
Shifting the Lens on Alien Tort Statute Litigation: Narrating US Hegemony in Filártiga and Marcos

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Abstract

This article revisits the two seminal Alien Tort Statute (ATS) cases Filártiga v. Peña-Irala and In re: Marcos Human Rights Litigation. Setting aside the dominant framework of accountability, the article explores the historical narratives produced in those cases. It exposes how Filártiga and Marcos recast as entirely foreign violence in which the US executive was deeply involved, due to a combination of legal and political constraints in the exercise of a controversial form of jurisdiction. Moreover, these constraints have persisted in subsequent ATS litigation, creating a trade-off between individual accountability and narratives about US hegemony. By offering an alternative account of ATS litigation and exposing hitherto ignored costs of familiar legal developments, this article challenges the assumption that broad assertions of jurisdiction are necessarily beneficial in human rights struggles, and urges international lawyers to pay more attention to the interplay among doctrine, political circumstances and historical narrative when considering and comparing human rights mechanisms.

*Filártiga v. Peña-Irala*¹ has been called the *Brown v. Board of Education* of international human rights litigation.² In 1980, the Court of Appeals for the Second Circuit in

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¹ 630 F.2d 876 (2nd Circ. 1980) (*Filártiga*).

² *Brown v. Board of Education*, 347 US 483 (1954). Koh, 'Transnational Public Law Litigation', 100(8) *Yale Law Journal* (1991) 2347, at 2366.

Filártiga interpreted the Alien Tort Statute (ATS) as granting US federal courts jurisdiction over a lawsuit by the family of a young Paraguayan man against a former police officer from Paraguay for torturing the young man to death in Paraguay during the authoritarian regime of Alfredo Stroessner.³ Thereafter, US courts entertained damage lawsuits by foreign victims of gross human rights violations. While few lawsuits resulted in judgments for the plaintiffs, one notable success was a class action brought against Ferdinand Marcos in 1986 in a Hawaii federal court on behalf of 10,000 Philippine victims of torture and other abuses during the former dictator's martial law regime. *In re: Marcos Human Rights Litigation* is also a landmark case as it was the first ATS lawsuit to be tried on the merits,⁴ the first class action to be filed under the ATS and the first time a former head of state was held liable under the ATS.⁵ In fact, the seminal quality of *Filártiga* and *Marcos* has only increased since the US Supreme Court restrictively interpreted the ATS in 2013 in *Kiobel v. Royal Dutch Petroleum Co.*, holding that the statute does not apply generally to violations of international law occurring outside US territory.⁶ In the wake of *Kiobel*, *Filártiga* and *Marcos* have been invoked as symbols of a gilded and perhaps lost age.⁷ Moreover, these two cases and their progeny have been hailed as a model that should inspire other jurisdictions to recognize universal civil jurisdiction.⁸

This article offers a different perspective. Setting aside the dominant framework of legal accountability, it explores the historical narratives produced in *Filártiga* and *Marcos*.⁹ Viewed through this new lens, a more troubling image of these cases emerges. During the Cold War, both the Stroessner and Marcos regimes were staunch allies of the USA, and the political, military and economic support they received from the US government proved crucial to the regimes' legitimacy and to their security forces' ability to engage in violent repression. The US government, of course, is not a monolithic entity, and different US administrations collaborated to varying degrees with each of these regimes. Members of the US Congress also exerted pressure on these regimes to respect human rights. Yet the two foundational ATS cases did not shed any light on

³ Alien Tort Statute (ATS), 28 USC § 1350.

⁴ *In re Estate of Marcos Human Rights Litigation (In re Marcos)*, DC no. MDL 840, Order Granting Class Certification (D. Haw. 8 April 1991). Lutz, 'The Marcos Human Rights Litigation: Can Justice Be Achieved in U.S. Courts for Abuses That Occurred Abroad?', 14 *British Columbia Third World Law Journal* (1994) 43, at 45.

⁵ Steinhardt, 'Fulfilling the Promise of *Filártiga*: Litigating Human Rights Claims against the Estate of Ferdinand Marcos', 20 *Yale Journal of International Law (YJIL)* (1995) 65.

⁶ 133 S Ct 1659 (2013) (*Kiobel*).

⁷ See Bechky, 'Homage to *Filártiga*', 33 *Review of Litigation* (2014) 335, at 335.

⁸ E.g., C. Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Tort Litigation* (2001). Universal jurisdiction is the taking of jurisdiction based not on the link of the parties or the facts of the case to the forum but, rather, on the nature of the norm invoked. Some commentators view ATS litigation as the American 'translation' of universal criminal jurisdiction. Stephens, 'Translating *Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations', 27 *YJIL* (2002) 1, at 9.

⁹ In this, I follow Lawrence Douglas, who explored how the Holocaust was portrayed in famous Nazi trials. L. Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001).

the complex relationship of the Stroessner and Marcos regimes with the USA. To the contrary, this article exposes how *Filártiga* and *Marcos* recast as entirely foreign violence in which the US executive was deeply involved.

This distancing of the USA from repression by its former allies occurred not only because the ATS litigation focused on the acts of individual defendants. The article demonstrates that in each case, US policy towards each regime was actually discussed in legally relevant ways. Rather than pointing to an inherent limitation of tort litigation against individuals, I explain that the historical narratives produced in these cases were a result of a combination of legal and political constraints in the exercise of a controversial form of jurisdiction.¹⁰ Legal doctrines protective of state sovereignty and the courts' questionable legitimacy¹¹ led the plaintiffs and judges to obscure US support for the implicated regimes. Holding the individual defendants legally accountable thus came at the price of a highly distorted narrative about repression during the Cold War.

The historical narratives produced in the course of ATS litigation have not yet been the subject of academic inquiry.¹² For each lawsuit, I explore how the US relation to the case was represented in litigation documents, court decisions and oral trial proceedings, in discussions of the context and facts of the case as well as in legal argumentation and reasoning. Drawing on historical scholarship and memoirs, interviews with plaintiffs and their lawyers as well as archival research, I offer my interpretation of the litigation participants' motivations and constraints for producing such representations. This article thus offers a legal-historical approach to ATS litigation that pays attention to the interplay among legal doctrine, political conditions and historical representation.

In exploring the historical narratives produced in *Filártiga* and *Marcos*, the article does not 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.¹³ Rather, it draws attention to historical narratives as a byproduct of human rights mechanisms that should form part of international lawyers' overall assessment of these mechanisms. Some historical discussions are inevitable in any legal process that judges state or mass crimes because the historical context helps in understanding the acts of violence.¹⁴ What is more, these historical discussions often

¹⁰ This conclusion also echoes the findings of Douglas and other scholars of Nazi trials. *Ibid*; N. Wood, *Vectors of Memory: Legacies of Trauma in Postwar Europe* (1999), at 117–118.

¹¹ As used in this article, 'legitimacy' refers not to the normative concept of 'justified authority' but, rather, to 'empirical legitimacy', the 'actual acceptance of authority by a relevant constituency'. Y. Shany, *Assessing the Effectiveness of International Courts* (2014), at 138 (footnote omitted).

¹² For an analysis of the historical research about business under the Third Reich produced in the wake of class action settlements in litigation based in part on the ATS, see Bilsky, 'The Judge and the Historian: Transnational Holocaust Litigation as a New Model', 24 *History and Memory* (2012) 117.

¹³ See, e.g., M. Osiel, *Mass Atrocity, Collective Memory and the Law* (1997); Douglas, 'Crimes of Atrocity, the Problem of Punishment and the Situ of Law', in P. Dojcinovic (ed.), *Propaganda, War Crimes Trials and International Law* (2012) 269, at 282.

¹⁴ R.A. Wilson, *Writing History in International Criminal Trials* (2011), at 22–23, 73.

make their way into public discourse through media reports.¹⁵ They may also leave their mark on the legal profession. Thus, the historical stories told through law matter because they contribute to the social and legal construction of violence, shaping lawyers and laypeople's perceptions of where the need for change lies.

The fact that this approach focuses on a byproduct of litigation should not detract from its normative force. As explained by Stephen Wilf, the legal historian engages in 'thick normativity', understood as 'the shifting of lenses ... to reorient the viewer. If as Marcel Proust once said, a voyage of discovery consists not in seeking new landscapes but in having new eyes, how can legal historical work provide glimpses of alternative worlds?'¹⁶ Adopting the lens of historical narrative, this article seeks to offer new eyes on ATS litigation, exposing hitherto-ignored costs and benefits of familiar doctrinal developments.

