purposive samples are chosen because they are relevant sources of evidence of the phenomenon (Potter, 1996: 107). The maximum variation approach signals analysis of the potential population in order to assess the maximum range of sites and people that constitute the population (Seidman, 2006: 52). My research aimed to collect data from a wide variation of sites and people within the limits of the study.

A popular technique in generating a purposive sample is called snowball. In snowball sampling, you locate one or more individuals and ask them to name others who would be likely candidates for your research. Once you have a preliminary list, you show it to several people who are on the list and ask them to name others who they think should be on the list. The process continues until the list becomes ‘saturated’ – that is, until no new names are offered (Bernard, 1999: 179).

For my research, interviewees were initially identified through personal contacts knowledgeable about transitional justice. Each interviewee was asked if he or she could suggest other possible interviewees, which created the snowball effect. The same individuals would often be recommended numerous times, and served as a useful crosscheck to ensure that key persons were interviewed.

Opportunistic sampling was also used in my research, where the researcher ‘takes advantage of opportunities that present themselves’ (Vogt & Gardner, 2012: 142). For example, while in Cambodia, I heard about a conference on US-Cambodia relations where several past US Ambassadors to the country and other important officials were present. I attended the event and approached several individuals for

interviews, which led to interviews with a former ambassador and two important Cambodia historians.

How interviews were conducted

An introductory email was sent, which included: the person who recommended I contact them (if such a person existed); my affiliation as a PhD Candidate at the LSE and Marshall Scholar; a brief description about my research and the benefit I hoped to gain by conducting the interview; and the issue of attribution. This approach follows the recommendations made by Richards (Richards, 1996: 201-202).

I prepared thoroughly for each interview. I was aware of the interviewee's social background and career, and, if available, read any publications or documents they had written. I mainly relied on internet searches for this information and created an electronic file on each interviewee. I prepared a set of questions around certain themes in advance.

Semi-structured interviews were conducted with an interview guide that I prepared beforehand that provided a framework for the interview. All interviewees were first explained the purpose of the project and asked if the interview could be recorded. They were also asked whether or not the interview could be attributed to the individual. Those interviews conducted on a non-attributable basis were attributed in the way the interviewee requested. Interviews lasted from one to two hours.

Each interview covered similar topics, but left room for certain areas to be explored more thoroughly. Depending on the interviewee's position and perspective, some issues were more relevant than others. Generally-speaking, however, each interview solicited views about US involvement in the development of transitional

justice more generally, and more specifically, the establishment and operations of the transitional justice processes explored in this study. After each interview, a thank you email was sent. I would transcribe or type of interview notes soon after each interview.

How interviews were used

Interviews were then analyzed in order to draw out trends and divergences within and across stakeholder groups. Interviews generated a wealth of material in terms of background information, confirmation of perceptions and views, and useable quotes. The quotations used in this thesis have been chosen to characterize or typify views or perceptions which have been commonly articulated by interviewees. Only a small proportion of the transcribed material from interviews is reproduced in quote format in this thesis. Nevertheless, the wealth and richness of material gathered through the many interviews and discussions underpins much of the analysis and conclusions reached in this research.

Dexter states that no matter how objective an interviewee seems to be, the research point of view is: ‘The informant’s statement represents merely the perception of the informant, filtered and modified by his cognitive and emotional reactions and reported through his personal verbal usages’ (Dexter, 1970: 119). He suggests four ways to detect distortion of ‘facts’ from interviewees: implausibility; unreliability; knowledge of an informant’s mental set; and comparing an informant’s account with the accounts given by other informants (Ibid: 123-124). The researcher thus discovers what the informant’s statements reveal about his feelings and perceptions and what inferences can be made from them about the actual environment or events he has experienced (Ibid: 126).

This approach was adopted in my research. It was understood that interview content was subjective and distortion was detected primarily through cross-checking interviewee contents. In this way, gaps in narrative were filled or competing explanations were described.

3. Research ethics

I was guided by the LSE Research Ethics Policy and Review Checklist, which helped ensure that research was conducted to high ethical standards and conformed to generally accepted ethical principles. Standards upheld include, but are not limited to, the following: Research was designed, reviewed and undertaken in a way that ensured its integrity and quality. Research subjects were informed fully about the purpose, methods and intended possible uses of the research and what their participation in the research entailed. The confidentiality of information supplied by research subjects and the anonymity of respondents was respected. Research participants participated in a voluntary way, free from any coercion. Harm to research participants was avoided. The independence and impartiality of the researcher was clear, and any conflicts of interest or partiality were explicit. Ethical and political issues relating to personal and national disparities in wealth, power, political interest and national political systems were considered, as were the differences between the civil and financial position of national and foreign subjects and/or participants. There was awareness that irresponsible actions could jeopardize access to a research setting or even a whole country for other researchers (LSE Research Ethics Policy, 2008). These standards comport with the American Political Science Association's Principles of Professional Conduct (APSA, ND).

Clark argues that while ethical codes and guidelines are valuable and offer a useful starting point, they lack the nuance and specificity that individual research environments require. In short, '[o]fficial guidelines and ethical codes of practice are insufficient to allow the researcher to navigate through the continually evolving course and context of research in a way that is morally responsive to the participant, while ensuring the integrity of the research' (Hewitt, 2007: 1149, 1157). Clark finds that a more situational and contextual approach to ethics – what Cutcliffe and Ramcharan term an 'ethics as-process approach' – is needed (Cutcliffe and Ramcharan, 2002: 1000, 1006). Using this approach, ethical issues are addressed, discussed, and negotiated in a co-learning environment as the research progresses (Clark, 2012: 825).

Similarly, my research set certain limits in order to ensure what was deemed ethically responsible. For example, interview sampling focused on key stakeholder groups, but tended to focus on elite members of these groups, i.e., those with specific knowledge of US involvement. Because of relatively limited time in each country, it was decided that victims and other vulnerable groups perhaps affected by US involvement were not interviewed, since adequate time was not available to ensure that re-traumatization would not take place. It was also not seen as directly necessary to respond to the research questions. Contextual issues were taken into account in each country visited.

4. Critical reflections on the student as researcher

Webb and Salancik explore how the interviewer must develop a self-consciousness about what is affecting the interviewee, including how he himself affects the interviewee. Dexter also examined the importance of 'self-assessment in the

interview process'. He discusses how an assessment of interview responses and reactions is important since interviewees are not engaging in undirected monologues, but are, on the contrary, addressing themselves to specific conceptions of a specific audience. Ordinarily, conceptions of a specific audience are *in part* determined by the characteristics of the interviewer as perceived by the interviewee. Webb and Salancik brought together analytic and experimental evidence to support this finding, but Dexter says that an interviewer intuitively realizes that interviewees will not talk in the same way to those whom they regard as not really understanding it as they will to those who strike them as being sophisticated about it. In all elite interviewing, interviewers will come across many examples of the way in which the interviewer, because of what he is or appears to be, affects the content, the style, the tone of responses (Webb and Salancik, 1966; Dexter, 1970: 139).

According to Dexter, what this means is that interviewing is a social relationship and the interviewer is part of that relationship. The interviewee's inarticulate and unexamined conception of the audience guides and determines what he says. Interviewees respond to cues given by the interviewer as cues of how to present themselves. Further, Dexter states that without any indication of viewpoint, the mere appearance of one interviewer may make him look like someone with a particular view. Or the name, the sponsorship, the letter of introduction may lead the interviewee to assign such interpretations. Interviewees are often shrewd about guessing how interviewers play their roles. But interviewers may have characteristics, which to some interviewees are misleading, or a particular institutional connection or project description may lead to systematic misinterpretation. In any case, the interviewer tends to affect what is said. In order to get around this situation, Dexter

places an emphasis on asking questions objectively, i.e., managing the impressions one creates that the interviewee has supposedly no cues to guide him (Ibid: 140).

Unfortunately, in most accounts of interviewing, the interviewer suppresses any account of his own role, and, except in extreme cases, of interviewee reactions to him. Interviewers do not normally discuss their role, however, since it appears egocentric or seems ‘to violate the canon of scholarly decency’ if he were to tell the reader about himself in at all the same way that he sometimes discusses his subjects. Dexter suggests that the researcher explain how the kind of person he is, how his characteristics may have affected what the interviewee said and how his biases may have impacted his interpretation of what he thought he heard, even though this is typically not done (Ibid: 142-143).

In this vein, Bentley and Dewey’s notion of ‘transaction’ is useful since the person ‘exists’ in a state of dynamic mutual interdependence with other persons and his ‘personality’ – what he says, realizes and perceives – is a function of this relationship. In the context of an interview, Dexter says that it is likely that the total-situation-as-felt-and-perceived affects or chiefly determines how a respondent answers a set of questions. Interviewers must therefore try to determine how respondents see situations, bearing in mind that the interviewee’s perceptions may be functions of unanalyzed or unplanned aspects of interviewer behavior. As far as possible, the interviewer will try to control or modify his behavior so as to lead the interviewee to focus on the study – an effort termed ‘objectivity’ (Ibid: 143-145).

It is important for the interviewer, *during the interview*, Dexter states, to realize what the interviewee is responding to, because on this basis, he can continuously modify his strategy, formulate his questions and plan his comments. He may even modify his own mannerisms to a limited extent. The skilled interviewer in an unstructured

interview, on the basis of such realizations just indicated can in a very primitive way ‘test’ hypotheses on the run; if he feels the interviewee is defining the situation in a certain way, he asks questions or makes comments designed to get further responses which will test those impressions (Ibid: 146).

Dexter also notes that physical characteristics can evoke different role conceptions in interviewees, which may affect their responses. A good interviewer is able to make relevant and applicable guesses, while the interview is going on, as to how he is regarded by the interviewee and to adapt his strategy accordingly. He is able, similarly, to make intelligent guesses about other factors which are affecting the interviewee’s choice of role and responses. And a good interviewer is also aware of his own reactions while the interview is going on and is able almost instantaneously to take account of them. After the interview is completed, when he is writing it up and analyzing it, the good interviewer will take account both of his own reactions and responses, and those, so far as he can guess, of the interviewee. Much of this has to be done intuitively and subconsciously and without explicit formulation (Ibid: 148-150).

