1 Introduction

Revisiting the Gilded Age of Transnational Human Rights Litigation in US Courts

With the breakup of the Cold War blocs and ensuing wave of democratization in Eastern Europe, Africa, and Central America from the 1980s, formerly authoritarian societies were called on to "engage with the past." Advised and prodded by academics, lawyers, nongovernmental organizations (NGOs), foreign governments, and international institutions, newly democratic states instituted a range of mechanisms addressing their histories of mass repression and violence. The central institutions of the field of practice that would come to be known as "transitional justice" included not only criminal trials such as the trials of former junta members in Argentina but also truth commissions such as the one instituted in South Africa in the aftermath of Apartheid, lustration policies, and reparation programs for victims. Since the mid-1990s, international criminal tribunals have been added to the arsenal of transitional justice institutions.

Scholars of transitional justice soon pointed out that two contradictory processes are at work in legal measures addressing political violence.[1] Transitional justice institutions are backward-looking: They provide an account of past violence and clarify history. At the same time, they are forward-looking: They attempt to lay the foundations for the new order by signaling the establishment or reestablishment of the rule of law. The transitional justice institutions developed at the end of the Cold War can thus be seen as attempts to enact political transitions through law.

Transitional justice emerged at a time when democratization models stressed agency and choice among elites.[2] Accordingly, the field's architects originally emphasized a short-term process of political bargaining, with justice and truth-telling serving the multiple goals of accountability, conflict-resolution, and democratization. This narrow understanding of

[1] Ruti G. Teitel, *Transitional Justice* (Oxford; New York: Oxford University Press, 2000), 6, 13.

[2] Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31 (2009): 321–67, 338.

political change was soon challenged by left-leaning scholars. These scholars pointed out that the centrality of physical human rights violations in transitional justice institutions displaces attention from political contexts of abuse, as well as from the economic roots and consequences of persecution and conflict.[3] They further highlighted transitional justice institutions' failure to address the important part played by Northern societies and neocolonialism in conflict and repression, and surmised that in any event these issues are difficult to address in the individualized accounts of violence offered by criminal trials and even truth commissions, despite the fact that the latter were created to overcome criminal justice's narrow focus on individual intent.[4] Transitional justice, they argued, may be a global project of interest to the international community, but it imposes obligations primarily on Southern states, and thereby in a narrow manner prevents profound political change and redistribution.

This book argues that contrary to common belief, the United States also held transitional justice trials, addressing its own transition and the transition of its Western bloc allies out of the Cold War order. I suggest viewing seminal human rights cases litigated in the United States in the 1980s and 1990s, and ostensibly concerning torture committed by foreigners abroad, as transitional justice trials: trials that provided a historical account of violence within the Western bloc all the while expressing a new role for the United States in relation to its former allies. This book focuses on *Filártiga* v. *Peña-Irala* and *in re Marcos Human Rights Litigation*, two damage lawsuits filed in US federal courts by victims of torture and other governmental abuses in Paraguay and the Philippines, respectively. These cases offered an unequivocal condemnation of political repression, and, in Paraguay and the Philippines, helped leftist groups challenge power relations during those states' transitions to democracy. However, in the United States, these trials narrated Cold War history in a way highly flattering to Americans. In fact, these two cases and the half-dozen trials that followed in their wake concerning violence by Western bloc regimes operating with the support of the United States, such as Argentina and El Salvador, were constructed in court and subsequently in the American legal imagination as sharply disconnected from the United States, under the rubrics of "international human rights litigation" and "universal jurisdiction." This book reveals how *Filártiga* and

[3] Zinaida Miller, "Effects of Invisibility in Search of the 'Economic' in Transitional Justice," *International Journal of Transitional Justice* 2 (2008): 266–91.

[4] Rosemary Nagy, "Transitional Justice as Global Project: Critical Reflections," *Third World Quarterly* 29 (2008): 275–89, 284.

Marcos operated as transitional justice mechanisms in the former Western bloc. Concentrating on the narratives about Cold War history produced in the course of litigation and in public commentary thereon in the United States, Paraguay, and the Philippines, it exposes the litigation's complex blend of hegemonic and emancipatory implications.

Revisiting the Beginnings of Alien Tort Statute Litigation

Filártiga and *Marcos* were filed under a federal statute commonly referred to as the Alien Tort Statute (ATS). Enacted in 1789 to shift power over foreign affairs away from states and toward the federal government,[5] the ATS grants US federal courts "jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The statute was rarely used until *Filártiga* in 1980, when US courts began interpreting it to allow damage lawsuits by foreign victims of torture and other heinous human rights violations against foreign state officials. During the next three decades, human rights organizations and victims of abuse from around the world found in human rights litigation under the ATS a promising avenue of accountability, and hailed it as a model that should inspire other countries to entertain similar litigation. American conservatives for their part condemned ATS litigation as a form of undemocratic judicial activism dangerous to US foreign policy and economic interests, especially after multinational corporations began to be sued under the statute from the mid-1990s in connection with their activities in the Global South. The conservative campaign against the ATS culminated in 2013 in the case of *Kiobel* v. *Royal Dutch Petroleum* when the US Supreme Court severely restricted the possibilities of invoking the ATS, limiting the statute generally to human rights violations that have a strong connection to the United States. For human rights lawyers, the trajectory of ATS litigation is thus one of rise and fall, the story of a gilded age of accountability across borders followed by a retreat of the US judicial system from its commitment to international human rights.