As extensive scholarship has shown, historical distortions are part and parcel of the legal process.¹⁷ The present claim is not that comprehensive historical accounts are possible in any legal proceeding. Rather, this article exposes a particular kind of historical distortion produced in ATS litigation, namely the obscuring of the USA's involvement in violence abroad. This distortion is significant for foreign powers often play a key role in supporting or enabling state and mass violence. And while the complicity of foreign states is absent from the accounts of human rights abuses produced by many other human rights mechanisms, the distortion operated by ATS litigation is particularly pernicious.¹⁸ As I hope to show in this article, ATS litigation has not only failed to challenge, but has legitimated, the complicity of the USA with the repression of some of its allies, and it has done so before audiences relevant to the determination of US foreign policy: American legal professionals and citizens in the jury box and beyond.¹⁹

Some international lawyers may find that these distorted narratives about the USA are an acceptable price to pay for establishing individual accountability or producing other positive impacts of ATS litigation. However, before reaching such a conclusion, we must first acknowledge the very existence of a trade-off. Moreover, in order to tackle human rights abuses effectively, when comparing human rights strategies, we should prefer those legal mechanisms that are successful in uncovering deep foundations of violence. The article ends by suggesting that regional human rights mechanisms, and, ironically, ATS litigation after *Kiobel*, may offer promising alternatives to ATS litigation as universal jurisdiction. The first and second sections of this article retell the *Filártiga* and *Marcos* cases respectively, showing how the lawsuits produced narratives

¹⁵ J.J. Savelsberg and R.D. King, *American Memories: Atrocities and the Law* (2011), at 82. The media itself operates within its own set of institutional constraints and transforms the representations produced in the legal arena. *Ibid.*

¹⁶ Wilf, 'Law/Text/Past', 1 *University of California Irvine Law Review* (2011) 543, at 562.

¹⁷ Wilson, *supra* note 14, at 1–23.

¹⁸ Nagy, 'Transitional Justice as Global Project: Critical Reflections', 29 *Third World Quarterly* (2008) 275, 284.

¹⁹ Both cases were covered extensively by US daily newspapers such as the *New York Times*, the *Washington Post* and *Newsday*.

that shielded the USA from criticism. The third section elaborates on the normative implications of this analysis.

1 *Filártiga*, Torture and the Deterioration of US-Paraguayan Relations

A Political and Legal Background

This section recounts the USA's involvement in repression in Paraguay – the main contours of which were known at the time of *Filártiga* – in order to throw into relief the narratives produced in the case. Joelito Filártiga was the son of Joel Filártiga, a doctor from Asunción. Dr Filártiga's free clinic in the countryside and outspoken criticism of the exploitation and harm to peasants at the hands of agricultural business had turned him into a champion of peasant welfare. This earned him the ire of the government of Alfredo Stroessner, which labelled him a communist.²⁰ Stroessner took power in Paraguay in 1954 and ruled in an authoritarian manner until he was deposed in 1989. He managed to remain in power for so long through violent repression and alliances with the country's military, political and economic power blocs.²¹ Until the end of the 1970s, by which time his regime was well consolidated, Stroessner was able to distribute the material incentives necessary to cultivate loyalty by using the substantial economic, military and political support provided by the USA.²²

Contrary to the situation in Paraguay's neighbours, the Left was weak during most of the Stroessner era.²³ Former political prisoner and human rights activist Martín Almada believes that the government nevertheless brutally repressed peasants in order to demonstrate to the USA that there was a credible communist threat in the country and to court US support.²⁴ It is probable that the regime also viewed the Christian agrarian leagues, community organizations encouraging peasants to work together and share proceeds, as a challenge to the patronage system. The regime persecuted these leagues, claiming they were communist organizations linked to guerrilla movements.²⁵ Under both explanations, the US-led struggle against communism provided the regime with a justification for repression. The formal discourse of law and democracy required of Western bloc members and adopted by the regime was

²⁰ A. Miranda and A. Filártiga, *El Caso Filártiga* (1992), at 26.

²¹ Lambert, 'The Regime of Alfredo Stroessner', in P. Lambert and A. Nickson (eds), *The Transition to Democracy in Paraguay* (1997) 3, at 3–7.

²² E.O. Mora and J.W. Cooney, *Paraguay and the United States: Distant Allies* (2007), at 161. US economic aid and aid from international institutions provided with the support of the USA allowed the government to expend huge sums in infrastructure, making the regime popular. *Ibid.*, at 168. In particular, foreign aid allowed the regime to construct an overblown public sector, cementing loyalty to the regime and the party (as state employees had to be party members). Lambert, *supra* note 21, at 10.

²³ P.H. Lewis, *Paraguay under Stroessner* (1980), at 199–224.

²⁴ Interview with M. Almada, Asunción, Paraguay, 25 April 2013.

²⁵ Miranda and Filártiga, *supra* note 20, at 43.

further invoked to justify repression against those accused of communist (and, thus, non-democratic) sympathies.²⁶

Implicating the USA more directly in torture is the fact that Paraguayan military officers, soldiers and police officers were trained in ‘counter-insurgency’ techniques at US military academies.²⁷ The final report of the government-established Truth and Justice Commission describes how an American colonel oversaw the creation of one of the principal torture centres in the country in the 1950s.²⁸ The sense among historians, survivors and activists that the USA bears significant responsibility for repression under Stroessner was expressed clearly in the report, which asked the US government to apologize to the people of Paraguay.²⁹

The *Filártiga* case was symptomatic of the torture that took place under Stroessner’s rule. Joelito’s torture aimed to repress peasant empowerment under cover of the struggle against communism, and the regime used law to legitimate itself in the aftermath of the case. In March 1976, in the midst of a wave of heightened governmental repression of peasants, 17-year-old Joelito was taken to a neighbourhood police station in Asunción and tortured to death by four policemen, among them Americo Peña, in the hopes that he would reveal information about his father’s activities. Faced with the teenager’s brutally violated body, the police framed the case as a crime of passion.

Joel Filártiga strove to repudiate the official version through legal proceedings in Paraguay – to no avail. As part of the official ‘crime of passion’ story, the state initiated criminal proceedings against the supposed jealous husband, Hugo Duarte, for the murder of Joelito. The Filártigas filed a number of motions seeking to broaden the scope of the trial to include ‘the organizers, accomplices, and anyone else involved in covering up the murder’.³⁰ These proceedings proved futile and were never able to hold the police responsible or to reveal the truth. Moreover, the family and their lawyers were constantly harassed.³¹ Peña, for his part, enjoyed the legal services of a member of Stroessner’s inner circle.³² Duarte was eventually found by a Paraguayan court to have killed Joelito, but he was exonerated from legal responsibility thanks to a defence available to husbands who find their wives in *flagrante delicto*.³³

In 1978, the Filártigas discovered by chance that Peña was living in Brooklyn.³⁴ In 1979, the Center for Constitutional Rights (CCR), a public interest legal organization,

²⁶ R. Fregosi, *Le Paraguay au XXe Siècle: Naissance d'une Démocratie* (1997), at 51.

²⁷ Mora and Cooney, *supra* note 22, at 163–169; Lewis, *supra* note 23, at 172. To this were added on-site sales of military equipment with instruction sessions and counselling from US military advisors. F. Yore, *La Dominación Stronista: Orígenes y Consolidación, Seguridad Nacional y Represión* (1992), at 171; Mora and Cooney, *supra* note 22, at 175.

²⁸ Comisión de Verdad y Justicia, Paraguay, *Informe Final*, vol. 7 (2008), at 264–267, available at www.verdadyjusticia-dp.gov.py/informes/informe_final.php (last visited 23 November 2015).

²⁹ Comisión de Verdad y Justicia, Paraguay, *Informe Final*, vol. 1 (2008), at 90, available at www.verdadyjusticia-dp.gov.py/informes/informe_final.php (last visited 23 November 2015).

³⁰ R.A. White, *Breaking Silence: The Case That Changed the Face of Human Rights* (2004).

³¹ *Ibid.*, at 54, 99, 125, 143–144, 243.

³² *Ibid.*, at 95. *Ibid.* 7567,964, 4, 1547, 82 U.N.T.S. 279, 288 (1945), reprinted.

³³ *Ibid.*, at 262.

³⁴ *Ibid.*, at 187.

decided to invoke the ATS to sue Peña. CCR attorney Peter Weiss had previously contemplated using the ATS to sue US officials, first in connection with the 1968 My Lai massacre and again after the death in 1973 of President Salvador Allende. However, Weiss' colleagues had discouraged him, insisting that such suits would be laughed out of court.³⁵ As explained by one scholar,

[t]iming being everything in the law, as it is in life, one can be thankful in retrospect that such suits were not pursued vigorously since the defendants would not have been an unsympathetic alien torturer but US nationals working for the government and it is hardly likely that the Nixon or Ford Administrations would have taken the position under the facts of these cases that the Carter Administration did in its *amicus curiae* brief in *Filártiga*.³⁶

However, this time, Weiss convinced his colleagues to invoke the ATS.³⁷ On 6 April 1979, Peña was served with a civil complaint for torture and wrongful death on behalf of Joel and his daughter Dolly. On 15 May 1979, the District Court dismissed the lawsuit. The ATS, enacted in 1789, 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'.³⁸ The District Court agreed with Peña that for the purposes of the ATS the law of nations did not apply to the case since torture concerned the relations among a state and its own citizens, whereas the law of nations, following dicta in *ITT v. Vencap*, was limited to those 'standards, rules or customs affecting the relationship between states and between an individual and a foreign state'.³⁹ While the CCR appealed, Peña was deported from the USA on immigration grounds.⁴⁰

The plaintiffs argued in their appeal that even if the District Court had been right to adopt *Vencap's* narrow definition of the law of nations, the prohibition of torture fit that definition since it concerned the relations among states. The plaintiffs argued, however, that the *Vencap* test should not be followed. First, they reasoned that the drafters of the ATS understood the law of nations to apply not only to relations among states but also to the conduct of individuals, as evidenced by the doctrine of *hostis humani generis*, 'which holds that certain tortious acts are so reprehensible and universally condemned that universal jurisdiction is accorded to insure that the perpetrators are brought to justice'.⁴¹ Second, the plaintiffs argued that contemporary international law prohibited torture and, therefore, that *Vencap* was inapplicable.⁴²

The appeal was assigned to Judge Irving Kaufman, who had served as trial judge in the case against Ethel and Julius Rosenberg, the two Americans executed for

³⁵ *Ibid.*, at 213.