During fieldwork, I was very cognizant of my age, gender, nationality, ethnic background, language abilities and institutional affiliations. These issues impacted my access to interviewees and interview content, and had different implications depending on the country I was in and the person I was interviewing. Although not always clear, some individuals agreed to be interviewed because of my scholarship, my undergraduate and postgraduate universities, or my previous professional experience in the field of transitional justice. My nationality helped gain access to American government officials, as did my affiliation with Georgetown University as a visiting researcher in DC. Spanish fluency impacted access and quality of

interviews in Colombia. Prior work experience in Liberia helped gain access to interviewees there.

Once I arrived at an interview, being a young woman appeared to be less threatening than perhaps male or older researchers may have been. My professional dress, business card, recorder and notebook seemed to signal to the interviewee I was undertaking a serious research initiative. Many interviewees also became more comfortable and talkative after they realized I was knowledgeable and informed about the topic based on the questions I asked. Interviews often lasted much longer than initially agreed, and most interviewees suggested additional contacts. During the interview, I followed prepared themes, but modified questions based on interviewee responses. I went into most interviews with an open and exploratory format and frame of mind in order to discover new knowledge of the topic. In the case study countries, my efforts to be sensitive to cultural differences seemed to be appreciated. My use of language and jargon was modified depending on the interviewee.

One limitation to mention is the difference in the quality of interviews conducted at the beginning of the research, and those conducted toward the end of the research. Those conducted toward the end were more revealing and informative since my interview skills had improved, I held greater knowledge of the topic, and my questions were more targeted. In addition, I could have more critically taken into account how my reactions and responses impacted interviewees.

5. Specific challenges of fieldwork in transitional settings

The data for qualitative analysis typically come from fieldwork. During fieldwork, the researcher spends time in the setting under study, where situations of importance to the study can be observed, people interviewed and documents analyzed. As Patton

describes, physical proximity for a period of time to the people and circumstances under study allows the researcher to capture what is happening (Patton, 2002: 4, 48). Fieldwork in transitional, including conflict and post-conflict settings, involves a number of methodological, practical and ethical challenges. These contexts are often marked by unpredictable change, polarized perspectives, and a high density of external interventions which interact in various ways with strategies of local populations. It is therefore necessary to adequately prepare for these situations, and develop a responsible research attitude, which takes into account the implications of these factors for data gathering and how to deal with them.

A Wageningen University course on fieldwork in conflict and post-conflict settings outlines key topics to consider: 1) the organization of access to and development of trust of research populations; 2) security considerations for the researcher as well as the research population; 3) issues of ethics; 4) positioning and strategic representation of the researcher and research subjects; 5) the effects of polarization on all stages of the research process; and 6) the nature and production of knowledge claims on conflict/post-conflict processes (Wageningen University, Fieldwork in conflict and post-conflict settings, ND).

Fieldwork for this research raised some challenges. First, arranging fieldwork in five countries in very different contexts required a great deal of logistical organization. Funding, as well as secure accommodation and transport were all issues which took time to arrange. Second, gaining access to diverse stakeholder groups and elite interviewees necessitated a high level of patience and communication skills. Some interviewees were wary of speaking with me, and some proved impossible to gain access to in the time period afforded for the fieldwork (i.e., Cambodian government officials). As previously mentioned, it was decided not to interview

vulnerable groups in order not to trigger re-traumatization, or to exacerbate any power imbalances that might be perceived.

To address some of these issues. I considered interactions between partiality, access, safety and trust in these environments. I attempted to understand the significance of my own and others' positions in the research field; assessed the limitations of my own and others' knowledge claims; and negotiated between stakeholders' varied interests in the topic and understandings of research in the design, execution and reporting stages. I also applied a culturally sensitive approach to each fieldwork visit. I considered issues such as language differences and differing norms and values, and adjusted my use of language, tone and approach to connect as closely as I could with each context. I also attended as many events related to my topic in order to observe the conversation and identify additional interviewees.

Some limitations involve different access to different groups in each setting. Although equal numbers of interviewees from each stakeholder group were sought, in some cases this was not possible.

Appendix 2 Interview List and Statistics

Breakdown of different types of interviews conducted

| | No. |
|--------------------------------------|------------|
| TOTAL INTERVIEWS CONDUCTED | 187 |
| TOTAL RELATED TO CASE STUDIES | 147 |
| Cambodia (38) | |
| Liberia (51) | |
| Colombia (58) | |
| TOTAL OTHER/GENERAL | 40 |
| US Government | 55 |
| Cambodia (6) | |
| Liberia (15) | |
| Colombia (16) | |
| Other (18) | |
| Transitional Justice Measures | 23 |
| Cambodia (4) | |
| Liberia (9) | |
| Colombia (4) | |
| Other (6) | |
| Case Study Governments | 11 |
| Cambodia (0) | |
| Liberia (2) | |
| Colombia (9) | |
| International Organizations | 16 |
| Cambodia (4) | |
| Liberia (7) | |
| Colombia (4) | |
| Other (1) | |
| International NGOs | 34 |
| Cambodia (8) | |
| Liberia (11) | |
| Colombia (9) | |
| Other (6) | |
| Local NGOs | 19 |
| Cambodia (6) | |
| Liberia (6) | |
| Colombia (7) | |
| Academia | 20 |
| Cambodia (9) | |
| Liberia (0) | |
| Colombia (2) | |
| Other (9) | |
| Media | 3 |
| Cambodia (1) | |
| Liberia (0) | |
| Colombia (2) | |

| | |
|--|---|
| US Implementing Partners (Colombia) | 5 |
| Foreign State Government | 1 |

Cambodia Interviews

Breakdown of different types of interviews conducted for Cambodia case study

| | No. |
|--|------------|
| TOTAL INTERVIEWS CONDUCTED | 38 |
| US Government | 6 |
| State Department (6) | |
| Transitional Justice Measure | 4 |
| Extraordinary Chambers in the Courts of Cambodia | |
| International Organizations | 4 |
| United Nations (4) | |
| International NGOs | 8 |
| Open Society Justice Initiative (3) | |
| Human Rights Watch (2) | |
| International Center for Transitional Justice (1) | |
| National Endowment Democracy (2) | |
| Cambodian NGOs | 6 |
| Documentation Center of Cambodia (3) | |
| Cambodian Human Rights and Development Association (1) | |
| Cambodian Human Rights Action Committee (1) | |
| Center for Justice and Reconciliation (1) | |
| Academia | 9 |
| Media | 1 |

Cambodia Interview List (non-attributable interviews left blank)

| US Government | | | | |
|-------------------------------------|----------------------------------|---------------------|----------------------------|------------------|
| Name | Position | Organization | Date | Attribute |
| Kent Wiedemann | Former US Ambassador to Cambodia | State Department | 21 July 2010 | Y |
| | | State Department | 4 August 2010 | US official 1 |
| | | State Department | 23 February 2010 | US official 3 |
| | | State Department | 18 March 2010 | N |
| | | State Department | 4 April 2010 | US official 2 |
| | | State Department | 14 April and 4 August 2010 | N |
| Transitional Justice Measure | | | | |
| Craig | Lead investigator, | ECCC | 20 July 2010 | Y |

| | | | | |
|------------------------------------|--|---|------------------|-----------------|
| Etcheson | Office of Co-Prosecution; Khmer Rouge scholar | | | |
| Bophal Keat | Former head of Victims' Unit (2008-2009) | ECCC | 23 July 2010 | Y |
| Richard Rogers | Chief of Defence Support Section | ECCC | 8 August 2010 | Y |
| Steve Heder | Investigator, ECCC; Lecturer, SOAS | ECCC; SOAS | 28 October 2009 | Y |
| International Organizations | | | | |
| Ton Vong | Legal Associate | UN Office of the High Commissioner for Human Rights (OHCHR) | 14 July 2010 | Y |
| David Tolbert | Former Special Expert to the UN Secretary-General on UN Assistance to the Khmer Rouge Trials | UN | 10 May 2010 | Y |
| | | UN | 17 June 2010 | UN official |
| | | UN Office of the High Commissioner for Human Rights (OHCHR) | 13 November 2009 | N |
| International NGOs | | | | |
| Long Panhavuth | Program Officer, Cambodia | Open Society Justice Initiative (OSJI) | 19 July 2010 | Y |
| Heather Ryan | Monitor, Khmer Rouge Tribunal | Open Society Justice Initiative (OSJI) | 29 July 2010 | Y |
| James Goldston | Executive Director | Open Society Justice Initiative (OSJI) | 23 February 2010 | Y |
| | | | 28 April 2010 | Cambodia expert |
| Sophie Richardson | Asia Advocacy Director | Human Rights Watch | 17 March 2010 | Y |
| Caitlin Reiger | Director, International Policy Relations | International Center for Transitional Justice | 3 November 2009 | Y |
| John Knaus | Senior Program Officer for Asia | National Endowment Democracy (NED) | 13 April 2010 | Y |
| Lynn Lee | Program Officer for East Asia | National Endowment | 13 April 2010 | Y |

| | | | | |
|-----------------------|---|--|---------------------------|---|
| | | Democracy (<i>NED</i>) | | |
| Cambodian NGOs | | | | |
| Youk Chhang | Director | DC-Cam | 15 July 2010 | Y |
| Anne Heindel | Legal Advisor | DC-Cam | 15 July 2010 | Y |
| John Ciorciari | Legal Advisor, DC-Cam; Assistant Professor, University of Michigan | DC-Cam; University of Michigan | 10 March and 27 July 2010 | Y |
| Thun Saray | President | Cambodian Human Rights and Development Association (ADHOC) | 19 July 2010 | Y |
| <i>Jedy Oeung</i> | Program Officer | Cambodian Human Rights Action Committee (CHRAC) | 20 July 2010 | Y |
| Theary Seng | Founder and President | Center for Justice and Reconciliation | 8 August 2010 | Y |
| Academics | | | | |
| Fred Z. Brown | Y Institute Fellow; Professorial Lecturer; former US foreign service officer | Johns Hopkins University (SAIS) | 6 November 2009 | Y |
| Kenton Clymer | Presidential Research Professor | Northern Illinois University | 22 July 2010 | Y |
| David Chandler | Professor | Monash University | 24 July 2010 | Y |
| Ben Kiernan | Professor and Director of the Genocide Studies Program | Yale University | 20 February 2010 | Y |
| Jaya Ramji-Nogales | Assistant Professor of Law | Temple University | 2 November 2009 | Y |
| Pamela Sodhy | Visiting Associate Professor | Georgetown University | 1 March 2010 | Y |
| David Steinberg | Professor; former member of Senior Foreign Service, USAID | Georgetown University | 18 February 2010 | Y |
| Robert Sutter | Visiting Professor; former US government career | Georgetown University | 18 February 2010 | Y |
| Beth Van Schaack | Legal Advisor, DC-Cam; Associate Professor of Law | Santa Clara University | 31 October 2009 | Y |
| Media | | | | |
| | | | 17 July 2010 | N |