[5] William R. Casto, "The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations," *Connecticut Law Review* 18 (1986): 467–530, 495; William S. Dodge, "The Historical Origins of the Alien Tort Statute: A Response to the 'Originalists'," *Hastings International & Comparative Law Review* 19 (1996): 221–58, 222. One influential account is that the ATS "was a direct response to what the Founders understood to be the nation's duty to propagate and enforce those international law rules that directly regulated individual conduct," a duty seen both to accord with national self-interest and befit a civilized nation. Anne-Marie Burley, "The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor," *American Journal of International Law* 83 (1989): 461–93, 475.

This book offers an alternative account of the "gilded age" of ATS litigation by revisiting its two foundational cases. *Filártiga* was filed in 1979 by the family of a young Paraguayan man, Joelito Filártiga, against a former police officer from Paraguay, for Joelito's torture to death in Paraguay during the Stroessner regime (1954–89). This was the case that revived the ATS, leading to a landmark decision of the Court of Appeals for the Second Circuit in 1980 establishing that the statute could be used in international human rights struggles. *Marcos* was a class action brought on behalf of 10,000 victims of Ferdinand Marcos's martial law regime in the Philippines (1972–86) against the dictator one month after his ouster from power. It is also considered a landmark, for it was the first class action filed under the ATS and the first time a former head of state was held liable under the ATS. As the first ATS judgment awarded on the merits after a full-fledged trial, *Marcos* has been praised for "fulfilling the promise of *Filártiga*" by addressing for the first time many legal questions that can arise in ATS litigation.[6] *Filártiga* and *Marcos* are repeatedly invoked by human rights advocates as the foundation of ATS litigation and the field's most glaring successes.

This book revisits *Filártiga* and *Marcos*, focusing on the historical narratives these cases produced about repression in the Cold War's Western bloc. Indeed, these two cases are linked by more than their quality as human rights landmarks. During the Cold War, both the Stroessner and Marcos regimes were staunch allies of the United States, and the economic, political, and military support they received from the United States proved key to each regime's legitimacy and ability to repress. In such a context, the two cases served not only to affirm international norms and promote individual accountability but also to establish a highly distorted historical record of repression in the Western bloc, all the while rearranging relations between the United States and its former allies. In what follows I reveal that due to legal and political constraints experienced by parties and courts in the exercise of a controversial form of jurisdiction, the US courts produced simplified accounts of repression that obscured its institutionalized foundations, and in particular US support for authoritarian regimes. I further show that these accounts were echoed in legal scholarship and the press in the United States. These early ATS cases, the book argues, contributed to the dissemination of a whitewashed version of American Cold War history in the United States.

[6] Ralph G. Steinhardt, "Fulfilling the Promise of *Filartiga*: Litigating Human Rights Claims against the Estate of Ferdinand Marcos," *The Yale Journal of International Law* 20 (1995): 65–104.

However, actors in Paraguay and the Philippines, respectively, invoked and interpreted these trials in ways challenging to power relations. In each of these countries, the ATS lawsuit gave voice to subordinated social groups and triggered extensive public discussion about repression, exposing the United States as well as local elites and institutions to criticism. Like criminal trials in times of regime change that address past violence all the while establishing the foundations of the new order, the ATS functioned as an unspoken transitional justice mechanism for the United States and its former allies in the Cold War's Western bloc to address and signal a break from unbridled state repression. US courts performed this transitional task by producing narratives legitimating the United States, while in Paraguay and the Philippines the legal and cultural distance between courts and community allowed for a more critical narration of the lawsuits and their underlying violence as symptomatic of structural injustice during the Cold War.

This multiplicity of meanings was enabled in part by the decentralized and privatized character of ATS litigation. The transitional justice mechanisms we are more familiar with, criminal trials and truth commissions, are typically established as a matter of governmental policy, and are often used to consciously promote an official version of the past. Even international criminal tribunals established outside perpetrator societies declare that clarifying history is one of their official objectives, and trials are typically accompanied by outreach programs. In contrast, ATS litigation is triggered by victims without the filter of a public prosecutor. *Filártiga* was litigated by public-interest lawyers, while the class action in *Marcos* was primarily managed by a for-profit attorney. Unsurprisingly, in line with the United States' long tradition of leaving matters of public interest to litigation by private parties,[7] control of the litigation and of its meaning was shared among parties, lawyers, judges, and intervening third-parties, and this before the press and other observers even interpreted the proceedings. As a result, the story told in this book is not one about US officials orchestrating the implementation of a transitional justice policy. Instead, it is a complex story of the transnational interaction and conflicts among a variety of actors operating within a set of legal and political constraints. This book thus describes "American transitional justice" in two senses: first, a legal mechanism enacting the transition of the United States and its former allies out of the Cold War

[7] Burt Neuborne, "A View from the United States – Potentials and Pitfalls of Aggregate Litigation: The Experience of the Holocaust Litigation" (unpublished manuscript on file with author).

order; and second, an approach to transitional justice drawing on the US tradition of privatizing public interest litigation.

While several early ATS lawsuits filed in the 1980s and early 1990s concerning violence in Latin America can be considered transitional justice trials under this definition, this book focuses on *Filártiga* and *Marcos*. Attention to these two cases not only reflects a renunciation of quantity in favor of in-depth analysis. *Filártiga* and *Marcos*, as landmarks and groundbreakers, have left their mark on American legal consciousness more than other contemporaneous ATS lawsuits, and played more clearly an expressive transitional role. Together they form the spearhead of a larger body of transitional cases.