³⁶ Lillich, 'Foreword', in B. Stephens and M. Ratner, *International Human Rights Litigation in US Courts* (1996) xvii, at n. 10.

³⁷ White, *supra* note 30, at 214.

³⁸ ATS, *supra* note 3.

³⁹ *ITT v. Vencap, Ltd.*, 519 F.2d 1001 (2nd Circ. 1975). *Filártiga v. Peña-Irala*, No. 79, C917, slip. op (EDNY 15 May 1979), reprinted in W.J. Aceves, *The Anatomy of Torture: A Documentary History of Filártiga v. Peña Irala* (2007), at 349–351.

⁴⁰ Aceves, *supra* note 39, at 38–39.

⁴¹ *Filártiga*, *supra* note 1, Appellants' Brief, at 28.

⁴² *Ibid.*, at 35–45.

espionage in 1953 for passing information about the atomic bomb to the Soviet Union. Participants in the litigation have suggested that Kaufman seized the case as an opportunity to redeem himself from his association with McCarthyism,⁴³ an option made easier thanks to the US government's support of the plaintiffs. Indeed, the State Department filed an *amicus* brief supportive of jurisdiction.⁴⁴ Contrary to the plaintiffs, who in their attempt to cover alternative arguments had argued that individual wrongdoing was covered by the law of nations because such had been the intent of the drafters of the ATS, the US government argued that international law should be interpreted as it evolves, not as it was in the 18th century, and that 'official torture' now violated international law.⁴⁵

The Circuit Court issued its famous ruling on 30 June 1980. It adopted the reasoning of the US brief and reviewed contemporary international law to 'conclude that official torture is now prohibited by the law of nations'.⁴⁶ The District Court issued a default judgment in June 1981 and awarded damages in the amount of US \$10 million. The Filártigas' efforts to collect have been unsuccessful.⁴⁷

B The Individual Torturer and the USA as Saviour

In their submissions, the plaintiffs exposed the Paraguayan state as a systematic violator of human rights. However, the courts primarily presented the case as one about the abuse by a cruel individual of his official position.⁴⁸ 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 USA.

1 The Plaintiffs

In the complaint, the plaintiffs explained Joelito's torture and murder as an act of repression against Joel Filártiga, who was presented as 'a leading political opponent of General Stroessner, the dictator-President of Paraguay'.⁴⁹ Peña's acts were placed in the context of the widespread use of torture by the regime: 'The torture-murder of Joelito Filártiga is not an isolated incident in Paraguay. ... The Amnesty International "Briefing on Paraguay" describes the political use of torture ... It has been argued that torture is applied primarily as a punishment for and deterrent to opposition activities.'⁵⁰ At a damage hearing, Joel Filártiga described the widespread nature of torture

⁴³ White, *supra* note 30, at 257–258; interview with P. Weiss, Tel Aviv, 1 November 2013.

⁴⁴ Aceves, *supra* note 39, at 39–41.

⁴⁵ *Filártiga*, *supra* note 1, Memorandum for the United States as Amicus Curiae, at 4.

⁴⁶ *Ibid.*

⁴⁷ Aceves, *supra* note 39, at 76.

⁴⁸ I explore further the individualized representation of torture in *Filártiga* as an instance of the 'anti-impunity' human rights discourse in Davidson, 'From Political Repression to Torturer Impunity: The Narrowing of *Filártiga v. Peña-Irala*', in K. Engle, Z. Miller and D.M. Davis (eds), *Anti-Impunity and the Human Rights Agenda* (2016) 255–288.

⁴⁹ *Filártiga*, *supra* note 1, Verified Complaint.

⁵⁰ *Ibid.*, Appellants' Brief, at 6.

in Paraguay and the special atmosphere of fear around the time of Joelito's murder, with the arrest, torture and confinement of thousands of peasants.⁵¹ The defendant's arguments similarly reflected the understanding that the regime itself was under attack, dismissing the proceedings as a 'show-trial'.⁵²

However, if they offered a general portrait of the Stroessner regime, the plaintiffs did not mention the crucial part played by the USA in providing Stroessner with the ideological and military tools for repression. More significantly, they offered a highly distorted portrayal of the USA's relationship to the case. In response to the District Court's rejection of the claim on the ground that the prohibition of torture did not form part of the law of nations under the *Vencap* test since it concerned the relations between a state and its own citizens, the plaintiffs argued that torture actually affects the relations among nations, citing as evidence the deterioration of US-Paraguayan relations. Thus, the plaintiffs devoted lengthy passages of their brief to what they described as the US government's policy to eradicate torture internationally.⁵³ They explained that '[h]uman rights which had long played an important role in US foreign policy, were elevated to a preeminent role in President Carter's inaugural address'.⁵⁴

They further noted that Congress had in the past decade institutionalized the centrality of human rights, and, in particular, torture, to US foreign policy through, for instance, legislation linking foreign military and economic aid to human rights.⁵⁵ The plaintiffs described the resulting deterioration in the relations between the USA and other states, referring to reductions in military and/or financial aid to Chile, Argentina, Brazil, El Salvador, Guatemala, Uruguay, Nicaragua, Paraguay, Ethiopia and the Philippines.⁵⁶ The plaintiffs concluded this line of argumentation by stating:

If there is any question about the significance of the effect of human rights violations such as torture on US foreign policy, generally and with respect to Paraguay in particular, appellants should be entitled to have that question fully explored in appropriate evidentiary proceedings before the District Court. At that time plaintiffs would also demonstrate, that the torture-murder of Joelito Filártiga has contributed to adverse relations between this country and Paraguay and that responsible authorities view the redress sought here as fully consistent with and supportive of US efforts to eliminate torture.⁵⁷

Carter's foreign policy foregrounded human rights, and Paraguayan-US relations deteriorated from the 1970s due to human rights concerns. However, by presenting these developments as a strengthening of, rather than a marked shift in, US foreign policy, the plaintiffs' narrative erased decades of American support for the Stroessner

⁵¹ *Ibid.*, Transcript of Hearing on Damages before the US District Court for the Eastern District of New York, reprinted in Aceves, *supra* note 39, at 627.

⁵² *Filártiga*, *supra* note 1, Defendant Peña-Irala's Memorandum of Law in Support of Motion to Dismiss Complaint and Vacate Stay, reprinted in Aceves, *supra* note 39, at 298.

⁵³ *Filártiga*, *supra* note 1, Appellants' Brief, at 52.

⁵⁴ *Ibid.*, at 48.

⁵⁵ *Ibid.*, at 50–51.

⁵⁶ *Ibid.*, at 51–53.

⁵⁷ *Ibid.*, at 53.

regime – decades well known to the plaintiffs. As related by Harvard University’s student newspaper the *Harvard Crimson* in February 1980, in an interview and public speech given before the landmark decision to garner support for the case, Joel Filártiga described the situation thus:

Lately many of his patients have arrived with kidney infections, rashes and appendicitis, which he believes are caused by the phosphate insecticide the government bought from the United States, a type banned in the United States ... The phosphate poisoning case is only one instance in which Filártiga holds the United States accountable for his nation’s woes. Filártiga outlines the relationship between Paraguay and the United States in blunt, unsparing words: ‘The government of Paraguay was created in the United States State Department in the year 1959.’ Carter’s human rights stance does not move Filártiga; he calls it a ‘make-up policy,’ which makes ‘the regime swallowable’ and allows repression to continue. But a deep faith in the ‘strength of people to free themselves’ from oppression once they are educated has led him to travel to the United States whenever he can slip out of Paraguay – usually without a visa – and come speak to students. At Harvard, he told a hushed audience, ‘By liberating the people of Latin America, Americans will become free themselves.’⁵⁸

The plaintiffs’ submissions freed Americans of their connection not only to the Stroessner regime but also to other right-wing authoritarian regimes in the Western bloc. However, they did so not from Filártiga’s critical stance but, rather, by concealing and forgetting. This could occur not because the broader context of US–Paraguayan relations was irrelevant to the facts of the case, as the plaintiffs had built one leg of their argumentation precisely on the nature of these relations, but, instead, because of legal and political constraints admittedly difficult to disentangle from each other. The plaintiffs’ legal argument that torture affected the relations among nations would not have been strengthened by an acknowledgement that the USA had in the past strongly supported the Stroessner regime. The plaintiffs’ assurance that the claim was in line with long-standing US foreign policy can be read as an attempt to convince the court that a finding of jurisdiction would not trigger a political backlash.

2 The Courts

The Second Circuit did not adopt the plaintiffs’ line of argumentation, and it followed the USA’s *amicus* brief in ruling that international law should be interpreted as it evolves. Therefore, it did not need to delve into the *Vencap* test and the deterioration of US–Paraguayan relations. However, the Circuit and District Courts presented Joelito’s torture as the deed of a cruel individual rather than an institutionalized practice of the Stroessner regime, further blurring traces of any US connection to the case. Drawing on the plaintiffs’ submissions, the Second Circuit hinted at some of the political context surrounding the case.⁵⁹ It also referred throughout the decision to ‘official torture’. Yet unlike the plaintiffs, it did not mention the routine use of torture

⁵⁸ Faludi, ‘The Art of Healing Paraguay’, *Harvard Crimson* (1 February 1980), available at www.thecrimson.com/article/1980/2/1/the-art-of-healing-paraguay-pidr/ (last visited 23 November 2015).

