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Judging the Marcos Regime in U.S. Courts: ATS Litigation as Postcolonial Law

As interpreted between 1980 and 2013, the Alien Tort Statute (ATS) enabled foreigners to sue, in U.S. courts, perpetrators of grave human rights violations that occurred abroad. This paper revisits the landmark ATS case Marcos, *in which the estate of former Filipino dictator Ferdinand Marcos was held liable in 1992 to 10,000 Filipino victims of torture, disappearance and extrajudicial killing in the Hawaii District Court. The case has been praised for promoting human rights accountability, but how has it operated as a site producing historical narratives about authoritarian regimes? This paper examines the historical narrative produced in the* Marcos *case, concentrating on the narration of two structural enablers of violence under Marcos also typical of many authoritarian regimes in the Cold War's Western bloc: the extensive U.S. support enjoyed by the regime, and the regime's use of formal legality. The paper reveals the numerous and surprising openings in the litigation to discuss the parts played by the U.S. and by law in repression. Yet despite these opportunities, I show that generally the litigation legitimated the U.S. role in the Philippines under Marcos, and created an image of the United States as a paragon of the rule of law, in contrast to its former colony. I therefore argue that in the* Marcos *case the ATS was "postcolonial," in Sundhya Pahuja's sense of being egalitarian with the formerly colonized and imperialist all at once. The paper draws out from this case study some institutional benefits and limitations of litigation under universal civil jurisdiction for narrating political violence. It also makes a methodological argument for studies in the tradition of "law and history" when exploring the ways law can legitimate or challenge power relations.*

During the Cold War, many authoritarian regimes in the Western bloc violently suppressed dissent all the while proclaiming attachment to electoral democracy and legality. The martial law regime of Ferdinand Marcos in the Philippines (1972-1986) followed such a pattern. The regime regularly held elections, only to rig their results. It also periodically arrested opposition politicians and activists, yet often released detainees after a short while, claiming they had been arrested in error by low-level security agents.[1] Yet the highly personalistic character of the Marcos regime made it impossible for Marcos to avoid eventually being blamed for the violence. One month after his ouster from power in February 1986 and while in exile in the United States, he

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[1] Vincent Boudreau, *Resisting Dictatorship: Repression and Protest in Southeast Asia* (Cambridge University Press. 2004), 142.

was sued in U.S. federal courts on behalf of 10,000 Filipino victims of torture, disappearance, and extra-judicial killing under the Alien Tort Statute ("ATS"),[2] which since 1980 had been interpreted as creating a form of universal civil jurisdiction, enabling foreign victims of torture and other gross violations of international law to sue perpetrators for damages in U.S. courts.[3] In September 1992, a U.S. jury found Marcos responsible, and in 1994 and 1995, awarded the plaintiffs damages totaling two billion dollars. It seemed that after years of paying lip service to the American legal culture inherited by the Philippines, the United States' former colony, Marcos (and his estate after his decease in 1989) had been caught by the powerful machinery of pro-plaintiff American justice.

That is one way of understanding this lawsuit – as a victory of the rule of law over arbitrary power. The lawsuit has been applauded for offering the only legal avenue for victims to seek redress, in the absence of effective accountability mechanisms in the Philippines.[4] The finding of liability and the large damage award also broke new legal ground. Not only was *Marcos* the first ATS lawsuit to be tried on the merits.[5] It was the first class action under the ATS, and the first time a former head of state was held liable under the statute.[6]

This paper revisits the landmark *Marcos* case, and offers a different view of the relationship between repression under Marcos on the one hand and the law and the United States on the other. The Marcos regime used the forms and discourse of law to commit abuses. Moreover, the extensive political, economic and military support the regime received from the United States was key to the regime's survival and ability to

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[2] The ATS grants U.S. 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". 28 U.S.C. §1350.

[3] Universal jurisdiction, a concept developed in the context of criminal law, is the taking of jurisdiction based not on the link of the parties or facts of the case to the forum, but on the nature of the norm invoked. See M. Cherif Bassiouni, "The History of Universal Jurisdiction and its Place in International Law," *Universal Jurisdiction, National Courts and the Prosecution of Serious Crimes under International Law*, ed. Stephen Macedo (University of Pennsylvania Press, 2004), 39, 42. In the landmark case *Filártiga*, the Court of Appeals for the Second Circuit held in1980 that federal courts had jurisdiction under the ATS over a claim by Paraguayans against a former Paraguayan police officer for the torture of their son and brother in Paraguay. Until the U.S. Supreme Court's decision in *Kiobel v Royal Dutch Petroleum Co.*,133 S.Ct. 1659 (2013) restricting the applicability of the ATS to facts that "touch and concern" the United States, the ATS' applicability had not been interpreted to depend on any link of the facts or parties to the United States, except that the court must have had personal jurisdiction over the defendant. Beth Stephens, "Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations," 27 *Yale Journal of International Law* 1 (2002), 8.