A number of scholars have interpreted legal mechanisms in the United States as instances of transitional justice conducted under other names. Redress to Japanese Americans interned during World War II,[8] to victims of civil rights violations and racial injustice,[9] as well as Holocaust-related litigation,[10] to name a few examples, have all been considered transitional justice measures. Like the ATS cases discussed in this book, these other types of litigation address mass historical injustice through law. In fact, the lawyers who brought *Filártiga* had been involved in civil rights litigation, and drew on the legal and strategic tools of that practice. Moreover, like some of the Holocaust-related litigation, ATS cases are transnational, and involve numerous foreign actors. Despite these similarities, I submit that only early ATS litigation can be understood as the particular American manifestation of the transitional justice project that emerged in the 1980s and 1990s. This is because like the institutions established in Latin America and South Africa at that time, ATS litigation specifically addressed Cold War-era violence in the former Western bloc. This book expands the history of the emergence of transitional justice institutions in the 1980s and 1990s by recovering a crucial yet ignored part of that history: legal responses developed within the United States to perform that country and its former allies' transition out of the Cold War order.

[8] Stephen Winter, *Transitional Justice in Established Democracies: A Political Theory* (Houndmills, Basingstoke: Palgrave MacMillan, 2014), 154–81.

[9] On the adoption of a transitional justice discourse in contemporary struggles for racial justice in the United States, see Christopher Lamont, "Justice and Transition in Mississippi: Opening the Books on the American South," *Politics* 30 (2010): 183–90; and James Edward Beitler, *Remaking Transitional Justice in the United States: The Rhetorical Authorization of the Greensboro Truth and Reconciliation Commission* (New York: Springer, 2013).

[10] Leora Bilsky, *The Holocaust, Corporations, and the Law: Unfinished Business* (Ann Arbor: University of Michigan Press, 2017), 143–65.

Cold War politics have produced, and been discussed in, a number of trials and hearings in the United States, most notoriously the trial of Ethel and Julius Rosenberg, the two Americans executed for espionage in 1953 for passing information about the atomic bomb to the Soviet Union. Beyond the prosecution of espionage and other "un-American activities," the Cold War entered US courtrooms with the trial of American soldiers involved in the massacre of civilians in My Lai, Vietnam, in 1968. According to one analysis, the narrative produced by the court in that case attributed responsibility solely to Lieutenant William Calley, Jr., obscuring the involvement of higher echelons of the army, and this narrative flattering to the United States was reproduced in history textbooks throughout the country.[11] The official court narratives in the two ATS cases examined in this book exhibit clear continuities with the *My Lai* trial, presenting in a positive manner US involvement in Cold War-era violence. In fact, contrary to both *Rosenberg* and *My Lai*, in the United States *Filártiga* and *Marcos* did not produce journalistic and artistic narratives challenging the official court narrative.[12] As the following chapters show, as cases ostensibly concerning foreign violence, *Filártiga* and *Marcos* were not extensively discussed in the US press, and when they were, the official court narrative was reproduced. In this sense, these cases contributed even more firmly than previous Cold War era trials to a whitewashed version of US history. Yet as transitional trials, *Filártiga* and *Marcos* distinguish themselves from previous courtroom treatments of the Cold War by clearly distancing the United States from its former allies, and offering tools to subordinate groups in other societies to voice claims and challenge their own elites.

The ATS cases' blend of continuity and change in relation to Cold War-era trials is neatly embodied in the person of Irving Kaufman, the judge who delivered in 1980 the Second Circuit decision in *Filártiga* reviving the ATS. As trial judge in the *Rosenberg* case, Kaufman had imposed the couple's death sentences, and apparently saw in *Filártiga* an opportunity to redeem himself. In *Filártiga*, he portrayed the United States as virtuous, despite the country's support of the Stroessner regime in Paraguay. At the same time, he delivered a groundbreaking condemnation of torture, and gave victims of abuses around the world a new tool to seek justice. By exposing the regrettable continuities and positive

[11] Joachim J. Savelsberg and Ryan D. King, *American Memories: Atrocities and the Law* (New York: Russell Sage Foundation, 2011), 34–51.

[12] For a survey of the numerous and conflicting artistic representations of the *Rosenberg* trial, see Virginia Carmichael, *Framing History: The Rosenberg Story and the Cold War* (University of Minnesota Press, 1993). For an analysis of the journalistic coverage of *My Lai*, see Savelsberg and King, *American Memories*, 34–51.

differences between the early ATS cases and prior Cold War trials, this book demonstrates the complexity of ATS litigation, a mechanism with deeply hegemonic and counterhegemonic implications.

A Legal–Historical–Ethnographic Approach

The argument is made through an original approach combining two types of legal–historical inquiry. The book examines the two lawsuits as historical events, based on extensive legal documentation, memoirs by and interviews with participants in the United States, Paraguay, and the Philippines, and archival research in all three countries. At the same time, drawing on a view of law as a key site of knowledge-production[13] and social construction of reality,[14] among the litigation's "outputs" the book focuses on representations of violence. It analyses how these cases narrated and portrayed political violence in the Cold War's Western bloc, in court and in public discourse out of court, including media reporting and cartoons, and debates in legislatures.