⁵⁹ The description of the facts repeats the Filártigas’ claim ‘that Joelito was tortured and killed in retaliation for his father’s political activities and beliefs’. *Filártiga*, *supra* note 1, at 878.

by the Stroessner regime. Instead, to dismiss Peña's argument that the lawsuit was barred by the act of state doctrine (which prevents courts from judging the public acts of another sovereign state committed within that sovereign's territory⁶⁰), the Second Circuit constructed the paradoxical image of the torturer as a state official acting alone, without institutional support, noting that it was doubtful 'whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state'.⁶¹

Similarly, the District Court suggested that the Paraguayan state and people played no part in the case. When awarding punitive damages in order 'to take the international condemnation of torture seriously',⁶² the court had to address the seemingly contradictory fact that 'damages designated punitive have rarely been awarded by international tribunals'.⁶³ The court's solution was to point out that the international law regarding damage awards had 'developed chiefly in the resolution of claims by one state on behalf of its nationals against the other state, and the failure to assess exemplary damages as such against a respondent government may be explained by the absence of malice or *mala mens* on the part of an impersonal government'.⁶⁴ The plaintiffs had pointed this out in a memorandum arguing for a high award of damages and distinguished the present case as one in which an individual defendant was being formally sued.⁶⁵ Yet the plaintiffs' memorandum pointed clearly to Paraguay's de facto, if not legal, responsibility for institutionalizing torture and immunizing the defendant due to the lack of independence of the Paraguayan judiciary.⁶⁶ The court added: 'Here Peña and not Paraguay is the defendant. There is no question of punishing a sovereign state or of attempting to hold the people of that state liable for a governmental act in which they played no part.'⁶⁷

By insisting that they were judging an individual and not a foreign state (which happened to be a US ally), the courts could avoid a legal challenge, given that Paraguay was protected from suit by sovereign immunity.⁶⁸ The courts would also have staved off the

⁶⁰ B. Stephens *et al.*, *International Human Rights Litigation in US Courts* (2008), at 349–354.

⁶¹ *Filártiga*, *supra* note 1, at 890.

⁶² *Ibid.*, at 863.

⁶³ *Ibid.*, at 865.

⁶⁴ *Ibid.*

⁶⁵ *Filártiga*, *supra* note 1, Plaintiffs' Post-Trial Memorandum of Facts and Law, reprinted in Aceves, *supra* note 39, at 694–696.

⁶⁶ The memorandum contains a section dedicated entirely to 'The Role of Torture in Paraguay', discussing the gap between the official legal norms of the Paraguayan Constitution and written laws and the absolute arbitrariness of the system. *Ibid.*, at 669–674.

⁶⁷ *Filártiga v. Peña-Irala*, 577 F. Supp. 860, 86, at 8657 (EDNY 1984).

⁶⁸ Under the Foreign Sovereign Immunities Act of 1976, 28 USC §§ 1330, 1602–1611, foreign governments are immune from suit in the USA except for categories of claims that reflect liability arising out of private law transactions. Though the plain language of the statute indicates that it is not applicable to individual defendants, some circuits ruled that it applied to individual officials, and it was only in 2010 that the US Supreme Court ruled otherwise. *Samantar v. Yousuf*, 130 S. Ct 2278 (2010). In addition, Peña could have argued that the action impleaded Paraguay, triggering sovereign immunity.

charge of imperialism. Indeed, this criticism was apparently troubling enough to Judge Kaufman that he rebutted it in a long article he wrote in the *New York Times* a few months after the decision. ‘The courts will not be transformed into some kind of roaming human-rights commission’, he insisted. ‘Nor is the United States, by empowering our courts to hear international claims of torture, engaging in messianic moral imperialism.’⁶⁹ The Second Circuit’s decision was written in the midst of the Iran hostage crisis, which highlighted yet another instance of American support for an authoritarian regime. According to Kaufman’s law clerk, the crisis loomed large over the court and led it to seek the executive’s guidance by requesting an *amicus* brief.⁷⁰ By denying they were judging Paraguay, the courts could ‘do good’, all the while avoiding the appearance of interventionism. The result was an inversion of the US connection to the case, from enabler of torture to saviour of torture victims. In the often-quoted closing words of the Second Circuit’s landmark decision, the USA was portrayed as one member of the community of nations that had consistently battled violence perpetrated by individual ‘pirates’:

Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.⁷¹

2 Marcos

Marcos was a class action targeting a former head of state. As a result, the human rights violations were presented by both the plaintiffs and the courts as systematic state policy. This constituted a substantial advance from the perspective of the historical narrative in comparison with *Filártiga*. Since the lawsuits against Marcos addressed the policy and practices of the regime as opposed to the acts of an individual torturer, the issue of US–Filipino relations could not be swept as easily under the carpet. Yet having come to the fore, discussions of this issue led more explicitly than in *Filártiga* to a whitewashing of the USA. I begin by providing background on the Marcos regime and on the class action and then analyse the narrative about the USA produced in the case.

A From the ‘US-Marcos Regime’ to the US Class Action

1 The Martial Law Regime

Ferdinand Marcos declared martial law in September 1972 before the end of his second term as elected president of the Philippines. Known as a brilliant lawyer,⁷²

⁶⁹ Kaufman, ‘A Legal Remedy for International Torture?’, *New York Times* (9 November 1980), at 44.

⁷⁰ Krause, ‘Filártiga Memoir’, cited in Koh, ‘Filártiga v. Pena-Irala: Judicial Internalization into Domestic Law of the Customary International Law Norm against Torture’, in J.E. Noyes *et al.* (eds), *International Law Stories* (2007) 45, at 52.

⁷¹ *Filártiga*, *supra* note 1, at 890.

⁷² A.F. Celozza, *Ferdinand Marcos and the Philippines: The Political Economy of Authoritarianism* (1997), at 23.

Marcos endeavoured to provide legal legitimacy to his regime through constitutional amendments, such as a temporary switch to a parliamentary system to avoid the prohibition of a third presidential term.⁷³ On 17 January 1981, following pressure from the Reagan administration, Marcos announced the lifting of martial law.⁷⁴ Yet the martial law decrees and the president's law-making powers were retained. Having returned to a presidential system with no limitations on tenure, Marcos officially won the presidential election in June 1981 with 92 per cent of the votes.⁷⁵

The attachment to law has been explained as a technique of rationalization masking the arbitrariness of Marcos' rule, along with a technocratic discourse of socio-economic development.⁷⁶ Both were geared towards international support: the technocratic discourse impressed international lenders, while the attachment to legal and democratic form pleased the USA. At Marcos' 1981 inauguration, US Vice-President George Bush praised Marcos: 'We love your adherence to democratic processes.'⁷⁷

Before imposing martial law, Marcos had cultivated a close relationship with US president Lyndon B. Johnson, calling him his 'right arm in Asia'.⁷⁸ In exchange for supporting the Vietnam War, the Philippines received extensive economic and military aid, enabling Marcos to satisfy the demand on public resources by his circle.⁷⁹ Successive US presidents – including Jimmy Carter⁸⁰ – perceived their relationship to the Philippines to be integral to furthering key security interests. This was because two US military bases in the Philippines constituted the largest US military presence outside US territory.⁸¹ In addition, at the time martial law was declared, approximately 800 American companies were doing business in the Philippines.⁸² A '1947 parity amendment' to the Philippine Constitution upon reaching independence from the USA had given US citizens and corporations the same rights as Filipinos in ownership and exploitation of natural resources until 3 July 1974.⁸³ As president, Marcos repeatedly reassured US businesses that there would be no nationalization once this date passed.⁸⁴ Therefore, it was no surprise that the American Chamber of Commerce in Manila praised the declaration of martial law.⁸⁵ Marcos enacted favourable labour

⁷³ M.R. Thompson, *The Anti-Marcos Struggle: Personalistic Rule and Democratic Transition in the Philippines* (1995), at 45; Celozza, *supra* note 72, at 50–52, 57.

⁷⁴ Celozza, *supra* note 72, at 73.

⁷⁵ *Ibid.*, at 74.

⁷⁶ Thompson, *supra* note 73, at 4.

⁷⁷ Celozza, *supra* note 72, at 110.

⁷⁸ *Ibid.*, at 102.

⁷⁹ Thompson, *supra* note 73, at 66.

⁸⁰ Celozza, *supra* note 72, at 109–110.

⁸¹ *Ibid.*, at 108–109.

⁸² *Ibid.*, at 42.

⁸³ *Ibid.*, at 110.

⁸⁴ *Ibid.*, at 115.