[4] Belinda A. Aquino, "The Human Rights Debacle in the Philippines," in Naomi Roht-Arriaza, ed. *Impunity and Human Rights in International Law and Practice* (Oxford University Press, 1995), 231-242.

[5] Ellen L. Lutz, "The Marcos Human Rights Litigation: Can Justice Be Achieved in Us Courts for Abuses That Occurred Abroad?" 14 BC Third World Law Journal 43 (1994), 45.

[6] Ralph G. Steinhardt, "Fulfilling the Promise of Filartiga: Litigating Human Rights Claims against the Estate of Ferdinand Marcos." 20 *Yale Journal of International Law.* 65 (1995), 68.

repress. Yet in their search for remedies, the victims turned to the ATS …that is, to the U.S. and its law. To what extent could litigation in American courts address the neo-colonialist[7] relationship of the Marcos regime with the United States and the ways formal legality facilitated repression?[8] This paper sets out to understand how the roles of the United States and of law in human rights violations under the Marcos regime were represented in the *Marcos* case. It is not concerned with attributions of legal responsibility - obviously, neither the United States nor "the law" were sued. Rather, it examines an important by-product of human rights litigation: the historical narrative produced.

This paper returns to the landmark *Marcos* case against the background of a decades-long debate on universal civil jurisdiction. The U.S. Supreme Court recently restricted the possibility of exercising universal jurisdiction under the ATS, in the case of *Kiobel*.[9] However, foreign victims of torture and extrajudicial execution may still sue individual defendants in U.S. courts under the Torture Victims Protection Act, a law enacted in 1991 to extend ATS-like litigation to plaintiffs who are American citizens, but applies equally to foreigners.[10] Human rights lawyers have also been exploring the possibility of bringing international human rights cases in state courts.[11] Moreover, ATS litigation has been hailed as a model that should inspire other countries to recognize universal civil jurisdiction.[12] These developments have generated an extraordinary amount of scholarship,[13] pitting human rights advocates against conservatives who see in universal civil jurisdiction a form of undemocratic judicial activism.[14] By revisiting a landmark ATS case, this paper seeks to offer a different perspective on the field: how

[7] By neo-colonialism I am referring to the exercise of economic and political power by a foreign state where "the State which is subject to it is, in theory independent and has all the outward trappings of international sovereignty." Kwame Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (Nelson, 1965), ix.
[8] By "formal legality" I am not referring to formalism as a legal theory, but to a political phenomenon whereby a regime adheres to legal form and procedure.
[9] *Kiobel, supra* note 3.
[10] 28 U.S.C.§ 1350.
[11] Roger P. Alford, "Human Rights after Kiobel: Choice of Law and the Rise of Transnational Tort Litigation," 63 *Emory Law Journal* 1089 (2014).
12 See eg. Craig Scott (Ed.) *Torture as Tort: Comparative Perspectives on the Development of Transnational Tort Litigation* (Hart, 2001); George P. Fletcher, *Tort Liability for Human Rights Abuses* (Hart, 2008), 8-15.
[13] Beth Stephens, "The Curious History of the Alien Tort Statute." *Notre Dame Law Review* 89 (2014): 1467 at 1468, noting in fn. 3 that over 4000 law review articles have referred to the statute since 1980.
[14]For a detailed analysis of the rigid opposition to the *Filartiga* line of cases by George W. Bush's administration, see Beth Stephens, "Upsetting Checks and Balances: the Bush Administration's Efforts to Limit Human Rights Litigation," 17 *Harvard Human Rights Journal* (2004) and Beth Stephens, "Judicial Deference and the Unreasonable Views of the Bush Administration," 33 *Brook. J. Int'l. L.* 773, 815-16 (2008). Conservative legal scholars have argued that the ATS creates foreign policy complications and could potentially damage the U.S. economy by imposing liability on multinational corporations. Carolyn A D'Amore, "Sosa v. Alvarez-Machain and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open," 39 *Akron L. Rev*. 593(2006).

might we assess this type of litigation if we view it as a site producing historical narratives about political violence?