Liberia Interviews

Breakdown of different types of interviews conducted for Liberia case study

| | No. |
|--|-----------|
| TOTAL INTERVIEWS CONDUCTED | 51 |
| US Government | 15 |
| State Department (9) | |
| USAID (3) | |
| Congress (2) | |
| Department of Justice (1) | |
| Transitional Justice Measures | 9 |
| Special Court for Sierra Leone (3) | |
| TRC (6) | |
| Liberian Government | 2 |
| Executive | |
| Legislature | |
| Foreign State Government | 1 |
| International Contact Group on Liberia | |
| International Organizations | 7 |
| UN Mission in Liberia (6) | |
| UNDP-Monrovia (1) | |
| International NGOs | 11 |
| International Center for Transitional Justice (2) | |
| Carter Center (3) | |
| American Bar Association (1) | |
| Search for Common Ground (1) | |
| Open Society Initiative of West Africa (1) | |
| Human Rights Watch (1) | |
| US Institute of Peace (1) | |
| Benetech (1) | |
| Liberian NGOs | 6 |
| Justice and Peace Commission (1) | |
| Liberian Council of Churches (1) | |
| PRS Tracking Network/ Transitional Justice Working Group (1) | |
| Rights and Rice Foundation/ Transitional Justice Wkg Group (1) | |
| Women NGO Secretariat of Liberia (1) | |
| Civil society coordinator for Grand Cape Mount (1) | |

Liberia Interview List (non-attributable interviews left blank)

| US Government | | | | |
|--------------------|--|------------------|---------------|-----------|
| Name | Position | Organization | Date | Attribute |
| Jendayi Frazer | Assistant Secretary of State for African Affairs (2005-09) | State Department | 9 April 2010 | Y |
| Pamela Bridgewater | Deputy Assistant Secretary for African | State Department | 21 April 2010 | Y |

| | | | | |
|--------------------------------------|--|--------------------------|------------------|---------------|
| | Affairs (2002-04) | | | |
| Chester Crocker | Assistant Secretary of State for African Affairs (1981-89) | State Department | 16 February 2010 | Y |
| Michael Arietti | Director, Office of West African Affairs (2001-04) | State Department | 9 May 2011 | Y |
| | | State Department | 18 May 2010 | N |
| | | State Department | 10 December 2009 | US official 1 |
| | | State Department | 10 December 2009 | N |
| | | State Department | 25 January 2010 | US official 2 |
| | | State Department | 16 March 2010 | US official |
| | | USAID | 3 December 2009 | N |
| | | Department of Justice | 8 December 2009 | N |
| | Office of Transition Initiatives | USAID | 7 April 2010 | N |
| | | USAID | 13 April 2010 | N |
| | | Senate | 24 March 2010 | N |
| | | House of Representatives | 12 April 2010 | N |
| Transitional Justice Measures | | | | |
| David Crane | Chief Prosecutor | SCSL | 19 April 2010 | Y |
| Gregory Townsend | Senior Legal Officer | SCSL | 12 January 2012 | Y |
| Chris Mahony | Consultant | SCSL and SL TRC | 29 January 2012 | Y |
| Cllr. Jerome Verdier | TRC Chairman | TRC | 9 December 2009 | Y |
| Rev. Gerald B. Coleman | TRC Commissioner | TRC | 10 December 2009 | Y |
| Cllr. Pearl Brown Bull | TRC Commissioner | TRC | 7 December 2009 | Y |
| Salif Massalay | Statement coding | TRC | 23 November 2009 | Y |
| | | TRC | 26 January | N |

| | | | | |
|------------------------------------|---|---|------------------|-----------------------------------|
| | | | 2010 | |
| | | TRC | 3 December 2009 | Senior TRC staff member |
| Liberian Government | | | | |
| Minister Natty Davis | Minister of State Development and Reconstruction | Office of the President | 2 December 2009 | Y |
| Rep. G. Wesseh Blamoh | Chairman, Standing Committee on Peace and National Reconciliation | Legislature of Liberia | 3 December 2009 | Y |
| Foreign State Government | | | | |
| | | | 28 November 2009 | ICGL member |
| International Organizations | | | | |
| | | UNMIL | 8 December 2009 | International rule of law advisor |
| | | UNMIL | 30 November 2009 | International observer 1 |
| | | UNMIL/OHCHR | 28 November 2009 | International observer 2 |
| | | UNMIL | 26 November 2009 | N |
| | | UNMIL | 26 November 2009 | N |
| | | UNDP, Monrovia | 30 November 2009 | N |
| Macdonald Metzger | Media Consultant for ICTJ/Radio Producer for UNMIL, Monrovia | UNMIL | 28 November 2009 | Y |
| International NGOs | | | | |
| | | | 9 December 2010 | International NGO staff member |
| | | International Center for Transitional Justice | 2 December 2009 | ICTJ staff member |
| | | American Bar Association | 7 December 2009 | N |
| | | Search for | 7 December | TJWG |

| | | | | |
|---------------------------|--|--|---------------------|------------------------------|
| | | Common Ground/ Talking Drums | 2009 | member |
| | | Open Society Initiative of West Africa | 27 November 2009 | N |
| Tom Crick | Associate Director | Carter Center | 28 June 2009 | Y |
| Sean MacLeay | Project Officer | Carter Center | 8 December 2009 | Y |
| Pewee Flomoku | Project Coordinator | Carter Center | 8 December 2009 | Y |
| Elise Keppler | Senior counsel, International Justice Program | Human Rights Watch | 23 February 2010 | Y |
| Abiodun Williams | Vice President of the Centre for Conflict Analysis and Prevention | US Institute of Peace | 26 February 2010 | Y |
| Kirsten Cibelli | Program Manager | Benetech | 21 November 2009 | Y |
| Liberian NGOs | | | | |
| Cllr. Augustine Toe | National Director | Justice and Peace Commission | 2 December 2009 | Y |
| Dr. Benjamin Lartey | General Secretary | Liberian Council of Churches | 3 December 2009 | Y |
| James Yarsiah | Coordinator of of the Transitional Justice Working Group and Executive Director of Rights and Rice Fdn. | Rights and Rice Foundation | 28 November 2009 | Y |
| Kanio Gbala | Coordinator of the Transitional Justice Working Group and Programme Manager of the PRS Tracking Network | PRS Tracking Network | 27 November 2009 | Y |
| | | | 27 November 2009 | N |
| Alex Ballo | Civil society county focal point | Sinje, Grand Cape Mount | 1 December 2009 | Y |
| Civil society leader 1 | Civil society leader | Focus group in Buchanan, Grand Bassa | 4 December 2009 | Civil society leader 1 |
| Civil society leader 2 | Civil society leader | Focus group in Buchanan, Grand Bassa | 4 December 2009 | Civil society leader 2 |
| Youth | Youth leader | Focus group in | 26 November | Youth |

| | | | | |
|----------------|--------------|--------------------------------|------------------|----------------|
| leader 1 | | Kakata, Margibi | 2009 | leader 1 |
| Youth leader 2 | Youth leader | Focus group in Kakata, Margibi | 26 November 2009 | Youth leader 2 |

Colombia Interviews

Breakdown of different types of interviews conducted for Colombia case study

| | No. |
|---|-----------|
| TOTAL INTERVIEWS CONDUCTED | 58 |
| US Government | 16 |
| State Department (7) | |
| USAID (6) | |
| Drug Caucus (1) | |
| Department of Justice (2) | |
| US Implementing Partners | 5 |
| International Organization of Migration (2) | |
| Management Sciences for Development (3) | |
| Transitional Justice Measures | 4 |
| Justice and Peace Unit (2) | |
| National Commission for Reparation and Reconciliation (2) | |
| Colombian Government | 9 |
| Attorney-General (1) | |
| Acción Social (3) | |
| National Planning Department (2) | |
| Office of the High Commissioner for Reintegration (1) | |
| Office of the High Commissioner for Peace (1) | |
| Ministry of the Interior and Justice (1) | |
| International Organizations | 4 |
| Organization of American States (1) | |
| UN Department of Peacekeeping Operations (1) | |
| UN Department of Political Affairs (1) | |
| World Bank (1) | |
| International NGOs | 9 |
| International Center for Transitional Justice (3) | |
| Center for International Policy (1) | |
| Washington Office on Latin America (2) | |
| Human Rights First (1) | |
| Woodrow Wilson Center (1) | |
| US Institute of Peace (1) | |
| Colombian NGOs | 7 |
| Colombia Commission of Jurists (1) | |
| <i>Fundación Ideas para la paz</i> (1) | |
| Arco Iris (1) | |
| Fundación Social (1) | |
| País Libre (1) | |
| Iniciativa de Mujeres Colombianas por la Paz (1) | |

| | |
|----------------------------|---|
| Independent consultant (1) | |
| Academia | 2 |
| Media | 2 |