This book does not claim that the judges and parties in *Filártiga* and *Marcos* purported to provide exhaustive historical accounts, though as we shall see the plaintiffs' primary objective in each case was to counter official denial and establish the nature and extent of repression under each regime. Neither do I propose to transplant to ATS litigation the didactic approach developed by some scholars of international criminal law, who argue that trials should consciously aim to teach history.[15] Rather, I draw attention to historical narratives as a significant by-product of human rights litigation. Historical discussions can seldom be avoided in a legal process judging political or mass crimes, because the historical context helps understand the acts of violence.[16] Even where legal discussions of violence are decontextualized, they give rise to a narrative about the causes, consequences, and responsibilities for the violence that occurred at a particular historical moment. What is more,

[13] Tobias Kelly, "The UN Committee against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty," *Human Rights Quarterly* 31 (2009): 777–800.

[14] Law is "not merely an instrument or tool working on social relations, but … also a set of conceptual categories and schema that help construct, compose, communicate, and interpret social relations." Susan S. Silbey, "After Legal Consciousness," *Annual Review of Law and Social Science* 1 (2005): 323–68, 327.

[15] See e.g. Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick, NJ: Transaction Publishers, 1997); Lawrence Douglas, "Crimes of Atrocity, the Problem of Punishment and the Situ of Law," *Propaganda, War Crimes Trials and International Law*, ed. P. Dojcinovic (Oxfordshire: Routledge, 2012), 269, 282.

[16] Richard A. Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011), 22–23, 73.

the historical discussions produced in the course of the legal process often make their way into public discourse through media reports. While not all legal decisions are surveyed by the media, they may leave their mark on the legal profession studying case-law. The historical stories told through law thus matter, for they contribute to the social and legal construction of violence, shaping lawyers' and laypeople's perceptions of where the need for change lies.

As extensive scholarship shows, historical distortions are part and parcel of the legal process.[17] This book exposes the particular historical distortions produced in the two seminal ATS cases, in particular the recasting of the United States as bystander rather than active accomplice in violence in the Western bloc.

I begin by retelling each case in a way that recovers some of the structural causes of torture during the Cold War, in particular the links between torture and economic injustice, the institutionalized nature of repression, the complicity of civil society and of the United States with each regime, and the way each regime used legal discourse to justify repression. I do so drawing on historical scholarship, firsthand written accounts of each case, and interviews with participants in each lawsuit. In Paraguay, I conducted ten semi-structured interviews with Joel Filártiga, his ex-wife Nidia, and daughter Analy, other torture victims under Stroessner, as well as journalists and a historian. I also interviewed plaintiff counsel Peter Weiss in Tel Aviv. In the Philippines, I conducted twenty-three semi-structured interviews with plaintiffs, members of plaintiff and human rights organizations, government officials, a foreign diplomat, a journalist, and an academic, in addition to a telephone interview and email correspondence with the lead American lawyer in the case, Robert Swift.

The retelling of each case provides a foil against which to examine the historical narratives produced in US courts by the various participants to the litigation, paying attention to the legal, strategic, and political constraints within which those participants operated. I closely analyze party submissions, briefs submitted by third parties, transcripts of oral court proceedings, and court decisions. I resort to critical discourse analysis,[18]

[17] Ibid., 1–23.

[18] Norman Fairclough, "Critical Discourse Analysis and the Marketization of Public Discourse: The Universities," *Discourse & Society* 4, (1993): 133–68. Critical Discourse Analysis is "discourse analysis which aims to systematically explore often opaque relationships of causality and determination between (a) discursive practices, events and texts, and (b) wider social and cultural structure, relations and processes; to investigate how such practices, events and texts arise out of and are ideologically shaped by relations of power and struggles over power; and to explore how the opacity of these

elucidating how torture under each regime is represented, and how the identities of the participants and their relations to one another are constructed. I buttress my interpretations through my interviews with plaintiffs and their lawyers, written accounts of the litigation by participants and observers as well as press coverage of the litigation in the United States as it was ongoing.

The book then traces how these narratives were reinterpreted in the United States, Paraguay, and the Philippines in key sites of public discourse, in particular the press. In libraries and archives in Washington, DC, Asunción, and Manila, as well as online, I gathered a sample of parliamentary debates, media texts, and other sources discussing the litigation from the time of each case to the present. I use critical discourse analysis to interpret how the texts construct the ATS litigation, the political violence subject of the litigation and its causes, as well as the participants thereto. Viewing ATS litigation as a social phenomenon of which court decisions are only one component, I analyze not only how court decisions were interpreted in public discourse but also how legal stages and arguments made before and after judgments on liability were interpreted. Here too I validate my interpretations through interviews and other textual sources, such as internal police files in Paraguay.

In Paraguay, my study of the independent and official press as well as police archives reveals that the independent press harnessed the *Filártiga* lawsuit to challenge the legitimacy of the Stroessner regime. As to *Marcos*, I explore how the lawsuit has interacted with transitional justice initiatives in the Philippines. I trace through the sources mentioned earlier, as well as court decisions from the Philippines, the United States, Switzerland, and Singapore, how human rights victims used the ATS judgment to pressure the Philippine Republic to recognize the extent of abuses under Marcos and obtain compensation, leading to the enactment in 2013 of a reparations law in the Philippines, which in turn fueled new memory projects. To understand the mobilization around this law and its relation to the ATS lawsuit, over a three-week period in the summer of 2014, I observed claims proceedings under the law in Metro Manila and the provincial town Baguio City. I also expose the conflict between the human rights victims' claims for compensation and the state's program of economic redistribution in the post-Marcos era. I situate my findings

relationships between discourse and society is itself a factor securing power and hegemony … " (at 135). It focuses on the perspective(s) adopted by the text, structure and sequencing, vocabulary, verb transitivity, level of sentence complexity, and modality (the tone used to convey authority and certainty), to construct the interpersonal meaning of the text, constituting the parties and the relationships among them.

about the construction and deployment of each case in Paraguay and the Philippines in relation to the narratives produced in US courts.

