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.