Colombia Interview List (non-attributable interviews left blank)

| US Government | | | | |
|----------------------|---|---------------------------|---------------------|----------------------------------|
| Name | Position | Organization | Date | Attribute |
| Ileana Baca | Director, Demobilization and Reintegration Program | USAID/Colombia | 31 August 2010 | Y |
| Sandra Pabón | Assistant Director, Demobilization and Reintegration Program | USAID/Colombia | 31 August 2010 | Y |
| | | USAID/Colombia | 18 August 2010 | USAID official 1 |
| | | USAID/Colombia | 18 August 2010 | N |
| | | USAID | 9 March 2010 | N |
| | | USAID | 9 March 2010 | N |
| Myles Frechette | US Ambassador to Colombia | US Embassy in Colombia | 7 April 2010 | Y |
| | | US Embassy in Colombia | 23 August 2010 | N |
| | | State Department | 23 March 2010 | N |
| | Bureau of Democracy, Human Rights and Labor | State Department | 12 March 2010 | State Departme nt official |
| | Office of the Coordinator for Reconstruction and Stabilization | State Department | 12 April 2010 | N |
| | Office of the Coordinator for Reconstruction and Stabilization | State Department | 22 March 2010 | N |
| | Office of the Coordinator for Reconstruction and Stabilization | State Department | 22 March 2010 | N |
| Janet Drew | Professional Staff | Drug Caucus | 24 March 2010 | Y |
| | | Department of Justice | 6 September 2010 | DOJ official 1 |

| | | | | |
|--------------------------------------|--|--|---|-------------------|
| | | | (interview); 7-8 September 2010 (email communication) | |
| | | DOJ | 27 August 2010 | DOJ official 2 |
| US Implementing Partners | | | | |
| | | International Organization of Migration (IOM) | 9 September 2010 | N |
| | | International Organization of Migration (IOM) | 7 September 2010 | N |
| | | Management Sciences for Development (MSD) | 1 September 2010 | N |
| | | Management Sciences for Development (MSD) | 1 September 2010 | N |
| | | Management Sciences for Development (MSD) | 31 August 2010 | N |
| Transitional Justice Measures | | | | |
| Luis González León | Director, Justice and Peace Unit | Attorney General's Office | 3 September 2010 | Y |
| Loreley Oviedo | Staff member, International Cooperation, Justice and Peace Unit | Attorney General's Office | 3 September 2010 | Y |
| Eduardo Pizarro | President | National Commission of Reparations and Reconciliation (CNRR) | 7 September 2010 | Y |
| Catalina Martínez | Executive Director | National Commission of Reparations and Reconciliation (CNRR) | 26 August 2010 | Y |
| Colombian Government | | | | |
| Patricia Linares Prieto | Former delegate of the Procuradora to CNRR | Procuradora | 26 August 2010 | Y |

| | | | | |
|------------------------------------|--|---|-------------------|---|
| Sandra Alzate | Director | Acción Social | 25 August 2010 | Y |
| Viviana Cañon Tamayo | Assessor, Office of International Cooperation | Acción Social | 20 September 2010 | Y |
| Gloria Gomez | Assessor, Office of International Cooperation | Acción Social | 3 September 2010 | Y |
| Luis Carlos Restrepo | High Commissioner for Peace | Office of the High Commissioner for Peace | 21 September 2010 | Y |
| Paola Buendia | Director of the Justice and Security Unit | National Planning Department (DNP) | 19 August 2010 | Y |
| Paula Aponte | Staff member, Justice and Security Unit | National Planning Department (DNP) | 19 August 2010 | Y |
| Heidi Abuchaibe | Director of Transitional Justice | Ministry of the Interior and Justice (MIJ) | 1 September 2010 | Y |
| | | Office of the High Commissioner for Reintegration (ACR) | 10 September 2010 | N |
| International Organizations | | | | |
| Daniel Millares | Justice and Peace Manager, Mission to Support the Peace Process in Colombia (Mapp-OEA) | Organization of American States | 23 August 2010 | Y |
| Veronica Hinestroza | Consultant | World Bank | 20 August 2010 | Y |
| | | UN Department of Peacekeeping Operations | 22 February 2010 | N |
| | | UN Department of Political Affairs | 23 February 2010 | N |
| International NGOs | | | | |
| Michael Reed | Director, Colombia office | International Center for Transitional Justice | 27 August 2010 | Y |
| Angelica Zamora, Bogota | Staff member, Colombia office | International Center for Transitional Justice | 19 March 2010 | Y |
| Cristina Rivera | Communications associate, Colombia office | International Center for Transitional Justice | 25 August 2010 | Y |

| | | | | |
|-------------------------|--|---|-------------------|---|
| Adam Isacson | Director | Center for International Policy | 2 March 2010 | Y |
| Gimena Sanchez | Senior Associate for the Andes | Washington Office on Latin America | 18 March 2010 | Y |
| Anthony Dest | Intern | Washington Office on Latin America | 18 March 2010 | Y |
| Andrew Hudson | Senior Associate | Human Rights First | 8 September 2009 | Y |
| | | Woodrow Wilson Center | 10 March 2010 | N |
| Virginia Bouvier | Senior Program Officer for Latin America | US Institute of Peace | 25 February 2010 | Y |
| Colombian NGOs | | | | |
| Gustavo Gallón | President | Colombia Commission of Jurists (CCJ) | 10 September 2010 | Y |
| Maria Victoria Llorente | Director | <i>Fundación Ideas para la paz (FIP)</i> | 24 August 2010 | Y |
| Lucho Celis | Coordinator | Arco Iris | 24 August 2010 | Y |
| Paula Gaviria | Director of Impact in Public Policy | Fundación Social | 8 September 2010 | Y |
| Edgar Gomez | Coordinator of Victims' Attention Center | País Libre | 7 September 2010 | Y |
| Angela Cerón | Director | Iniciativa de Mujeres Colombianas por la Paz (<i>IMP</i>) | 1 September 2010 | Y |
| Alvaro Cordoba | Consultant for UNDP/ USAID/ CNRR | N/A | 25 October 2009 | Y |
| Academics | | | | |
| Florian Huber | Doctoral candidate | Georg-August-Universität Göttingen | 16 October 2009 | Y |
| Lerber Lisandro | Investigator (Former combatant) | National University of Colombia | 6 September 2010 | Y |
| Media | | | | |
| Marta Ruiz | Editor, Security and Justice section | Semana | 24 August 2010 | Y |
| Toby Muse | Independent media consultant | N/A | 28 August 2010 | Y |

General Interviews

Breakdown of different types of general interviews

| | No. |
|-----------------------------------|-----------|
| TOTAL INTERVIEWS CONDUCTED | 40 |
| US Government | 18 |
| Transitional Justice Measures | 6 |
| International Organizations | 1 |
| NGOs | 6 |
| Academia | 9 |

List of general interviewees (non-attributable interviews left blank)

| US Government | | | | |
|----------------------|--|--|------------------|-------------|
| Name | Position | Organization | Date | Attribute |
| David Scheffer | Ambassador-at-large for War Crimes Issues | State Department | 12 March 2012 | Y |
| Pierre Prosper | Ambassador-at-large for War Crimes Issues | State Department | 22 April 2010 | Y |
| Clint Williamson | Ambassador-at-large for War Crimes Issues | State Department | 21 April 2010 | Y |
| Steven Rapp | Ambassador-at-large for War Crimes Issues | State Department | 26 July 2010 | Y |
| Anne-Marie Slaughter | Head of Policy Planning/ Professor | State Department; Princeton University | 23 May 2012 | Y |
| Donald McHenry | Former US Ambassador to the UN/ Professor | USUN/ Georgetown University | 1 March 2010 | Y |
| Anthony Lake | Former National Security Council Adviser/ Professor | National Security Council/ Georgetown University | 18 February 2010 | Y |
| Victor Cha | Former Asian Affairs Director/ Professor | National Security Council/ Georgetown University | 1 March 2010 | Y |
| | | National Security Council | 20 April 2010 | N |
| | | Senate | 8 January 2010 | US official |
| David Hodgkinson | Director, Office of Human Rights and Transitional Justice, Coalition Provisional Authority | State Department | 8 April 2010 | Y |

| | | | | |
|--------------------------------------|---|---|------------------|---|
| Andy Loomis | Senior Conflict Prevention Officer | State Department | 12 March 2010 | Y |
| Lisa Chandonnet-Bedoya | Program Analyst, Office of Conflict Management & Mitigation | USAID | 6 April 2010 | Y |
| Marie Pace | Democracy Specialist, Office of Civilian Response | USAID | 20 April 2010 | Y |
| Andrew Natsios | Administrator | USAID | 22 March 2010 | Y |
| Grant Harris | Senior Policy Advisor to Susan E. Rice, the U.S. Ambassador to the United Nations | USUN | 24 February 2010 | Y |
| | Professional staff member | House Foreign Affairs Committee | 16 April 2010 | N |
| | | State Department | 14 April 2010 | N |
| Transitional Justice Measures | | | | |
| Frederick Swinnen | Political Adviser | International Criminal Tribunal for the former Yugoslavia | 13 January 2012 | Y |
| Matias Hellman | External Relations Adviser, Office of the President | International Criminal Court | 13 January 2012 | Y |
| Rod Rastan | Legal Advisor, Office of the Prosecutor | International Criminal Court | 13 January 2012 | Y |
| | | Special Tribunal for Lebanon | 12 January 2012 | N |
| | | Special Tribunal for Lebanon | 12 January 2012 | N |
| | | International Criminal Tribunal for Rwanda | 13 January 2012 | N |
| International Organizations | | | | |
| Kaoru Okuizumi | Transitional justice focal point in the judicial section | United Nations Department of Peacekeeping Operations | 4 March 2010 | Y |
| NGOs | | | | |
| Tom Melia | Senior Advisor | Freedom House | 9 March 2010 | Y |
| Tom Malinowski | Washington Advocacy Director | Human Rights Watch | 15 March 2010 | Y |
| Paige Arthur | Deputy Director, Institutional | International Center for | 22 February 2010 | Y |