⁸⁵ *Ibid.*, at 114.

and wage laws and banned strikes.⁸⁶ In 1980, multinational corporations expressed concern when the possibility of lifting martial law was raised.⁸⁷

Extensive US military aid enabled Marcos to gain and retain army loyalty, by increasing the status, resources and sphere of operations of the military.⁸⁸ The USA also sent army special forces to participate in military activities in provinces with a perceived potential for insurgency. In addition, historian Alfred McCoy suggests that the Central Intelligence Agency may have provided torture training.⁸⁹

Like the Stroessner regime, ‘the Marcos regime used the spectacle of violence for civil control’.⁹⁰ However, a particularly shocking display of violence would come to signal the regime’s downfall – the assassination on 21 August 1983 of opposition leader Benigno Aquino at Manila International Airport before a crowd of foreign journalists as he returned from exile in the USA to lead the opposition. Aquino’s assassination created a crisis of confidence among international bankers, exacerbating the country’s economic crisis and unravelling support from the Philippine’s elite.⁹¹ The US government also grew worried about the lack of a successor given Marcos’ failing health, the threat of a communist insurgency and the growing issue of crony capitalism.⁹² President Ronald Reagan’s administration therefore urged Marcos to implement reform and to hold free elections.⁹³ Marcos announced the holding of elections in February 1986 and did so on American television. Marcos was announced the winner of the elections against Aquino’s widow, Corazon Aquino, but the polls had been clearly rigged. Aquino launched a successful civil disobedience campaign a few days after the election, supported by the Roman Catholic Church and a group of rebel army officers. After receiving assurances that Aquino was a moderate, Reagan asked Marcos to resign, arranging for his flight out of Manila to Hawaii.⁹⁴

2 *The ATS Lawsuit*

One month later, five lawsuits, including one class action led by American class action attorney Robert Swift, were filed against Marcos in federal courts in California and Hawaii under the ATS, alleging torture, disappearances and extrajudicial killing. As explained by one of the lead plaintiffs for the victim organizations, the objective was ‘first and foremost ... to let the Marcoses account for the violations that they committed. And let the world as well as the nation know that this is what Marcos did’.⁹⁵

Marcos died in 1989 and was replaced thereafter by his estate. All five cases were initially dismissed on grounds of the act of state doctrine. In 1989, the Ninth

⁸⁶ *Ibid.*, at 117–118.

⁸⁷ *Ibid.*, at 118.

⁸⁸ *Ibid.*, at 77.

⁸⁹ A.W. McCoy, *Closer Than Brothers: Manhood at the Philippine Military Academy* (1999), at 189–190.

⁹⁰ *Ibid.*, at 205–206.

⁹¹ Thompson, *supra* note 73, at 119.

⁹² *Ibid.*, at 140.

⁹³ *Ibid.*, at 141.

⁹⁴ *Ibid.*, at 160–161.

⁹⁵ Interview with M. Hilao-Enriquez, Quezon City, Philippines, 30 July 2014.

Circuit reversed the dismissals, and the cases were consolidated for trial in the District of Hawaii before Judge Manuel Real.⁹⁶ As one commentator has noted, in finding that the act of state doctrine was inapplicable, the Ninth Circuit ‘seemed driven primarily by the attitudes of ... the United States and current Philippine governments, neither of which had raised ... objections to the justiciability of the human rights claim’.⁹⁷ The Philippine government had filed an *amicus curiae* brief that was supportive of the claims.⁹⁸ The USA, though it had argued in an *amicus* brief for a restrictive interpretation of the ATS that would not give federal courts jurisdiction in the case, had also stated that the act of state doctrine would not be applicable since the case would not embarrass relations between the USA and the Philippines.⁹⁹

The case proceeded as a combination of individual lawsuits and the class action relating to ‘all civilian citizens of the Philippines, who, between 1972 and 1986, were tortured, summarily executed or “disappeared” by Philippine military or paramilitary groups’.¹⁰⁰ Marcos’ liability for these acts was determined by a jury after two weeks of trial. Proving liability towards all class members required establishing a pattern of human rights violations,¹⁰¹ matching the plaintiff organizations’ goal of establishing the wide extent of abuses under Marcos. This evidence was provided through the testimony of over 40 victims, eight expert witnesses and many legal documents, including arrest orders, legislation and decrees. On 22 September 1992, the jury found the defendant liable.¹⁰² In 1994 and 1995, the jury awarded the plaintiffs US \$1.2 billion in exemplary damages and close to US \$800,000 in compensatory damages. The plaintiffs have been trying to enforce this judgment against assets belonging to the Marcos estate that are spread around the world.

B The USA as Saviour, Again

1 US Pressure as Proof of Defendant’s Knowledge

Marcos was sued under the doctrine of ‘command responsibility’, a doctrine developed by the international military tribunals at Nuremberg and Tokyo, whereby defendants are held responsible for the actions of their subordinates.¹⁰³ The jury was instructed that even if Marcos had not directly ordered torture, summary execution and disappearance, his knowledge of these violations and failure to take effective measures to

⁹⁶ *Trajano v. Marcos*, No. 86–2448, 1989 WL 76892 (9th Circ. 10 July 1989), reported in *Trajano v. Marcos*, 878 F.2d 1438, at 2, Table (unpublished decision). Stephens *et al.*, *supra* note 60, at 349–354.

⁹⁷ Fitzpatrick, ‘The Future of the Alien Tort Claims Act of 1789: Lessons from in Re Marcos Human Rights Litigation’, 67 *John’s Law Review* (1993) 491, at 498 (footnote omitted).

⁹⁸ *Trajano v. Marcos*, *supra* note 96, Amicus Curiae Brief of the Republic of the Philippines; *Hilao v. Marcos*, 1986 WL 732853 (CA 9).

⁹⁹ *Trajano v. Marcos*, *supra* note 96, Brief for the United States of America as Amicus Curiae. *Hilao v. Marcos*, *supra* note 98.

¹⁰⁰ *In re Marcos*, *supra* note 4, cited in Stephens *et al.*, *supra* note 60, at 241.

¹⁰¹ Fitzpatrick, *supra* note 97, at 499.

¹⁰² *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, US District Court (Hawaii), 910 F. Supp. 1460, at 1463–1464 (30 November 1995).

¹⁰³ Stephens *et al.*, *supra* note 60, at 257–258.

prevent them was a sufficient basis for liability.¹⁰⁴ To establish that he knew about the violations, the plaintiffs brought evidence that international human rights organizations and, crucially for our purposes, representatives of the US government constantly pressured Marcos to stop the abuses. As one plaintiff lawyer put it in his opening statement:

the evidence will show that when Marcos was confronted by US governmental officials, human rights groups and others, about the torture and other violations, they refused to take action to prevent the abuses from occurring. ... You'll hear that the US ambassador to the Philippines met personally with Marcos several times. ... You'll hear that ... Vice-President Mondale raised human rights' concerns with Marcos on a special trip to the Philippines. And you'll hear that each year dozens of congressmen and congresswomen going to Manila and confronting President Marcos with evidence of human rights abuses.¹⁰⁵

Former US ambassadors and diplomats testified about the numerous meetings held by high-ranking US officials with Marcos in order to discuss human rights. They also testified about the help the US embassy had provided to individual victims and portrayed the USA as having set up a broad and organized effort to improve the human rights situation.¹⁰⁶ Thus, as in *Filártiga*, since only one part of the story was told – that of the American attempt to reduce repression – without discussion of the critical support the regime had received from the USA, the litigation produced a distorted narrative about the USA's involvement. One can obtain a measure of the distortion by looking at how Philippine human rights organizations themselves changed their story. Consider, for example, how Task Force Detainees of the Philippines (TFD) describes former US Attorney-General Ramsey Clark's visit to the Philippines in a 1984 report:

In 1979, when former US Attorney-General Ramsey Clark came to the Philippines and visited the AFP Intelligence Service headquarters in Camp Bago Bantay, Quezon City, then Commanding Officer Col. Pedro Balbanero (now a brigadier general) was confronted with torture equipment found in the place. The unabashed officer was quoted as informing Clark that he had learned the techniques in Fort Bragg and other key military training schools in the US.¹⁰⁷

At trial, however, Sister Mariani Dimaranan, who was an expert witness on behalf of TFD, told a very similar story but failed to mention any US torture training and to the contrary depicted Americans as denouncers of human rights abuses:

When former US Attorney General Ramsey Clark was in the Philippines in August 1977, TFD gave him the location of a room in a military camp where detainees had been tortured by electric shock. In his tour of the camp, he forced his way into the room and photographed the field telephone with electrodes attached to it and a metal chair nearby.¹⁰⁸

¹⁰⁴ *In re Marcos*, *supra* note 4, Final Jury Instructions, at 10.

¹⁰⁵ *Ibid.*, Opening Statement by Randall H. Scarlett, Esquire, Attorney for Plaintiffs Ortigas and Clemente, Trial Transcript, 9 September 1992, at 43.

¹⁰⁶ *Ibid.*, Trial Transcript, 17 September 1992, at 9.

¹⁰⁷ Task Force Detainees of the Philippines, *TRENDS: A Report on Political Detention, Salvaging and Disappearances* (January–June 1984), at 15.

¹⁰⁸ *In re Marcos*, *supra* note 4, Trial Transcript, 10 September 1992, at 58.

The point is not that TFD's report was more accurate. Rather, the change in the story suggests limits on what could be said in court.

2 *Discussions of US Complicity Silenced*

In what was probably an attempt to affect Dimaranan's credibility in the eyes of the jury, the defence attorneys tried to show that her organization (TFD) had used anti-American rhetoric. When cross-examining her, defence counsel William Johnson referred her to one of TFD's reports. The following exchange ensued:

Q. The third paragraph of that page refers to the US Marcos regime, is that correct? ...

A. Yes

Q. The third paragraph, do you see that?

A. Yes.

Q. The US Marcos regime?

A. Yes.

Q. What the book mean, what are you referring to there in your book?

Mr Swift: Objection.