To examine the historical narrative produced in *Marcos*, I focus on the representation of the roles of the U.S. and of the law. I chose to do so because formal legality and the support of foreign powers are structural enablers of violence that not only played crucial parts under Marcos, but are also typical of political violence elsewhere. These two structural factors are also connected, and examining one without the other would lead to a very partial understanding of the historical narrative produced in the *Marcos* litigation. Law in the Philippines, including the possibility of declaring martial law, is a legacy of American colonialism.[15] Moreover, during the Cold War, maintaining a democratic and legal façade was required by membership in the Western bloc and repeatedly requested by U.S. administrations. Thus, the two factors examined in this chapter can be seen as two facets of neo-colonialism. As such, they would appear to have little chance of being frankly discussed in ATS litigation. It is not just that by its very nature, litigation simplifies complex realities by translating them into workable legal terms. According to scholarship on Holocaust trials and transitional justice, when mass violence is addressed through law, there is a tendency to present the violence as non-legal.[16] Similarly, atrocity trials and transitional justice measures have been accused of obscuring the heavy responsibility of the global North for repression and conflict in the global South.[17] Each of these problems, taken separately, would seem to pose special challenges in ATS litigation. These difficulties are compounded in the *Marcos* case, when discussing the role of law would involve linking the U.S. legal heritage to repression.

Despite the steady growth of literature on the relationship between international law and imperialism,[18] and the fact that ATS litigation is often conceptualized as the

[15] This is generally the case in former colonies of Europe. Sally Engle Merry, *Law and Colonialism*, 25 Law and Society Review 889 (1991).
[16] David Fraser, *Law after Auschwitz: Towards a Jurisprudence of the Holocaust* (Carolina Academic Press, 2005) (arguing that Nuremberg and subsequent Nazi trials have obscured the legal aspects of the Holocaust and of the processes leading to it); Bronwyn Anne Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge University Press, 2011) (arguing that South Africa's Truth and Reconciliation Commission failed to address the institutionalized nature of apartheid because of its legalist framework).
[17] Nagy, Rosemary. "Transitional Justice as Global Project: Critical Reflections." 29*Third World Quarterly* 275 (2008); Susan Marks, "Human Rights and Root Causes." 74 *The Modern Law Review* 57 (2011).
[18] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2007); Chimni, B.S. "International Institutions Today: An Imperial Global State in the Making." 15 *European Journal of International Law* 1 (2004).

elaboration and enforcement of international norms in domestic courts,[19] very little attention has been given to ATS litigation as a site in which American power might be legitimated or challenged.[20] Ugo Mattei and Jeffrey Lena have, it is true, criticized ATS litigation for being a form of imperialism.[21] They state:

> "Sometimes litigation in the United States would appear to be the only vehicle available for vindication of rights. And this is indeed one of the strongest rhetorical rationales promoting the hegemony of American law in the international context. The class action is the intellectual-ideological device that permits U.S. hegemony to obtain the consent of hegemonized communities by offering and promoting an alternative to political struggle."[22]

However, their analysis is not convincing because, like much of the leftist critique of human rights, it "operate[s] at the level of … elite discourses about human rights… at the expense of work more rooted in an observation of the actual uses of human rights."[23] In contrast, this chapter adopts the contextualized approach of the case study. It offers a close reading of litigation documents inspired by scholarship on law's representation of history.[24] Because the litigation led to a trial before a jury, it produced a wealth of proceedings, including oral and written arguments, testimony by experts and victims, as well as decisions. I analysed the transcripts of oral trial proceedings, court decisions issued between 1986 and 1996 (decisions after that date concern enforcement), and amici briefs submitted to the court. I also interviewed the lead plaintiff counsel and a dozen plaintiffs who had either participated in the U.S. proceedings or helped prepare the case.

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[19] Harold Hongju Koh, *Transnational Litigation in United States Courts* (Thomson/West, 2008), 23-26.