| | | | | |
|-------------------------|---|---|------------------|---|
| | Development | Transitional Justice | | |
| Juan Mendez | Former President | International Center for Transitional Justice | 9 April 2010 | Y |
| Morton Halperin | Senior Advisor | Open Society Foundations | 19 March 2010 | Y |
| Neil Kritz | Senior Scholar in Residence | US Institute of Peace | 16 March 2010 | Y |
| Academics | | | | |
| Chet Crocker | Professor | Georgetown University | 16 February 2010 | Y |
| Charles Kupchan | Professor | Georgetown University | 16 February 2010 | Y |
| Lynn C. Ross | Professor | Georgetown University | 19 February 10 | Y |
| Pauline Baker | Adjunct Professor/ Director of Fund for Peace | Georgetown University | 4 November 2009 | Y |
| Erik Voeten | Peter F. Krogh Associate Professor of Geopolitics and Justice in World Affairs | Georgetown University | 17 March 2010 | Y |
| Julie Shackford-Bradley | Lecturer | UC Berkeley | 2 November 2009 | Y |
| Richard Wilson | Professor of Law/ Director of the International Human Rights Law Clinic | American University | 4 November 2009 | Y |
| Victor Peskin | Associate Professor | Arizona State University | 30 June 2009 | Y |
| Eric Stover | Adjunct Professor of Law and Public Health; Faculty Director, Human Rights Center | UC Berkeley | 12 February 2009 | Y |

Appendix 3 List of Meetings Attended

| Cambodia |
|--|
| Judgment of Kaing Guek Eav alias Duch, ECCC, Phnom Penh, 26 July 2010 |
| OSJI Event after the Duch Judgement, Phnom Penh, 26 July 2010 |
| Academic Symposium on the 60th Anniversary of U.S.-Cambodia Diplomatic Relations 1950-2010, 21-22 July 2010 |
| Liberia |
| President Ellen Johnson-Sirleaf, Chatham House, 13 June 2011 |
| Colombia |
| President Juan Manuel Santos, 'Leading Colombia towards Prosperity for All', LSE, 22 November 2011 |
| 'In the Shadow of the ICC: Colombia and International Criminal Justice', Conference at Senate House, University of London, 26-27 May 2011 |
| General |
| Secretary of State Madeleine Albright. 'Global Political Challenges: Women Advancing Democracy', LSE, 2 December 2011 |
| Geoffrey Robertson, 'Ending Impunity: the struggle for global justice', SOAS, 21 November 2011 |
| Taking Stock of Transitional Justice, Oxford University, 26-28 June 2009 |
| 'Shaping the future of Transitional Justice: growing synergies between theory and practice', Essex Transitional Justice Network international conference, 16-17 September 2010 |
| Several meetings of the London Transitional Justice Network |
| Transitional justice panels (participant and presenter) at CISS-ISA, Venice, July 2010; ISA, Montreal, April 2011; ECPR, Reykjavik, August 2011; ISA, San Diego, April 2012 |
| David Scheffer lecture at SOAS on his book <i>All the Missing Souls</i> , 12 March 2012 |

Appendix 4 Cambodia Materials

Abbreviations

| | |
|------------------|--|
| CGJA | Cambodian Genocide Justice Act |
| CGDK | Coalition Government of Democratic Kampuchea (FUNCINPEC/PDK/KPNLF) |
| CGP | Yale's Cambodian Genocide Program |
| CPP | Cambodian People's Party |
| DC-Cam | Documentation Center of Cambodia |
| ECCC | Extraordinary Chambers in the Courts of Cambodia |
| FUNCINPEC | National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia |
| GA | United Nations General Assembly |
| IRI | International Republican Institute |
| OSJI | Open Society Justice Initiative |
| KPLF | Khmer People's Liberation Front |
| KPNLF | Khmer People's National Liberation Front |
| KR/ CPK/PDK/CGDK | Khmer Rouge/ Communist Party of Kampuchea (1960s-1970s)/ Party of Democratic Kampuchea (1980s)/ Coalition Government of Democratic Kampuchea |
| OLA | UN Office of Legal Affairs |
| PRK (later SOC) | People's Republic of Kampuchea (State of Cambodia) |
| RGC | Royal Government of Cambodia |
| UN | United Nations |
| UNDP | United Nations Development Programme |
| UNSC | United Nations Security Council |
| UNTAC | United Nations Transitional Authority in Cambodia |
| USUN | US Mission to the United Nations |

Cambodia Timeline

1969-73 – President Nixon approves covert bombing of Cambodia

1975-79 – Khmer Rouge in power

1979-89 – Vietnamese control of Cambodia

1991 – Paris Peace Accords and establishment of UNTAC

1993 – Elections in Cambodia and UNTAC withdraws

1994 – US passes Cambodian Genocide Justice Act

1996 – Cambodian government provides amnesty to Ieng Sary

1997 – Cambodian request to UN for assistance with a tribunal; Hun Sen stages coup

1997-01 – David Scheffer serves as first US Ambassador for War Crimes Issues

1998 – Hun Sen wins elections in Cambodia; US Mission to UN circulates ICTC draft; UN Group of Experts commissioned

1999 – UN Group of Experts release their report; Cambodia rejects report; Mixed tribunal is proposed by the US

2000 – US mediates between the UN and Cambodia

2001 – Cambodia passes ECCC Law

2002 – UN Secretary-General withdraws his good offices and stops negotiations

2003 – UN Secretary-General resumes negotiations at behest of UN General Assembly and signs Agreement with Cambodia on ECCC's establishment in June

2004 – UN/Cambodia Agreement approved for ECCC

2004-07 – Congress blocks US funding the court, but continues to fund DC-Cam

2007 – OSJI and UNDP accuse ECCC of corruption

2008 – US announces \$1.8 million for the tribunal

2009 – Case 001, that of Duch, begins

2010 – Duch is convicted; Former US War Crimes Ambassador Clint Williamson appointed as UN Special Expert to ECCC

2011 – Case 002 starts in November

Appendix 5 Liberia Materials

Abbreviations

| | |
|--------|---|
| ACS | American Colonization Society |
| AFL | Armed Forces of Liberia |
| CIA | Central Intelligence Agency |
| CPA | Comprehensive Peace Agreement |
| DOD | Department of Defense |
| ECOMOG | Economic Community Military Observer Group |
| ECOMIL | ECOWAS Military Mission to Liberia |
| ECOWAS | Economic Community of West African States |
| GOL | Government of Liberia |
| ICC | International Criminal Court |
| ICGL | International Contact Group on Liberia |
| ICTJ | International Center for Transitional Justice |
| LFF | Liberian Frontier Force |
| LURD | Liberians United for Reconciliation and Democracy |
| MODEL | Movement for Democracy in Liberia |
| NGO | Nongovernmental organization |
| NSC | National Security Council |
| NTGL | National Transitional Government of Liberia |
| OTI | USAID Office of Transition Initiatives |
| RUF | Revolutionary United Front |
| SCSL | Special Court for Sierra Leone |
| TRC | Truth and Reconciliation Commission |
| TJWG | Transitional Justice Working Group |
| UN | United Nations |
| UNSC | United Nations Security Council |
| UNMIL | United Nations Mission in Liberia |
| UNOMIL | United Nations Observer Mission in Liberia |
| USAID | US Agency for International Development |
| USG | US Government |

Liberia Timeline

1822 – Liberia is founded as an outpost for returning freed slaves from the Americas.

1847 – Liberia achieves independence.

1971 – William Tubman, Liberia's president of 27 years, dies while in office. Tubman's long-serving vice president, William Tolbert, assumes the presidency.

1980-1989 – In April Samuel Doe leads a coup d'état and assumes power. Doe wins elections in 1985 despite allegations of fraud.

1989–1997 – Liberia's first civil war between Charles Taylor's National Patriotic Front of Liberia (NPFL) and six other major factions.

1997 – Charles Taylor wins the presidential election.

1999-2003 – Liberia's second civil war between NPFL, the armed forces and new opposition groups called the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL). Taylor retains power.

2001 – In March the UN Security Council imposes sanctions on Liberia because of Taylor's support of the Revolutionary United Front (RUF) in Sierra Leone's civil war.

2003 – ECOWAS-sponsors peace talks in Ghana. The Special Court for Sierra Leone unseals an indictment against Taylor. Taylor resigns and accepts asylum in Nigeria. A peace agreement is signed by the government, LURD, MODEL and political parties, which establishes a two-year transitional government. In October, the UN Mission in Liberia (UNMIL) takes over peacekeeping operations from ECOWAS.

2003-2005 – The transitional government is headed by Charles Gyude Bryant

2005 – The Truth and Reconciliation Commission (TRC) Act becomes law in June. Ellen Johnson-Sirleaf wins the presidential election in November.

2006 – Charles Taylor is arrested and transferred to the Special Court for Sierra Leone in March. He is transferred to The Hague in June. The TRC is officially launched in June.

2007 – Taylor's trial begins in April.

2008 – Volume I of the TRC's final report is released in December.

2009 – An unedited version of Volume II of the TRC's final report is released in July and the edited version is released in December.

2011 – Johnson-Sirleaf is re-elected for a second term as President of Liberia.