The Court: The objection is sustained.¹⁰⁹

Conversely to the plaintiffs who tried to prove Marcos' knowledge of human rights abuses through the existence of US pressure, the lawyers for Marcos' estate argued that US aid was evidence of the fact that there had not been widespread abuses. Through protracted cross-examination of expert witnesses, defence counsel tried to bring up the issue of US aid to the Philippines. These attempts were invariably silenced by the court at the plaintiffs' insistence. For example, in the cross-examination of Michael Posner, executive director of the Lawyers Committee for Human Rights, defence counsel asked about US aid:

Q. Mr. Posner, in regards to – do you recall the amount of military aid that was granted by – or military and economic assistance that was granted by the United States to the Philippines for the years '75 through '82?

Mr Steinhardt [plaintiff counsel, ND]: Objection.

The Court: The objection is sustained.¹¹⁰

Johnson's cross-examination of Benjamin Muego, a political science professor who testified on the organizational structure of the Philippine military, led to a similar silencing:

Q. Mr. Muego, regarding your testimony about the military increase, this increase cost money, did it not?

A. I would imagine so, yes.

Q. And the Philippine military was almost totally dependent on United States aid for their armed training?

A. I would not characterize it that way. They did receive military assistance from the United States but they were not totally dependent on the United States. It would be inaccurate to say that.

¹⁰⁹ *Ibid.*, at 79–80.

¹¹⁰ *Ibid.*, at 79.

Q. If I said that, I apologize. Were they almost entirely dependent on the United States for armed training?

A. Again, I think I already responded to the question. I cannot testify as to degrees of dependence, that's not within the scope of my expertise.

Q. Did you ever hold that opinion?

A. That the military –

Q. That the Philippines was almost entirely dependent on the United States for weapons and other military hardware?

Mr Swift: Objection, relevance.

The Court: The objection is sustained.¹¹¹

Diplomat Stephen Cohen actually testified that between 1977 and 1980 the State Department refused to approve indirect aid – over ten loans provided by international development institutions to the Philippines.¹¹² In his opinion, '[t]his refusal reflected the determination that torture and summary execution continued to be practiced by the Marcos regime during these years on a significant scale with no evidence that Marcos or high government officials were trying to improve the situation'.¹¹³ When, in cross-examination, Johnson pointed out that during those years the USA continued to provide hundreds of millions of dollars in direct military and economic aid, Cohen explained that this aid was a form of 'rent' paid by the USA for the use of military bases in the Philippines, which were key to the security not only of the USA 'but [also] the entire free world'.¹¹⁴ With respect to the American support for loans from the Asian Development Bank for the years 1978–1980, Cohen answered that these loans were 'humanitarian in nature out of a concern that poor people living in a country like the Philippines not be penalized by the human rights violations of the government'.¹¹⁵ He continued by explaining that the lack of a formal finding in Congress that the Marcos regime had committed gross human rights violations was a product of diplomatic practice, according to which '[s]ensitive issues which involve criticizing other governments are dealt with privately, ... which we thought would allow the US government to be as effective as possible'.¹¹⁶

Defence counsel tried again to bring up the subject of US aid in the cross-examination of international law professor Diane Orentlicher, who testified in her capacity as a former monitor of human rights abuses in the Philippines. Similarly to Cohen, Orentlicher explained that the 'package of [economic and military aid] was clearly intended to be, in effect, compensation for continued access to military bases'.¹¹⁷ When Johnson asked Orentlicher whether, in her past testimony about the Philippines before the US Congress, she had brought up the issue of aid, the court interjected: 'Counsel, the giving or not giving of aid by the Congress is not an issue in this case.'¹¹⁸ The court quashed further motions to allow the

¹¹¹ *Ibid.*, 16 September 1992, at 27–28.

¹¹² *Ibid.*, 17 September 1992, at 16–17.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*, at 21–22.

¹¹⁵ *Ibid.*, at 30–31.

¹¹⁶ *Ibid.*, at 52–53.

¹¹⁷ *Ibid.*, 18 September 1992, at 14.

¹¹⁸ *Ibid.*, 17 September 1992., at 172.

defence to cross-examine Orentlicher on the issue of US aid, repeating that it was irrelevant.¹¹⁹

Thus, American support for the Marcos regime was obscured at trial and, to the extent that it was discussed, it was justified by reference to good diplomatic practice, humanitarian and security concerns and the USA's fulfilment of contractual duties (paying 'rent'). This legitimization of US involvement derived from the plaintiffs' theory of liability and rules of relevance. As for the defence, it invoked US support for the Marcos regime to demonstrate that human rights abuses had not been widespread. Had the defence been more successful in presenting their case, it is doubtful that the narrative produced would have been critical of US foreign policy.

Yet these legal constraints did not operate mechanically to obscure US responsibility. Ethnocentrism and strategic factors were also at work. Notice that each side's case turned in large part on Marcos' relationship to the USA. That is, the US position on the Marcos regime implicitly operated as the measure of wrongdoing. Moreover, for Swift, avoiding discussions of US support of the regime was necessary in order to win the case. Comparing this issue, as well as the communist leanings of many plaintiffs, to the issue of race in the O.J. Simpson trial, Swift explained to me that 'what you try to do at trial is keep out extraneous events that could appeal to prejudice.'¹²⁰

In addition, in Swift's view, open recognition of the political aspects of the case would have triggered immunity and other doctrines protective of the separation of powers within the US government, further endangering the case.¹²¹ These doctrines likely motivated the court to bar discussions of political issues. Indeed, the court's consistent rulings that the defence's discussions of US aid to the regime were beyond the scope of the case are highly questionable, given that the court allowed the plaintiffs to introduce testimony that indirect aid had been reduced, in support of the plaintiffs' argument that Marcos knew of the human rights violations. Given the inconsistency, the court's silencing of discussions of US aid was likely meant to protect the court's jurisdiction, if not its legitimacy.

It is worth noting that in 1992 the plaintiffs themselves did not appear to have been disturbed by the distorted historical narrative. As related by lead plaintiff Marie-Hilao Enriquez, the board members of SELDA – a victims' organization on the extreme left – clapped their hands upon hearing that the Hawaii District Court had acceded to the plaintiffs' demand that the word 'communist' not be pronounced before the jury,¹²² seeing it as a sign that Judge Real was enabling them to win the case.¹²³ Later, in 1999, Enriquez and three other victims would appear before Judge Real to vehemently oppose a settlement agreement reached between the Marcos estate and Swift on behalf of the class members, in which Marcos' widow and son maintained their innocence. Judge Real nevertheless approved the settlement (which was ultimately invalidated for lack of funds). When plaintiff Aurora Parong insisted that the agreement would be used by

¹¹⁹ *Ibid.*, 18 September 1992, at 91–93.

¹²⁰ Telephone interview with R. Swift, 4 December 2014.

¹²¹ *Ibid.*

¹²² Swift explained that he worried that defence counsel would insist on the communist sympathies of many victims to win over the jury. *Ibid.*

¹²³ Interview with M.H. Enriquez, Quezon City, Philippines, 30 July 2014.

the Marcoses in the Philippine press to distort the historical record, Judge Real clarified that he was not concerned with the non-legal consequences of the litigation: ‘Not only in the Philippines, Ms. Parong. I wonder sometimes when I happen to read a paper of something that’s happened in my courtroom as to whether I was in the same courtroom. Papers don’t tell us anything ... Unfortunately, we can’t control the press. We have a Constitution.’¹²⁴ If ATS litigation offered a venue for the victims to assert their claims, it also presented risks for the historical narrative. Yet as long as the litigation could be interpreted as establishing Marcos’ responsibility for widespread abuses, even the most principled victims within the class were willing to sacrifice the details of the historical narrative, including the part played by the USA.

3 A New Perspective on ATS Litigation

Filártiga and *Marcos* are two among hundreds of claims invoking the ATS since 1980. We should therefore be careful about drawing generalizations from these cases, which are embedded in particular historical constellations. Barbara Keys argues that from the late 1970s human rights offered a way for Americans to reclaim the mantle of moral virtue lost during the Vietnam War, due in no small part to US support for the brutal South Vietnamese regime.¹²⁵ This article suggests that ATS litigation was one of the sites where American identity was recast through human rights in a way that disassociated the nation from its former repressive allies.

Nevertheless, these cases are indicative of broader trends in the field of ATS litigation for two reasons. First, these are the seminal cases that have largely set the legal framework for the field. The interpretation of the ATS to allow for human rights litigation regardless of the nationality of the parties or the place of commission of the violations has been described as the ‘*Filártiga* doctrine’.¹²⁶ Scholars view *Marcos* as having significantly developed this doctrine because the full-fledged trial clarified many of the legal questions that can arise during ATS litigation.¹²⁷ Lawsuits against multinational corporations, many of which are based in the USA, have attempted to highlight the responsibility of American business for much of the injustice in the global south. Contrary to the lawsuits against corporations, *Filártiga* and *Marcos* were presented as ATS claims at their most basic, as the core of the field that continued to be framed as foreign through the concepts of ‘international human rights litigation’, ‘universal jurisdiction’ and ‘foreign-cubed cases’.¹²⁸

¹²⁴ *Ibid.*, at 45.