The Human Rights Framework and Historical Narratives about Political Violence

Filártiga, *Marcos*, and the case-law that sprang from them have generated an extraordinary amount of scholarship. Yet for all the ink spilled, beyond doctrinal histories or elegiac accounts,[19] a historical perspective on these cases is sorely lacking. The heated debate on ATS litigation has pitted legalistic praise by human rights lawyers for holding individual perpetrators accountable against a conservative critique of judicial interference in foreign policy. By offering a critical historical analysis that focuses on the meaning of the litigation for perpetrator societies, this book offers a third and novel perspective on ATS litigation.

International law and international human rights mechanisms have been the subject of sustained postcolonial and leftist critiques.[20] "[T]endered as an antipolitical and expressly moral antidote to abusive political power,"[21] the international human rights project is understood to depoliticize struggles for justice and therefore obstruct the possibility of profound, systemic change. The focus on individual suffering disconnects physical repression from the broader neoliberal economic project it has often served to implement, ironically preventing us from understanding the profound causes of physical violence itself, and leaving intact the unequal socioeconomic and geopolitical conditions.[22] The human rights framework is further accused of discouraging political activism, not only because it constructs passive, apolitical subjectivities through the simplistic categories of perpetrator-victim-savior[23] but also because it is

[19] William J. Aceves, *The Anatomy of Torture: A Documentary History of* Filartiga *v.* Pena Irala (Leiden; Boston: Martinus Nijhoff Publishers, 2007); Harold Hongju Koh, "*Filartiga* v. *Pena-Irala*: Judicial Internalization into Domestic Law of the Customary International Law Norm against Torture," *International Law Stories*, ed. John E. Noyes, Laura Anne Dickinson, Mark W. Janis, and David J. Bederman (New York: Foundation Press/Thomson/West, 2007), 45–76.

[20] Sundhya Pahuja, "The Postcoloniality of International Law," *Harvard International Law Journal* 46, (2005): 459–69; Makau Mutua, "Savages, Victims, and Saviors: The Metaphors of Human Rights," *Harvard International Law Journal* 42 (2001): 201–45; David Kennedy, "The International Human Rights Movement : Part of the Problem?" *Harvard Human Rights Journal* 15 (2002): 101–25.

[21] Wendy Brown, "'The Most We Can Hope For…': Human Rights and the Politics of Fatalism," *South Atlantic Quarterly* 103 (2004): 451–63, 454.

[22] Susan Marks, "Human Rights and Root Causes," *Modern Law Review* 74 (2011): 57–78.

[23] Mutua, "Savages, Victims, and Saviors"; Kennedy, "The International Human Rights Movement."

perceived to impede public deliberation due to its absolute, trump-like character.[24] Yet the critical lens has not yet been applied in depth to the ATS. By exploring the early ATS cases' historical narratives about political violence and their implications for political deliberation in times of transition, this book challenges the human rights lawyer's single-minded focus on the individual perpetrator's accountability and individual victims' rights, exposing the profound and sometimes troubling collective implications of human rights litigation.

Samuel Moyn has pointed to the late 1970s as a watershed moment in the rise of the human rights movement, explaining the movement's emergence as a result of disappointment with earlier utopias.[25] Exploring the centrality of human rights to US foreign policy in the 1970s, Barbara Keys argues that human rights offered a way for Americans to reclaim the mantle of moral virtue lost during the Vietnam War, all the while disassociating themselves from repressive allies as well as the appearance of interventionism. Because human rights were to fulfill such a limited program of virtuous action, human rights abuses came to be conceptualized as a problem that "lay in individual evil perpetrated by small numbers of wrongdoers, rather than fundamental injustices in which Americans, too, were implicated."[26]

Building on these recent histories of the international human rights discourse and of its alignment with American power, this book points to the United States as one of the perpetrator communities implicated in landmark ATS cases. It challenges the current perception on both left

[24] Kennedy, "The International Human Rights Movement," 49–50.

[25] "The best general explanation for the origins of this social movement and common discourse around rights remains the collapse of other, prior utopias, both state-based and internationalist. These were belief systems that promised a free way of life, but led into bloody morass, or offered emancipation from empire and capital, but suddenly came to seem like dark tragedies rather than bright hopes. In this atmosphere, an internationalism revolving around individual rights emerged, and it did so because it was defined as a pure alternative in an age of ideological betrayal and political collapse." Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Belknap Press of Harvard University Press, 2010), 8. Philip Alston sharply criticized Moyn's theory for implausibly dismissing all previous rights phenomena as radically different from contemporary human rights, defined to require globalization to such an extent that it could only have happened in the late twentieth century: Philip Alston, "Does the Past Matter? On the Origins of Human Rights," *Harvard Law Review* 126 (2013): 2043–82, 2069–72. While Moyn certainly exaggerates the novelty of contemporary human rights activism, he does not quite offer the "big bang theory" that Alston accuses him of offering (at 2074). *The Last Utopia* provides a historical explanation for the emergence of human rights, namely fatigue with the ideologies of the twentieth century. It nonetheless remains vulnerable to Alston's charge of failing to acknowledge the complex, "polycentric nature of the human rights enterprise" (at 2045).