**Table 1: US Assistance to Liberia, FY1990 to FY2001
(\$ millions)**

| Year | DA | ESF | FY | IMET | Peace Corps | Other Economic Assistance | Annual Total |
|---------------------------|------|-----|-------|------|-------------|---------------------------|--------------|
| 1990 | 0 | 0 | 14.5 | 0.4 | 1.9 | 0.2 | 17 |
| 1991 | 0 | 0 | 43.5 | 0 | 0 | 0 | 43.5 |
| 1992 | 0 | 1.3 | 35.4 | 0 | 0 | 0 | 36.7 |
| 1993 | 0 | 0 | 50.6 | 0 | 0 | 0 | 50.6 |
| 1994 | 3.7 | 0 | 56.4 | 0 | 0 | 0 | 60.1 |
| 1995 | 0 | 0 | 51.6 | 0 | 0 | 0 | 51.6 |
| 1996 | 2.3 | 0 | 55.7 | 0 | 0 | 0 | 57.9 |
| 1997 | 12.5 | 1.7 | 23.1 | 0 | 0 | 0 | 37.3 |
| 1998 | 10.8 | 1.4 | 30.3 | 0 | 0 | 0 | 42.5 |
| 1999 | 7.1 | 0.5 | 16.8 | 0 | 0 | 0 | 24.5 |
| 2000 | 8.9 | 0 | 4.2 | 0 | 0 | 0 | 13.1 |
| 2001 | 5.7 | 0 | 4 | 0 | 0 | 0 | 9.7 |
| Totals by function | 51 | 4.9 | 386.1 | 0.4 | 1.9 | 0.2 | 444.5 |

Source: US Agency for International Development, *US Overseas Loans & Grants Online* [a.k.a. *Greenbook*], [<http://quesdb.cdie.org/gbk/index.html>]. Data as of December 19, 2003.

Abbreviations: DA: Development Assistance (USAID grants); ESF: Economic Support Fund; FY: Food for Peace — P.L.480 Title II - Food Aid and Section 416 Program; IMET: International Military Education and Training.

Note: For background on US assistance to Africa, see CRS Issue Brief IB95052, *Africa: US Foreign Assistance Issues*. USAID's *Greenbook* is among the most comprehensive sources of historical data on US foreign assistance. It provides data on assistance by functional category, as obligated during a given year. Calculations of annual assistance figures from other sources, such as data on annual appropriations or recent actual expenditures in agencies' annual budget requests, may differ from the figures listed above.

Table 2. U.S. Bilateral and Related Assistance to Liberia, FY2004-FY2011
(\$ millions; actual, estimated, or requested levels; errors due to rounding)

| Account | FY 2004 Actual | FY 2005 Actual | FY 2006 Actual | FY 2007 Actual | FY 2008 Actual | FY 2009 Actual | FY 2010 Estimate | FY 2011 Request |
|--|-------------------------------|-------------------------------|-------------------------------|-------------------------------|-------------------------------|-------------------------------|---------------------------------|--------------------------------|
| CSH | 2.82 | 3.97 | 2.87 | 8.50 | - | - | - | - |
| GHCS | - | - | - | - | 24.04 | 25.7 | 35.65 | 34.14 |
| DA | - | 6.85 | 23.73 | 30.5 | 29.86 | 32 | - | - |
| ESF | - | 24.8 | 92.72 | 30 | 43.19 | 104.3 | 153 | 137.34 |
| FMF | - | 2.98 | 1.98 | 1.52 | .30 | 1.5 | 6 | 9 |
| GHAI | - | .70 | .70 | .95 | - | - | - | - |
| IDFA- Supplement-al | 200 | - | - | - | - | - | - | - |
| IDFA/IDA | .04 | 9.71 | 3.71 | 2.46 | - | - | - | - |
| INCLE | 0 | 5 | 0.99 | 1 | 4.10 | 4.13 | 6 | 17 |
| IMET | 0 | 0 | .13 | .21 | .38 | .44 | 0.5 | 0.53 |
| NADR- SALW | 0.16 | - | .22 | 5 | - | - | - | - |
| PKO | - | 25 | 20 | 53.25 | 51.66 | 49.65 | 10 | 5 |
| P.L. 480, Title II/Food for Peace Title II | 21.53 | 22.55 | 26.97 | 16.47 | 9.41 | 6.3 | 15 | 15 |
| TI | 3.072 | 2.58 | 6.39 | 5.6 | .06 | - | - | |
| MRA | 27.89 | 28.19 | 31.65 | 22.5 | - | - | - | |
| Sub-Total: Bilateral and Emerg. Aid | 255.51 | 132.33 | 212.06 | 177.96 | 163.00 | 224.02 | 226.15 | 218.02 |
| UNMIL/CIPA | 290.34 | 235.42 | 77.17 | 177.21 | 154.28 | 123.40 | 135.40 | 135.40 |
| Totals - All Funding | 545.85 | 367.75 | 289.23 | 355.17 | 317.28 | 347.42 | 361.55 | 353.42 |

Sources: Cook, 25 May 2010: 73. State Department, *Congressional Budget Justification for Foreign Operations* [CBJ] and *Department of State Congressional Budget Justification* for FY2011 and prior fiscal years, and information from USAID/OFDA, State/PRM, State/OGAC, and State/Political-Military Affairs officials.

Abbreviations: Account names: **CSH:** Child Survival and Health Program Fund Account; **GHCS:** Global Health and Child Survival Account; **DA:** Development Assistance Account; **ESF:** Economic Support Fund Account; **FMF:** Foreign Military Financing Account; **GHAI:** Global HIV/AIDS Initiative; **IDA:** International Disaster Assistance (former IDFA account; renamed IDA in FY 2008); **IDFA:** International Disaster & Famine Assistance Account (once known as the IDA account, which it was again renamed in FY 2008); **INCLE:** International Narcotics Control and Law Enforcement ; **IMET:** International Military Education and Training Account; **NADR-SALW:** Nonproliferation, Antiterrorism, Demining and Related Projects-Small Arms and Light Weapons; **PKO:** Regional Peacekeeping Account; **TI:** Transition Initiatives Account; **MRA:** Migration and Refugee Assistance Account; and **CIPA:** Contributions for International Peacekeeping Account

Table 3. US Assistance for the Special Court for Sierra Leone

(\$ millions)

| Account | Amount | Fiscal Years by Appropriation and Obligation |
|-----------------------------|--------|--|
| ESF | 2 | 2000 |
| DFA | 3 | 2001 |
| ESF | 5 | 2002 |
| ESF | 10 | 2003 |
| K Fund | 2 | 2005 |
| ESF | 13 | 2006 |
| ESF | 13 | 2007 |
| ESF | 12.4 | 2008 |
| ESF | 9 | 2009 |
| ESF | 7.5 | 2010 |
| Total through FY 2008 | 76.9 | |
| ESF | 5 | Requested 2011 level |

Source: Cook, 25 May 2010: 54-55.

Abbreviations: K Fund: Emergencies in the Diplomatic and Consular Service; DFA: Development Fund for Africa; ESF: Economic Support Fund.

Appendix 6 Colombia Materials

Abbreviations

| | |
|----------|---|
| AUC | United Self-Defense Forces of Colombia |
| CCJ | Colombian Commission of Jurists |
| CNRR | National Commission for Reparation and Reconciliation |
| DNP | National Planning Department |
| DOJ | US Department of Justice |
| ELN | National Liberation Army |
| FARC | Revolutionary Armed Forces of Colombia |
| FIP | <i>Fundación Ideas para la paz</i> |
| GAO | US Government Accountability Office |
| ICITAP | <i>DOJ International Criminal Investigative Training Assistance Program</i> |
| ICTJ | International Center for Transitional Justice |
| IOM | International Organization of Migration |
| JPL | Justice and Peace Law |
| JPU | Justice and Peace Unit' |
| MAPP-OEA | OAS Mission to Support the Peace Process |
| MIJ | Ministry of the Interior and Justice |
| MSD | Management Sciences for Development |
| OAS | Organization of American States |
| OPDAT | DOJ Office of Overseas Prosecutorial Development Assistance and Training |
| OVP | USAID Office for Vulnerable Populations |
| UNDP | UN Development Programme |
| USAID | US Agency for International Development |
| USIP | US Institute of Peace |
| WOLA | Washington Office on Latin America |

Colombia Timeline

1948 – Riots in Bogota which give rise to a ten-year period of civil conflict.

1960s – The emergence of several non-state armed groups in remote areas of the country, in particular, the ELN and FARC that ignite the current conflict.

1980s – The emergence of paramilitary groups to provide private security for important economic and political sectors in Colombia.

1997 – Various paramilitary groups consolidate in 1997 with the creation of an umbrella body – the United Self-Defense Forces of Colombia (AUC).

1999 – Clinton administration announces Plan Colombia.

2002 – Alvaro Uribe is elected as President of Colombia.

2003 – The Colombian government and the AUC sign a framework peace accord committing paramilitaries to full demobilization by the end of 2005.

2005 – The Justice and Peace Law is passed.

2008 – 14 AUC leaders are extradited to the US in May.

2010 – President Juan Manuel Santos is elected as President of Colombia

Table 1: Program Assistance Objectives in Colombia, 2000-2013¹⁶⁷

| State and Defense | USAID and State | Justice |
|---|---------------------------------------|---------------------------------------|
| Reduce Illicit Narcotics and Improve Security | Promote Social and Economic Justice | Promote Rule of Law |
| <i>1. Support to the Colombian Military</i> | Alternative Development | Judicial Reform and Capacity Building |
| Army Aviation | Internally Displaced Persons | |
| Army Ground Forces | Demobilization and Reintegration | |
| Infrastructure Security | Democracy and Human Rights | |
| Air Interdiction | Civilian Government Capacity Building | |
| Coastal, River Interdiction | | |
| <i>2. Support to the National Police</i> | | |
| Eradication | | |
| Air Service | | |
| Interdiction | | |
| Police Presence in Conflict Zones | | |

¹⁶⁷ GAO, 'PLAN COLOMBIA: Drug Reduction Goals Were Not Fully Met, but Security has Improved; U.S. Agencies Need More Detailed Plans for Reducing Assistance,' Report to the Honorable Joseph R. Biden, Jr., Chairman, Committee on Foreign Relations, U.S. Senate, October 2008, 12 [GAO report].