¹²⁵ B. Keys, *Reclaiming American Virtue: The Human Rights Revolution of the 1970s* (2014).

¹²⁶ See, e.g., Stephens, ‘Upsetting Checks and Balances: The Bush Administration’s Efforts to Limit Human Rights Litigation’, 17 *Harvard Human Rights Journal* (2004) 169, at 169; Bradley, ‘The Costs of International Human Rights Litigation’, 2 *Chicago Journal of International Law* (2001) 457, at 461, n. 15.

¹²⁷ Steinhardt, *supra* note 5. The first time the US Supreme Court extensively considered the ATS in *Sosa v. Alvarez-Machain*, 542 US 692, at 731 (2004), it referred approvingly to the reasoning in *Filártiga* and *Marcos* regarding the requirement that the claim relate to a norm of international law with sufficient international acceptance.

¹²⁸ O. Hathaway, ‘Kiobel Commentary: The Door Remains Open to ‘Foreign Squared’ Cases’, 18 April 2013, available at www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/ (last visited 23 November 2015).

Second, for decades after *Filártiga* and *Marcos*, the doctrinal and political constraints that had led the courts to obscure US involvement in foreign violence in these two cases have persisted. Claims have continued to be subject to sovereign immunity and the act of state doctrine, as well as the political question doctrine, where the dispute presents issues assigned by the US Constitution to the executive.¹²⁹ The USA cannot be sued under the ATS because of its sovereign immunity, absent a waiver.¹³⁰ While US officials do not enjoy the same immunity as the government, the government can substitute itself in place of an official when that official has acted within the scope of employment. In such a case, the government can invoke its immunity.¹³¹

It is difficult to disentangle these legal constraints from politics. In this regard, the political context has not changed significantly since *Filártiga*. Scholars of collective memory in the USA point out that the dominant collective representations of the past, as embodied in museums, memorials and national holidays, continue to this day to focus on 'groups of victims of a brutal foreign regime and the role of America as a liberator and provider of refuge'.¹³² While *Filártiga* and *Marcos* were celebrated by human rights advocates, and legislation was enacted in 1991 to allow plaintiffs who are American citizens to file similar lawsuits in cases of torture and extrajudicial killing,¹³³ conservative scholars and politicians have challenged increasingly the legitimacy of the *Filártiga* doctrine, especially from the mid-1990s when corporations and other powerful defendants began to be sued.¹³⁴

In such a context, we should not expect critical histories of the USA to have been produced in ATS litigation. While a study of the historical narratives produced in other cases is beyond the scope of this article, a survey of ATS judgments imposing liability on defendants who were officials of regimes with close relations to the USA reveals that American support or involvement with these regimes has not been discussed.¹³⁵ Thus, in the 1980s, 1990s and 2000s, cases relating to Argentina's dirty war, the Indonesian repression in East Timor and gross abuses in Guatemala, Chile

¹²⁹ Stephens *et al.*, *supra* note 60, at 338.

¹³⁰ Thus, the doctrine of sovereign immunity has barred ATS claims brought against the US government by individuals detained as 'enemy combatants' at Guantanamo Bay. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (DDC 2005). The USA can be sued under the Federal Tort Claims Act, 28 USC § 1346(b) (1) (2006), however, the US Supreme Court in *Sosa*, *supra* note 127, at 127, dismissed the 'headquarters doctrine', which until then was understood to impose liability on the US government for acts committed in a foreign country if federal agents played a significant role in planning the act. Baluarte, 'Comment, *Sosa v. Alvarez-Machain*: Upholding the Alien Tort Claims Act While Affirming American Exceptionalism', 12 *Human Rights Brief* (2004) 13.

¹³¹ Stephens, 'The Curious History of the Alien Tort Statute', 89 *Notre Dame Law Review* (2014) 1532.

¹³² Savelsberg and King, *supra* note 15, at 120.

¹³³ Torture Victim Protection Act, 28 USC § 1350.

¹³⁴ Stephens, *supra* note 131, at 1491–1505.

¹³⁵ *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (ND Cal. 1987), on reconsideration 694 F. Supp. 707 (ND Cal. 1988); *Martinez-Baca v. Suarez-Mason*, Civ. no. 87–2057 (ND Cal. 22 April 1988); *Quiros de Rapaport v. Suarez-Mason*, Civ. no. 87–2266 (ND Cal. 11 April 1989); *Todd v. Panjaitan*, Civ. no. 92–12255 (D. Mass. 26 October 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Circ. 2005); *Arce v. Garcia*, 400 F.3d 1340 (11th Circ. 2005), substituted opinion at 434 F.3d 1254 (11th Circ. 2006); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (ED Cal. 2004).

and El Salvador – all by military forces widely known to have been armed, funded or otherwise supported by the USA¹³⁶ – were retold as foreign violence having no connection to the USA, other than the fact that the plaintiffs had found refuge there, and this despite the courts' sometimes detailed exposition of the historical context.¹³⁷

Conversely, it is where US courts have refused to adjudicate ATS claims that US complicity in the violence has been made most explicit. In *Corrie v. Caterpillar* (2007), for instance, the Ninth Circuit upheld a district court ruling dismissing claims against the manufacturer of bulldozers used by the Israel Defense Forces to demolish homes in the Palestinian territories, on the grounds that because the manufacturer's sales to Israel were paid for by the USA, allowing the action to proceed would require the judicial branch to question the political branches' decision to grant extensive military aid to Israel.¹³⁸

The cases about East Timor and Latin America I have referred to, like *Filártiga* and *Marcos*, have established the personal liability of perpetrators of atrocities. Some of these lawsuits have enabled the victims to tell their personal stories of suffering in court. My research on the domestic impact of *Filártiga* and *Marcos* in Paraguay and the Philippines, respectively, further indicates that these cases have empowered victims locally *vis-à-vis* their governments.¹³⁹ *Corrie v. Caterpillar*, in contrast, is arguably a setback on all these fronts. What has gone unnoticed is the trade-off between legal accountability and historical narratives present in ATS litigation. To admit that transnational human rights claims have implicated the US government is to risk triggering doctrines meant to protect the separation of powers among branches of the US government and to risk alienating the judge or jury. Conversely, to accept a case is to abide by the fiction that there are no foreign policy issues involved. By ignoring and – at least in *Filártiga* and *Marcos* – absolving the USA of responsibility, these cases have not only addressed human rights abuses in a superficial manner, but they have further legitimated the conditions under which the abuses have been perpetrated.

¹³⁶ For discussion of US initial support for Argentina's dirty war, see Schmidli, 'Institutionalizing Human Rights in US Foreign Policy: US-Argentine Relations, 1976–1980', 35 *Diplomatic History* (2011) 351. On US support and arming of the Indonesian invasion of East Timor, see Simpson, "'Illegally and Beautifully": The United States, the Indonesian Invasion of East Timor and the International Community, 1974–76', 5 *Cold War History* (2005) 281. On the US support of the Guatemalan army during the 1980s, see F.H. Gareau, *State Terrorism and the United States: from Counterinsurgency to the War on Terrorism* (2004), at 43–66. On US involvement in Pinochet's overthrow of Salvador Allende, see P. Kornbluh, *The Pinochet File: A Declassified Dossier on Atrocity and Accountability* (2013). On the US relationship with El Salvador in the 1970s and 1980s, see W.M. LeoGrande, *Our Own Backyard: The United States in Central America, 1977–1992* (1998), at 149–284.

¹³⁷ See, e.g., *Doe v. Saravia*, 348 F. Supp. 2d 1112 (ED Cal. 2004). Note, however, that according to the Center for Justice and Accountability, in a lawsuit against Salvadoran Colonel Nicolas Carranza, 'Carranza admitted on the witness stand that he had been receiving money from the US government since 1965'. See Center for Justice and Accountability, 'Two Victories for CJA's El Salvador Cases', available at www.cja.org/section.php?id=73 (last visited 28 December 2016), referring to *Chavez v. Carranza*, WD Tenn. no. 03-2932 M1/P (18 November 2005), affirmed (6th Cir. 17 March 2009).

¹³⁸ *Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir. 2007).

¹³⁹ N.R. Davidson, *Between Individual and Community Justice: Assessing Transnational Tort Human Rights Litigation* (PhD Dissertation, Tel Aviv University, 2016).

How does *Kiobel* affect this analysis of ATS litigation? In this case, Chief Justice Roberts, writing for the court, held that the ATS does not apply to conduct occurring on the territory of another sovereign, based on the presumption against extraterritoriality, a canon of statutory interpretation that ‘reflects the “presumption that United States law governs domestically but does not rule the world”’.¹⁴⁰ He opined that ‘even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against territorial application ... Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices’.¹⁴¹

Though scholars debate the precise implications of this decision, it clearly restricts the types of cases that can be litigated under the ATS. Lawsuits filed under the statute have begun to be dismissed for failing to sufficiently ‘touch and concern’ the USA.¹⁴² However, viewed through the historical lens adopted in this article, *Kiobel* may have a thin silver lining. This article has exposed the trade-off between accountability and historical narrative due to legal doctrine as well as concerns for the legitimacy of the plaintiffs and the courts. *Kiobel* has changed the institutional constraints within which judges and parties operate. First, legal doctrine has been made more amenable to highlighting the involvement of Americans in injustice, now that a close link between the case and the USA must be established. Second, now that jurisdiction under the ATS has been significantly narrowed and brought in line with concerns for sovereignty and international comity, the legitimacy concerns surrounding ATS litigation have been reduced. *Kiobel* may therefore offer an opportunity for human rights lawyers to bring claims in which legal accountability and historical narrative will be better aligned, though still primarily in relation to US private citizens and corporations and not to US political branches.