[26] Barbara Keys, *Reclaiming American Virtue: The Human Rights Revolution of the 1970s* (Cambridge, MA: Harvard University Press, 2014), 8.

and right that ATS litigation is a manifestation of pure universalism, an instance of "us" judging "them." It describes ATS litigation as one of the sites in which US identity was recast in flattering ways at the end of the Cold War through international human rights activism, and exposes this human rights mechanism's alignment, at times, with neoliberal logic. It also calls attention to the role of law in the relations between the United States and some of its former authoritarian allies, as both the Stroessner and Marcos regimes sought legitimacy in the formal legality and democratic façade required of US allies during the Cold War, only to find themselves challenged through legal proceedings in the United States.

The book offers a unique angle on the relationship between human rights and history through its focus on the historical narratives produced in the course of litigation. The historical narratives produced by criminal trials of atrocity – now the human rights movement's weapon of choice – have become the subject of much interdisciplinary scholarship. While legal texts are not expected to match the rich and detailed narratives of history books, criminal trials of atrocity have been criticized for portraying mass violence in a manner that is difficult to reconcile with historical scholarship and that obscures the structural causes of such violence. Law's failure to produce complex historical narratives is due primarily to the incompatibility between legal and historical approaches to evidence, and to the way legal constraints limit courts' scope of enquiry.[27] Moreover, scholars of Holocaust trials argue that courts' concerns with legitimacy when exercising extraordinary forms of jurisdiction add to legal constraints to further produce "tortured history."[28] For instance, scholars famously deplored the failure of the International Military Tribunal at Nuremberg to extensively address the mass extermination of European Jews, in the prosecutors' legally cautious focus on war crimes and crimes against peace – crimes then known to international law – at the expense of the unprecedented category of crimes against humanity. Yet over time, scholars have pointed to creative doctrinal developments that allow the criminal law to adapt to the reality of mass crimes.[29]

Landmark ATS cases have not yet been submitted to this line of enquiry.[30] Scholars of American collective memory – the knowledge about the past shared by a collectivity – have studied how criminal trials

[27] Wilson, *Writing History*, 7, 9.

[28] Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven, CT: Yale University Press, 2001), 65–94; Nancy Wood, *Vectors of Memory: Legacies of Trauma in Postwar Europe* (Oxford: Berg, 1999), 117–18.

[29] Douglas, *The Memory of Judgment*; Wilson, *Writing History*.

[30] For an analysis of the historical scholarship produced following the settlement of Holocaust-related litigation based in part on the ATS, see Leora Bilsky, "The Judge

of wartime atrocities have reinforced a collective memory focusing on "groups of victims of a brutal foreign regime and the role of America as a liberator and provider of refuge."[31] However, they have not considered ATS litigation. As a result, it is not clear whether ATS litigation, when it has gone to trial and produced judgments, has operated differently than criminal trials in narrating political violence, and if so, what features of tort litigation affect the historical narrative. It is widely thought that because tort litigation is an individual, agency-focused legal tool framed around a victim-perpetrator dyad, it is unhelpful for producing systemic, structural accounts of injustice.[32]

This book points to many similarities between ATS litigation and criminal trials in terms of the production of historical narratives, and the contribution to an American collective memory emphasizing the country as savior of foreign victims. At the same time, the book's close attention to legal doctrine and procedure exposes tort litigation's distinct characteristics and relative advantages for producing structural narratives about violence. Specifically, I argue that contrary to what has been suggested by scholarship, the use of civil litigation, including the need to evaluate damages, opened the door to structural and politicized representations of violence during the litigation, in particular in the plaintiffs' oral and written submissions. Yet as in groundbreaking Holocaust trials, the courts' need for legitimacy in a controversial exercise of jurisdiction significantly narrowed the narrative produced in written court decisions, which emphasized individual cruelty and even legitimated US complicity with each of the Stroessner and Marcos regimes.

Though inspired by the growing scholarship on the historical narratives produced in atrocity trials and drawing similar conclusions, this book departs significantly from that body in that it does not stop at the legal arena but explores the repercussions of ATS litigation's historical narratives outside legal institutions.[33] As such, this book contributes to a small

and the Historian: Transnational Holocaust Litigation as a New Model," *History and Memory* 24 (2012): 117–56; Bilsky, *The Holocaust, Corporations, and the Law*.

[31] Savelsberg and King, *American Memories*, 120.

[32] Bronwyn Anne Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge; New York: Cambridge University Press, 2011), 19; Robert W. Gordon, "Undoing Historical Injustice," *Justice and Injustice in Law and Legal Theory*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1999): 36–38, 67–71.

[33] The few studies of courts' historical narratives that explore media discourse include: Devin O. Pendas, "The Fate of Nuremberg: The Legacy and Impact of the Subsequent Nuremberg Trials in Postwar Germany," *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography*, ed. Kim Christian Priemel and Alexa Stiller (New York: Berghahn Books, 2012), 249–75; Rebecca Wittmann, *Beyond Justice: The Auschwitz Trial* (Cambridge, MA: Harvard University Press, 2005), 248.

body of scholarship that has begun to examine ATS litigation as a social practice. Sociologists have examined two class action lawsuits brought under the ATS – including *Marcos* – under the framework of social movement activism. The lawsuits were found to provide opportunities for mobilization but also to create strategic dilemmas for activists.[34] However, these important works do not delve into the social meaning of the litigation in the countries where the abuses occurred beyond the direct circle of participants – plaintiffs, human rights litigators, and activists.[35] Remarkably, the domestic meaning of ATS litigation has been largely ignored, despite the recent "empirical turn" in the study of international human rights mechanisms.[36] This book is one of the first to explore ATS litigation's implications for perpetrator societies.