Table 2: US Assistance by Program Objectives, 2000-2008 (dollars in millions)¹⁶⁸

| Program objective | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | Total |
|---|----------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|----------------|
| Reduce Illicit Narcotics and Improve Security | \$817.8 | 232.8 | 395.9 | 607.9 | 617.7 | 585.6 | 587.3 | 591.1 | 423.4 | 4,859.5 |
| Promote Social and Economic Justice | 80.0 | 0.5 | 109.9 | 125.7 | 126.5 | 124.7 | 130.4 | 139.7 | 194.4 | 1,031.8 |
| Promote Rule of Law | 121.1 | 0.9 | 15.8 | 27.0 | 9.0 | 7.3 | 10.5 | 7.8 | 39.4 | 238.7 |
| Total | 1,018.9 | 234.2 | 521.6 | 760.6 | 753.2 | 717.6 | 728.2 | 738.6 | 657.2 | 6,130.0 |

¹⁶⁸ GAO report, 15: Beginning in 2008, funding for Justice and USAID rule of law programs was provided through INCLE, with other USAID programs funded through the Economic Support Fund (ESF). Defense receives the bulk of its funding through its own counternarcotics budget for Colombia and State-controlled FMF and IMET funds.

**Table 3: US Nonmilitary Assistance, Fiscal Year Appropriations 2000-2008
(dollars in millions)¹⁶⁹**

| Program category | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | Total |
|--|--------------|-------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|----------------|
| Promote Social and Economic Justice | \$80.0 | \$0.5 | \$109.9 | \$125.7 | \$126.5 | \$124.7 | \$130.4 | \$139.8 | \$194.4 | \$1,031.9 |
| Alternative Development | | | 49.9 | 60.2 | 59.8 | 70.7 | 72.0 | 68.2 | 119.7 | \$500.5 |
| Internally Displaced Persons | | | 34.0 | 41.5 | 42.6 | 32.0 | 30.7 | 31.1 | 35.3 | \$247.2 |
| Demobilization and Reintegration | No program | No program | 2.0 | 0 | 0 | 0 | 8.9 | 15.7 | 18.3 | \$44.9 |
| Democracy and Human Rights | | | 24.0 | 24.0 | 24.0 | 22.0 | 18.8 | 24.8 | 21.1 | \$158.7 |
| Not allocated | 80.0 | 0.5 | 0 | 0 | 0 | 0.0 | 0 | 0 | 0 | \$80.5 |
| Promote the Rule of Law, Judicial Reform and Capacity Building | \$121.1 | \$0.9 | \$15.8 | \$27.0 | \$9.0 | \$7.3 | \$10.5 | \$7.8 | \$39.4 | \$238.9 |
| Total | 201.1 | 1.4 | 125.7 | 152.7 | 135.5 | 132.0 | 140.9 | 147.6 | 233.8 | 1,270.7 |

¹⁶⁹ GAO report, 47: Funding sources include the State controlled Andean Counterdrug Initiative, Economic Support Funds, and Defense controlled counternarcotics funding. State officials noted funding data represents the amount allocated for the categories and does not reflect any budget reprogramming that occurred after allocations were made or holds placed by Congress on funds due to certification requirements relating to human rights or environmental concerns over the aerial spray program.

Table 4: Shift in US Assistance to Colombia, FY 2007-2009¹⁷⁰

| Account (\$ in thousands) | FY 2007 Actual | FY 2008 Actual | FY 2009 Estimate |
|---|--|--|--|
| Economic Support Fund (ESF) | 0 | 194,412 | 200,000 |
| International Narcotics Control and Law Enforcement (INCLE) | 0 | 41,907 | 45,000 |
| Andean Counterdrug Program (ACP) includes Critical Flight Safety Program (CFSP) and Air Bridge Denial | 465,000 (and CFSP of 37,313) <u>Total</u> 502,313 | 205,636 (and CFSP of 38,982) <u>Total</u> 244,618 | 199,500 (and CFSP of 43,000) <u>Total</u> 242,500 |
| Nonproliferation, Antiterrorism & Demining (NADR) | 4,086 | 3,288 | 3,150 |
| International Military Education & Training (IMET) | 1,646 | 1,421 | 1,400 |
| Foreign Military Financing (FMF) | 85,500 | 52,570 | 53,000 |
| TOTAL | \$593,545 | \$538,216 | \$545,050 |

CFSP was a separate line item within ACP in FY 2007. For FY 2008 and FY2009, CFSP is funded out of the overall Colombia ACP program line item and we have indicated those amounts. Also in FY 2007, ESF was included in the ACP appropriation, but was separate in FY 2008 or FY 2009. Rule of Law programs, funded by ACP in FY 2007, are provided by INCLE in FY 2008 and FY 2009. FY 2008 does not include the \$2.48M (includes rescission) transfer from ACP to FMF.

Appropriations Act, 2009, (Division Y, P.L. 111-8). Not included are several programs funded by global accounts, including, for FY 2007-FY 2009, P.L.480 (\$7.7 million), Migration and Refugee Assistance (\$51.2 million) and Transition Initiatives (\$11.7 million).

¹⁷⁰ US State Department , Report on the Multiyear Strategy for US Assistance Programs in Colombia – No Date

Table 5: DOJ Donations to JPL, FY 2006-2010

| DOJ Donations to JPL, FY2006-2010¹⁷¹ | |
|--|--------------------|
| Training | \$3,300,309 |
| Equipment | \$3,379,528 |
| Operational Support | \$586,270 |
| TOTAL | \$7,266,107 |

Table 6: USAID Contribution to CNRR, 2006-2009¹⁷²

| Activities | Total | Total executed USD by 31 Dec 2009 |
|--|------------------|--|
| <i>1. Reconciliation</i> | | |
| International experiences on reconciliation | 25,000 | 392,581 |
| Database of victims | 232,000 | 43,589 |
| Workshops on reconciliation and reparations | 441,000 | 275,589 |
| <i>2. Reparations</i> | | |
| CNRR regional offices: Medellín, Bucaramanga, Bogotá | 1,100,000 | 1,232,868 |
| <i>3. Assistance to victims and collective reparations</i> | | |
| Questionnaire | 41,000 | 89,325 |
| Awareness workshops | 155,000 | 6,453 |
| Pilot project on collective reparations | 1,000,000 | 921,378 |
| TOTAL | 2,994,000 | 2,961,783 |

¹⁷¹ DOJ Justice and Peace Presentation, 15 April 2010. Numbers of training include ICITAP salaries of US\$400,000 per year. Donations also include police stations which ICITAP donated US\$33,000 plus forensic donations were approx \$100,000. ICITAP training 2009 and 2010 was \$365,000. Estimate for 2006, 2007 and 2008 was \$200,000 per year.

¹⁷² Data provided by Catalina Martínez Guzman, Executive Director, CNRR, 4 September 2010.

Appendix 7 List of Transitional Justice Actors

Note: This is an illustrative list, not a comprehensive one.

| International organizations |
|--|
| Office for the High Commissioner of Human Rights |
| UN Department of Peacekeeping Operations |
| UN Development Programme (UNDP) |
| UNICEF |
| World Bank |
| International NGOs |
| International Center for Transitional Justice |
| Amnesty International |
| Center for Justice and International Law (CEJIL) |
| Human Rights Watch |
| Humanitarian Law Center |
| Open Society Justice Initiative |
| International Coalition of Sites of Conscience |
| Local NGOs |
| The Arab Institute for Human Rights |
| The Association for Human Rights (APRODEH) |
| The Association for Truth and Reconciliation |
| B92 |
| The Burma Lawyers' Council (BLC) |
| The Center for Human Rights Legal Action (CALDH) |
| The Centre for Democracy and Development (CDD) |
| The Center for Legal and Social Studies (CELS) |
| The Centre for Policy Alternatives (CPA) |
| The Centre for the Study of Violence and Reconciliation |
| The Commission on Involuntary Disappearances and Victims of Violence (KONTRAS) |
| Conflict Management and Development Associates (CMDA) |
| The Congolese Coalition for Transitional Justice (CCJT) |
| Documentation Center of Cambodia (DC-Cam) |
| The East Timor Steering Committee on the Truth Commission |
| Equitas |
| The Ghana Center for Democratic Development |
| The Greensboro Truth and Community Reconciliation Project |
| Groupe Lotus |
| Guatemalan Forensic Anthropology Foundation (FAFG) |
| The Healing Through Remembering Project |
| Human Rights Education Institute of Burma (HREIB) |
| The Human Rights Information and Documentation Center (INDOK) |
| The Human Rights Office of the Social Foundation |
| The Institute for Justice and Reconciliation (IJR) |
| Iraq Memory Foundation |
| The Foundation Ideas for Peace |
| Institute for Policy Research and Advocacy (ELSAM) |
| The International Centre for Ethnic Studies |