ATS claims can still not directly target the USA due to sovereign immunity, and lawsuits against private actors that implicate the US government will likely be dismissed as in *Corrie v. Caterpillar* for interfering with the political branches’ foreign policy decisions.¹⁴³ However, lawsuits drawing attention to corporate decisions or commercial and financial activities in the USA, which do not directly implicate US political branches, could be accepted by the courts.¹⁴⁴ While it is not yet clear what situations would satisfy the *Kiobel* holding that the facts must sufficiently ‘touch and concern’ the USA, post-*Kiobel* Circuit Court rulings regarding claims against US corporations

¹⁴⁰ *Kiobel*, *supra* note 6, at 1664, citing *Microsoft Corp. v. AT&T Corp.*, 550 US 437, 454 (2007).

¹⁴¹ *Ibid.*, at 1669.

¹⁴² E.g., *In re South African Apartheid Litigation*, 02 Civ 4712 (SDNY 2014).

¹⁴³ Such was the outcome of *Al Shimari*, where upon remand the District Court found that it did not have jurisdiction over a lawsuit against US private military contractors for torture in Iraq, despite the Circuit Court’s finding that the case sufficiently ‘touched and concerned’ the USA under *Kiobel*, as ‘a decision on the merits would require this Court to question actual, sensitive judgments made by the military’. *Al Shimari v. CACI Premier Tech., Inc.*, 2015 US Dist. LEXIS 107511, at 2–3. However, the Fourth Circuit later overturned this dismissal of the case on political question grounds. *Al Shimari v. CACI Premier Tech., Inc.*, No. 15–1831 (21 October 2016).

¹⁴⁴ This argument was already made by Chander, ‘Unshackling Foreign Corporations: *Kiobel*’s Unexpected Legacy’, 107 *American Journal of International Law* (2013) 829.

in effect direct plaintiffs to allege that a substantial part of the wrongdoing has taken place in the USA or has involved Americans.¹⁴⁵ Thus, corporate defence lawyers note that:

'plaintiffs' lawyers could ... more carefully craft ATS claims to withstand the presumption against extraterritoriality. In *Ahmad v. Found, for Int'l Research and Education* ... plaintiffs alleged that the defendants which were charities in the United States, collected donations and provided material support to Israeli citizens who purportedly illegally built settlements in Palestinian territory. The plaintiffs specifically alleged in the complaint that '[a]ll of the Defendants' activities [took] place in the United States and thereby fall within the recent holding under the ATS by the US Supreme Court.¹⁴⁶

Similarly, in a lawsuit arising from the development and customization by Cisco of a surveillance system targeting members of the Falun Gong religion in China, the plaintiffs amended their complaint after *Kiobel* to emphasize the key part played by system features developed in the USA in the persecution of Falun Gong members.¹⁴⁷

Thus, the new requirement of a link to the USA in *Kiobel* may ironically open the door to challenges to US hegemony, understood to comprise the profiting of US companies from violence abroad. However, *Kiobel* does not appear to resolve the problem of ATS litigation legitimating US foreign policy.¹⁴⁸ It is actually possible that impositions of liability on US corporations or individuals will continue to come at the price of obscuring US governmental involvement since plaintiffs might distinguish the facts of their claims from US governmental policies in order to avoid doctrines that are protective of sovereignty and the separation of powers.

If that is the case, then *Kiobel*'s principal benefit might be to steer human rights claims to other fora whose institutional features are more favourable to critical narratives, such as regional human rights systems, where relevant. Indeed, the narrative

¹⁴⁵ The Second Circuit requires that the 'conduct that is in fact a violation of customary international law or aiding and abetting a violation' be alleged to have occurred in the USA. *Mastafa v. Chevron Corp.*, 770 F.3d 170, 186 (2nd Circ. 2014). The Eleventh Circuit requires that 'enough' of the relevant conduct occur within the USA. *Doe v. Drummond Co., Inc.*, 782 F.3d 576, 597 (11th Circ. 2015) (emphasis in original). The Fourth Circuit is less strict, requiring courts to 'consider all the facts ... including the parties' identities and their causes of action.' *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Circ. 2014).

¹⁴⁶ Weiss and Panlilio, 'Defending against Alien Tort Statute Cases Post-*Kiobel*: What Are the Key Defenses?', Paper presented at an American Law Institute Continuing Legal Education Seminar, New York, 12 June 2013, at 3, available at www.orrick.com/Events-and-Publications/Documents/Defending-Against-Alien-Tort-Statute-Cases-Post-Kiobel-What-Are-the-Key-Defenses.pdf (last visited 23 November 2015).

¹⁴⁷ *Doe I v. Cisco Systems, Inc.*, Case no. 5:11-cv-02449-EJD-PSGx (ND Cal. 18 September 2013) (Second Amended Class Action Complaint). Compare to *Doe I v. Cisco Systems, Inc.*, Case no. 5:11-cv-02449-JF-PSGx (ND Cal. 2 September 2011) (Corrected First Amended Class Action Complaint). The case was dismissed for failing to displace the presumption against extraterritoriality and is being appealed. See '*Doe v. Cisco Systems, Inc. (Amicus)*', available at <http://ccrjustice.org/home/what-we-do/our-cases/doe-v-cisco-systems-inc-amicus> (last visited 27 April 2016).

¹⁴⁸ While the involvement of the US government, on the one hand, and of private citizens and corporations, on the other, in injustice abroad can be seen as two facets of US hegemony or neo-colonialism (as exemplified by the alignment of US governmental and corporate interests under Marcos described in notes 81–87 above and accompanying text), they are of a different nature and raise different legal and historical issues.

in *Filártiga* can be contrasted to that in *Goiburú v. Paraguay*.¹⁴⁹ In this case, the Inter-American Court of Human Rights (IACtHR) held in 2006 that Paraguay had violated the rights to life, humane treatment, liberty and a fair trial in connection with the torture and disappearance during the Stroessner regime of Paraguayans apprehended in Argentina as part of ‘Operation Condor’, the system of cooperation among South American security services established under US auspices during the Cold War. The 134-page judgment contains an extensive description of the historical context, drawing on the testimony of two experts on repression under Stroessner and a wealth of primary and secondary documents, including the secret archives of the Paraguayan police discovered in 1992.¹⁵⁰ The court discussed the doctrine of national security that formed the ideological basis of the Western bloc and the fact that Operation Condor had been ‘supported by the Central Intelligence Agency (the CIA), among other United States agencies’.¹⁵¹

Of course, the IACtHR had the benefit of hindsight, extensive historical research and available police archives. In this particular case, the state had also agreed to most of the facts. Yet, alongside these factors, the court’s mandate to judge state responsibility and its treaty basis made its in-depth exploration of institutionalized repression less controversial than adjudication under the ATS, offering a more promising environment for the production of complex accounts of violence that include the part played by foreign powers.¹⁵²

4 Conclusion

Ugo Mattei and Jeffrey Lena have portrayed ATS litigation as a form of US imperialism.¹⁵³ Through a close study of *Filártiga* and *Marcos*, this article has shown that the ATS has indeed served to legitimate the neo-colonial relationship between the USA and Paraguay and the Philippines, respectively, and has suggested that the same is probably true of other ATS cases. However, because it has examined these cases using a legal-historical approach, searching for the representations of the past that have emerged in legal texts and interpreting the reasons – legal and other – for such representations, it has avoided depicting the transnational human rights lawsuit as an abstract hegemonizing force. Instead, it has revealed the web of doctrinal limitations, litigation strategies, political constraints and cultural assumptions that have shaped the historical narratives in these cases. This detailed approach is not only more convincing than broad critical assertions. Because it pinpoints the factors leading to poor

¹⁴⁹ IACtHR, *Goiburú v. Paraguay*, Judgment (Merits, Reparations and Costs), 22 September 2006, available at www.corteidh.or.cr/index.php/en/jurisprudencia (last visited 27 April 2016).

¹⁵⁰ *Ibid.*, at paras 56–61(14) (expert witnesses).

¹⁵¹ *Ibid.*, at para. 61(6).

¹⁵² The Inter-American Court of Human Rights is subject to its own set of legitimacy challenges. See Huneeus, ‘Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights’, 44 *Cornell International Law Journal* (2011) 493.

¹⁵³ Mattei and Lena, ‘United States Jurisdiction over Conflicts Arising outside of the United States: Some Hegemonic Implications’, 24 *Hastings International and Comparative Law Review* (2000–2001) 381.

representations, it also provides tools to reconstruct the law so as to produce narratives more challenging to power relations. In the case of ATS litigation, it has pointed to the costs of both the mechanism's poor legitimacy and the legal doctrines protective of sovereignty and has suggested the benefits of recalibrating human rights litigation so that it is more territorially circumscribed and conducted in institutions enjoying stronger legitimacy. This approach can thus be seen as a constructive form of legal critique.