In doing so, this book engages empirically not only scholarship on law and history, but also critical approaches to human rights. It supports the critics' claims that there are serious political costs to framing justice claims as human rights claims, especially when the legal vehicle is a transnational tort lawsuit. However, the book tells a nuanced story in which legal conceptualizations of violence were reinterpreted out of court in more complex senses. The in-depth historical study of cases and discourse analysis allow me to trace openings in which power relations are made explicit and challenged. I therefore not only urge critical scholars to engage in more empirically grounded studies of human rights; I also challenge their implicit assumption that the human rights discourse carries a constant meaning across social fields and cultural contexts.

In examining ATS litigation's meaning for societies involved in mass violence, the book adopts the framework of transitional justice. I use this term in both historical and analytical senses. The book argues that the early ATS cases should be understood as part of the historical phenomenon of transitional justice institutions emerging in the 1980s and 1990s to legally address Cold War-era mass violence. At the same time, I find

[34] Cheryl Holzmeyer argues, based on interviews of plaintiff attorneys and activists involved in the ATS class action *Doe* v. *Unocal*, that ATS litigation can help mobilize resistance to corporate power and neoliberal policies. Cheryl Holzmeyer, "Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in *Doe* v. *Unocal*," *Law & Society Review* 43 (2009): 271–304. In a more critical vein, Nate Ela explores how the class action lawsuit against Marcos created a series of dilemmas for leftist victim organizations in the Philippines. Nate Ela, "Litigation Dilemmas: Lessons from the Marcos Human Rights Class Action," *Law & Social Inquiry* 42(2) (2017): 479–508.

[35] For a sociological analysis of ATS lawsuits against corporations, see Ronen Shamir, "Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility," *Law & Society Review* 38 (2004): 635–64.

[36] Gregory Shaffer and Tom Ginsburg, "The Empirical Turn in International Legal Scholarship," *American Journal of International Law* 106 (2012): 1–46.

the transitional justice framework useful analytically, as it emphasizes the dual function of trials in times of political transition: a backward-looking task of accounting for past violence, including through the establishment of a historical record, and a forward-looking task of declaring or clarifying the new regime's identity. The duality embedded in the concept of transitional justice conveys my analysis of ATS litigation as accounting for violence in the Western bloc all the while performing a new, less supportive American relationship to right-wing authoritarianism. It should be noted, however, that the book departs from the rigid demarcation of regime change prevalent in transitional justice scholarship to consider an undeclared but nevertheless significant political transition, namely the United States' renouncement of right-wing authoritarian allies at the end of the Cold War. It also devotes considerable attention to public discourse in Paraguay in the decade preceding the country's formal transition to democracy, the decade of the regime's slow decline. This informal and capacious view of transitions allows the book to bring together and compare developments in the United States, Paraguay, and the Philippines, and thus to better understand the role played by ATS litigation in processes of political change.

Book Structure

Chapter 2 presents the dominant account of ATS litigation, which the remainder of the book challenges, providing at the same time some legal background necessary to understanding the book's analysis. It outlines the development of human rights litigation under the ATS, the law and practice of ATS litigation, and the dominant terms of the scholarly and policy debate surrounding this form of litigation. It explains that the debate has pitted human rights advocates seeking to promote international norms and human rights accountability beyond borders against conservatives seeking to avoid judicial interference in foreign policy. It highlights the assumptions and blind spots in that debate, in particular the striking indifference to the meaning of the litigation for the societies in which the litigated abuses occurred, at the same time as the United States itself has been viewed as disconnected from the litigated violence.

Chapters 3 and 4 explore *Filártiga* v. *Peña-Irala*. The case has been described as the *Brown* v. *Board of Education* of international human rights litigation, and applauded for inaugurating the modern era of ATS litigation. Chapter 3 retells *Filártiga* as a story of structural injustice deeply implicating the United States. It then describes a first stage of narrowing: before the case was filed in US courts in 1979, it was part of an international human rights campaign against state repression in

Paraguay led by Amnesty International. In emphasizing the Paraguayan state's systematic use of torture, this campaign ignored some of the deeper foundations of torture in Paraguay, in particular the fact that torture was used to silence criticism of economic injustice, and that the US strongly supported the regime and trained its security forces in "counterinsurgency."

The bulk of the chapter then focuses on a second stage of narrowing that occurred in US courts. The chapter shows that while the plaintiff submissions presented the case as implicating the institutionalized practices of the Paraguayan state, and even managed to reintroduce some of the case's links to economic injustice, this story of political repression, resistance, and complicity was lost in the simplified narrative produced by the Court of Appeals for the Second Circuit as well as by the subsequent District Court decision awarding damages, in two now often-cited and applauded decisions. The two decisions were framed instead in terms of a universal struggle – that is, a struggle that defies national boundaries and is based on a universally accepted set of values – against individual torturers. Moreover, the plaintiffs insisted on their lawsuit's compatibility with US foreign policy and in doing so whitewashed decades of US complicity in torture. The courts' individualized representation of torture further blurred any trace of factual connection of the case to the United States. Discussion of the case in legal and lay commentary echoed this distorted understanding of US–Paraguay relations.