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| The Judicial System Monitoring Programme (JSMP) |
| The Kenya Human Rights Commission |
| The Khulumani Support Group (KSG) |
| The Kosovar Research and Documentation Institute (KODI) |
| The Law & Society Trust |
| The Liberia National Law Enforcement Association (LINLEA) |
| The Lebanese Center for Policy Studies |
| Legal Aid Foundation (YLBHI) |
| The Mexican Commission for the Defense and Promotion of Human Rights (CMDPDH) |
| The Moroccan Center for Documentation, Information and Training in Human Rights |
| The National Forum for Human Rights, Sierra Leone |
| The National Human Rights Coordinating Group (CNDDHH) |
| The NGO Follow-up Committee, Morocco |
| Peace Advocates for Truth and Healing (PATH) |
| The Post-conflict Reintegration Initiative for Development and Empowerment (PRIDE) |
| The Research and Documentation Center (Sarajevo) |
| The Sierra Leone Court Monitoring Programme (SLCMP) |
| The Sustainable Democracy Center (SDC), Lebanon |
| The Task Force Detainees of the Philippines (TFDP) |
| The Transitional Justice Working Group in Liberia (TJWG) |
| The Transitional Justice Working Group in Sri Lanka (TJWG) |
| UMAM Documentation & Research |
| Universities |
| The Centre for the Study of Human Rights (CSHR), University of Colombo, Sri Lanka |
| The Human Rights Center, University of California, Berkeley, US |
| The Human Rights Center of the University of Chile Law School, Chile |
| The Human Rights Program of the Universidad Iberoamericana |
| Katholieke Universiteit Leuven |
| Transitional Justice Project at the Center for Civil and Human Rights, University of Notre Dame, US |
| New York University Law School's Justice in Transition program, US |
| Columbia Law School, US |
| Transitional Justice Database Project, University of Wisconsin |
| American University |
| Foundations |
| Ford Foundation |
| MacArthur Foundation |

Appendix 8 Attendees of Early Transitional Justice Conferences

This chart is taken from Paige Arthur’s article titled ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’ (2009). She identifies the participants at three conferences that treated the issues of justice in transitional periods. The first part of the chart identifies those people who attended more than one of these conferences. In the second, all the other participants are listed.

| <i>State Crimes: Punishment or Pardon?</i> | <i>Justice in Times of Transition</i> | <i>Dealing with the Past</i> |
|---|--|---|
| Aspen Institute Wye, Maryland November 4–6, 1988 Funder: Ford Foundation | Charter 77 Foundation Salzburg, Austria March 7–10, 1992 Funders: German Marshall Fund of the United States, the Charles Stewart Mott Foundation, the National Endowment for Democracy, Open Society, the Rockefeller Family & Associates, the Rockefeller Foundation, and the Charter 77 Foundation-New York | Institute for a Democratic Alternative for South Africa Somerset West, Western Cape February 1994 Funder: Open Society |
| Henkin, Alice Y. The Aspen Institute, New York, USA | Henkin, Alice Y. | |
| Malamud-Goti, Jaime Buenos Aires University, Argentina | Malamud-Goti, Jaime | |
| Méndez, Juan E. Americas Watch, Washington, D.C., USA | | Méndez, Juan E. |
| | Michnik, Adam Editor-in-Chief of <i>Wyborcza</i> , Member of Parliament, Poland | Michnik, Adam |
| Neier, Aryeh HRW, New York, USA | | Neier, Aryeh |
| Orentlicher, Diane Columbia University, New York, USA | Orentlicher, Diane | |
| | Sajo, Andras Legal Advisor to President Arpad Gönz, Hungary | Sajo, Andras |
| Weschler, Lawrence <i>The New Yorker</i> , New York, USA | Weschler, Lawrence | Weschler, Lawrence |
| Zalaquett, José (Esq.) Santiago, Chile | | Zalaquett, José |
| Bajeux, Jean-Claude Ecumenical Center of Human Rights, Port-au-Prince, Haiti | Alfonsín, Raoul President of Argentina, 1983–89 | Adam, Heribert South Africa |

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| <p><i>State Crimes: Punishment or Pardon?</i></p> <p>Aspen Institute Wye, Maryland November 4–6, 1988 Funder: Ford Foundation</p> | <p><i>Justice in Times of Transition</i> Charter 77 Foundation Salzburg, Austria March 7–10, 1992 Funders: German Marshall Fund of the United States, the Charles Stewart Mott Foundation, the National Endowment for Democracy, Open Society, the Rockefeller Family & Associates, the Rockefeller Foundation, and the Charter 77 Foundation-New York</p> | <p><i>Dealing with the Past</i> Institute for a Democratic Alternative for South Africa Somerset West, Western Cape February 1994 Funder: Open Society</p> |
| <p>Crahan, Margaret Occidental College, Los Angeles</p> | <p>Bence, Gyorgy Philosopher, Hungary</p> | <p>Asmal, Kader South Africa</p> |
| <p>Dworkin, Ronald New York University New York, USA</p> | <p>Biedenkopf, Kurt Minister President of Saxony, Germany</p> | <p>Boraine, Alex IDASA, South Africa</p> |
| <p>Fitch, Samuel University of Colorado, Boulder, USA</p> | <p>Bratinka, Pavel Member of Federal Assembly, Czechoslovakia</p> | <p>Burton, Mary South Africa</p> |
| <p>Fruhling, Hugo Academia de Humanismo Cristiano, Santiago, Chile</p> | <p>Degutis, Arunas MP, Lithuania</p> | <p>Calata, Nomonde South Africa</p> |
| <p>Henkin, Louis Columbia University, New York, USA</p> | <p>Errera, Roger Conseiller d'état, France</p> | <p>Canas, Roberto El Salvador</p> |
| <p>Herz, John Y. City University of New York, USA</p> | <p>Garretón, Roberto Deputy Foreign Minister of Chile</p> | <p>Du Plessis, Lourens South Africa</p> |
| <p>Mamdani, Mahmood Makerere University, Kampala, Uganda</p> | <p>Goldman, Robert American University Law School Washington, D.C., USA</p> | <p>Du Toit, André South Africa</p> |
| <p>Meron, Theodor NYU, New York, USA</p> | <p>Grossman, Claudio American University Law School, USA</p> | <p>Gauck, Joachim Germany</p> |
| <p>Mulet, Edmond (Cong.) Guatemala City, Guatemala</p> | <p>Güttler, Vojen Justice, Constitutional Court of Czechoslovakia</p> | <p>Gcina, Paizoah South Africa</p> |
| <p>Nagel, Thomas NYU, New York, USA</p> | <p>Holmes, Stephen Professor of Political Science, University of Chicago, USA</p> | <p>Goldstone, Richard South Africa</p> |
| <p>Nakchung, Paik University of Seoul, Korea</p> | <p>Huntington, Samuel Olin Institute Harvard University, USA</p> | <p>James, Wilmot South Africa</p> |
| <p>Pérez Aguirre, Luis (Father) Servicio Paz Y Justicia, Montevideo, Uruguay</p> | <p>Laber, Jeri Executive Director, Helsinki Watch</p> | <p>Lapsley, Michael South Africa</p> |

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| <p><i>State Crimes: Punishment or Pardon?</i></p> <p>Aspen Institute Wye, Maryland November 4–6, 1988 Funder: Ford Foundation</p> | <p><i>Justice in Times of Transition</i> Charter 77 Foundation Salzburg, Austria March 7–10, 1992 Funders: German Marshall Fund of the United States, the Charles Stewart Mott Foundation, the National Endowment for Democracy, Open Society, the Rockefeller Family & Associates, the Rockefeller Foundation, and the Charter 77 Foundation-New York</p> | <p><i>Dealing with the Past</i> Institute for a Democratic Alternative for South Africa Somerset West, Western Cape February 1994 Funder: Open Society</p> |
| <p>Picken, Margo Ford Foundation, New York, USA</p> | <p>Luciani, Claudia Council of Europe</p> | <p>Motlana, Nthato South Africa</p> |
| <p>Pinheiro, Paulo Sergio Universidade de Sao Paulo, Brazil</p> | <p>Michellini, Rafael Deputy in Chamber of Representatives, Uruguay</p> | <p>Ntsebeza, Dumisa South Africa</p> |
| <p>Posner, Michael Lawyers Committee for Human Rights, New York, USA</p> | <p>Navasky, Victor Editor, <i>The Nation</i> USA</p> | <p>Osiatynski, Wiktor Poland/USA</p> |
| <p>Skweyiya, Lewis (Esq.) Durban, South Africa</p> | <p>Offe, Claus Professor of Political Science, University of Bremen, Germany</p> | <p>Petrova, Dimitrina Bulgaria</p> |
| | <p>Osiatynski, Wiktor Advisor to Polish government on drafting a new constitution, Poland</p> | <p>Rosenberg, Tina USA</p> |
| | <p>Petovar, Tanja HR Lawyer, Belgrade, Yugoslavia</p> | <p>Sachs, Albie South Africa</p> |
| | <p>Phillips, Tim Charter 77 Foundation, New York, USA</p> | <p>Schwarzenberg, Karel Czech Republic</p> |
| | <p>Rodrigo, Fernando Fundacion Ortega Y Gasset, Madrid, Spain</p> | <p>Slabbert, Frederik Van Zyl IDASA, South Africa</p> |
| | <p>Roginsky, Arseny Board Member of Memorial, Russian Human Rights Organization</p> | |
| | <p>Rupnik, Jacques Advisor to Mitterrand, France</p> | |
| | <p>Schwartz, Herman American University Law School Co-chair, Project on Justice in Times of Transition, USA</p> | |

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| <p><i>State Crimes: Punishment or Pardon?</i></p> <p>Aspen Institute Wye, Maryland November 4–6, 1988 Funder: Ford Foundation</p> | <p><i>Justice in Times of Transition</i> Charter 77 Foundation Salzburg, Austria March 7–10, 1992 Funders: German Marshall Fund of the United States, the Charles Stewart Mott Foundation, the National Endowment for Democracy, Open Society, the Rockefeller Family & Associates, the Rockefeller Foundation, and the Charter 77 Foundation-New York</p> | <p><i>Dealing with the Past</i> Institute for a Democratic Alternative for South Africa Somerset West, Western Cape February 1994 Funder: Open Society</p> |
| | <p>Steigenberger, Helmut Former Justice of the FRG Constitutional Court, Germany</p> | |
| | <p>Szajer, Jozef MP, Hungary</p> | |
| | <p>Teitel, Ruti New York Law School, USA</p> | |
| | <p>Urban, Jan Journalist for <i>Livdove noviny</i>, Czechoslovakia</p> | |