The chapter argues that the *Filártiga* courts' individualization of torture and the parties' removal of the United States from their narrative about the Stroessner regime derived from the legal and political constraints the courts experienced in their exercise of a controversial form of extraterritorial jurisdiction. In the political context of the late 1970s and early 1980s, individualized accounts of political violence were particularly apt to provide US courts legitimacy as they fit the then emerging discourse about human rights, understood as a way to "do good" all the while avoiding the charge of American intervention in other countries' affairs. The result was an incomplete narrative that not only obscured the systemic nature of torture by the Paraguayan government but also masked the economic and US-related aspects of the case.

Chapter 4 returns to Paraguay. After detailing the tensions created by the lawsuit in United States–Paraguayan relations, it reveals that in the late 1970s and early 1980s the commercial Paraguayan press used the ATS case to challenge the Stroessner regime. Where the US courts emphasized the responsibility of a cruel individual torturer, the Paraguayan commercial press insisted that the case also implicated the police and the judicial system; the defendant was presented as an ordinary, not

demonized, individual; and the victims were construed as agents. Documents from the Paraguayan police's secret police archive further reveal that high-ranking officials perceived the commercial press coverage of the case as threatening. The chapter offers overlapping explanations for the divergence between the representations of the case produced by US courts and the press in Paraguay, and draws particular attention to the opportunities created by features of tort litigation as well as processes of local reinterpretation.

Chapters 4 and 5 delve into the *Marcos* lawsuit, in which an American jury held Ferdinand Marcos' estate liable for torture, disappearance, and extrajudicial killing and awarded a class of 10,000 plaintiffs close to two billion dollars in damages. The case has been applauded as a victory of the rule of law over arbitrary power, and a sign of the United States' commitment to international human rights. Chapter 5 offers a different view of the relationship between abuses under Marcos, on the one hand, and law and the United States, on the other. In *Marcos*, the chapter shows, because the lawsuit took the form of a class action against a former head of state, the human rights violations were presented by both plaintiffs and court as systematic policy, in contrast to the US courts' individualized portrayal of violence in *Filártiga*. Yet the historical narrative produced by the courts was nonetheless highly distorted, as it whitewashed two key structural foundations of repression under Marcos: US support for the regime, as well as the regime's extensive use of legal discourse to legitimate and implement repressive policies.

The chapter shows that though US involvement in the Philippines was extensively discussed at trial, the United States was portrayed as a savior of human rights victims and discussions of US complicity were silenced. This silencing derived in part from the plaintiffs' legal theory of responsibility. However, the plaintiff lawyers – with the help of the court – also sought to avoid this issue in order to retain the jurors' sympathy. As to the role of law, the chapter shows that the contribution of legal form and discourse to repression was made very clear during the trial for doctrinal and evidentiary reasons. Philippine law and legal documents were valuable forms of documentary evidence that helped connect Marcos to individual acts of torture committed by low-level officials under the theory of command responsibility. In fact, where historians have seen Marcos' constitutional maneuvers and formal legality as a cosmetic cover for violence, the testimonies at trial show in addition how torture formed part of an intricate bureaucratic system of repression commanding obedience from both victims and their torturers. Yet the part played by law in repression came through principally in oral proceedings at trial, and even there it was implied to result from the Philippines' failure to

conform properly to the US legal model. In the more principled, doctrinal discussions of written court decisions, the courts showed great difficulty confronting the issue of law's contribution to violence. The courts' positive portrayal of the United States and its law were reproduced out of court in legal scholarship and press coverage in the United States.

Returning to the Philippines, Chapter 6 shows that these court narratives were reinterpreted in ways more challenging to power. In the decade following the judgment on liability, victim organizations, elected officials, and the leftist press used the judgment to clarify the historical record and provide evidence of the extent of abuses under Marcos. It further reveals that in two leading Philippine newspapers discussions of the trial offered a narrative about the Marcos regime much more challenging to both the United States and to Filipino elites than that offered in US courts. The chapter also explores post-liability proceedings, which have greatly affected transitional justice policy and the collective memory of the Marcos regime in the Philippines. The chapter details the ATS plaintiffs' attempts to enforce their large damage award, and exposes the conflict between these enforcement attempts and the Philippine Republic's policy of agrarian reform in the post-Marcos era. In their attempt to receive damages, the ATS plaintiffs, leftists tortured typically because they criticized economic injustice, ironically became the fiercest opponents of a pioneering program of economic redistribution. However, this conflict was resolved in 2013 through the enactment of a law providing reparations and recognition to victims of the Martial Law regime. Though the reparations law was initially conceived as a way to enforce the ATS judgment and was accordingly limited to narrow categories of abuse, following parliamentary debates its scope was extended to cover a broader range of victims whose stories are being recorded for the first time. In addition, the reparations legislation has triggered and strengthened various governmental and nongovernmental memory and official history projects. The chapter thus traces how in the move from the United States. to the Philippines, the meaning of the lawsuit was transformed to produce richer public narratives of repression under Marcos.

The conclusion draws together the book's findings and arguments, and elaborates on their historical and normative–legal implications today. It calls for a history of human rights that explores the multiple social and narrative practices through which the human rights discourse has been deployed and sometimes transformed; in other words, it calls for an unabashedly interdisciplinary legal–historical–ethnographic approach to human rights.