[20] Nate Ela's Master's thesis explores the *Marcos* case under the framework of social movement activism, and argues that while the case presented opportunities for social mobilization, it also created a series of dilemmas for leftist victim organizations in the Philippines. Among these dilemmas, he found that victims appreciated the irony of seeking justice in U.S. courts, given their criticism of U.S. imperialism. Nate Ela, Litigation Dilemmas: Lessons from a Human Rights Class Action, Master's Thesis, University of Wisconsin-Madison, 2012, 19. He thus complicates the picture offered by Cheryl Holzmeyer, who argued that ATS litigation can help mobilize resistance to corporate power and neoliberal policies. Cheryl Holzmeyer, "Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in Doe V. Unocal." *Law & Society Review* 43, no. 2 (2009): 271-304. As I detail further below, my interviews with members of plaintiff organizations in the Philippines confirmed Ela's findings, though according to my interviewees the risk of legitimating U.S. power was not given much weight by the organization members and did not create a dilemma.

[21] Ugo Mattei and Jeffrey Lena, "United States Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications" 24 *Hastings International and Comparative Law Review* 381 (2000-2001).

[22] *Ibid*, 395.

[23] Frédéric Mégret, "Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes," in *New Approaches to International Law: The European and the American Experiences* (David Kennedy José Maria Beneyto ed. 2012), 32.

[24] I draw principally on Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press, 2001), who examined how the Holocaust was portrayed in landmark Holocaust trials, and argues that legal constraints and judges' exacerbated need for legitimacy when breaking new legal ground led to "tortured history," though his overall assessment of the Nuremberg and Eichmann trials is that they were successful attempts to creatively adapt the law to the novelty of the Holocaust.

In what follows, I reveal the numerous and often surprising opportunities in the litigation for discussion of the parts played by the U.S. and the law in repression. Yet despite these opportunities, I show that ultimately the litigation legitimated the U.S. role in the Philippines under Marcos, and similarly obscured the role of law in violence. I therefore argue that in the *Marcos* case the ATS was "postcolonial," in Sundhya Pahuja's sense of being egalitarian with the formerly colonized and dangerously imperialist all at once.[25] If jurisdiction plays an important part in establishing status differences,[26] then the universal jurisdiction offered by the ATS should be seen as inclusive. The U.S. shared with Filipino victims a highly valuable and expensive public resource – their civil justice system, including decades of access to complex class action procedures. This universalism allowed Filipino victims and their families to tell their intensely personal stories of suffering and lives destroyed. However, the litigation also legitimated the U.S. relation to the Marcos regime and created an image of the United States as a paragon of the rule of law, in contrast to its former colony. The *Marcos* case thus offers a vivid illustration of Pahuja's claim that "there is something distinctive about the relation implied in the "postcolonial" – both a break from and a continuity with past forms of domination- and something particular about the capacity of law to be both appropriated to imperial ends and used as a force for liberation."[27]

Because the *Marcos* litigation has been applauded for empowering the victims, I will not devote much space to the "egalitarian" aspect of my argument. Part I offers my reading of historical accounts of the Marcos regime, focusing on the regime's heavy reliance on both U.S. support and formal legality. It also briefly lays out the stages of the litigation. Part II explores the representation of the role of the United States in the litigation. It shows that though U.S. involvement in the Philippines was extensively discussed, the U.S. was portrayed as a savior of human rights victims. This distorted image of US involvement derived in part from the plaintiffs' legal theory of responsibility. However, I show that the plaintiff lawyers –with the help of the court – also silenced defense counsel's attempts to discuss U.S. support for the Marcos regime in order to retain the jurors' sympathy and win the case. Part III explores the representation of the role of law. It shows that the contribution of legal form and discourse to repression was made very clear during the trial for doctrinal and evidentiary reasons. Philippine law and legal documents were valuable forms of

[25] Sundhya Pahuja, "The Postcoloniality of International Law," 46 *Harvard International Law Journal* 459 (2005).
[26] Robert Ford, "Law's Territory (A History of Jurisdiction)," 97 *Michigan Law Review* 943 (1999).
[27] Pahuja, *supra* note 25, 460 (fn. omitted).

documentary evidence that helped connect Marcos, as president, to individual acts of torture committed by low-level officials under the theory of command responsibility. In fact, where historians have seen Marcos' constitutional maneuvers and formal legality as a way to concentrate power and cosmetically cover violence, the testimonies at trial show in addition how torture formed part of an intricate bureaucratic system of repression. Yet the part played by law in repression came through principally in oral proceedings at trial, and even there it was implied to result from the Philippines' failure to conform properly to the U.S. legal model. In the more principled discussions of written court decisions, the courts showed great difficulty confronting the issue of law's contribution to violence. The conclusion draws out from this analysis some institutional benefits and limitations of litigation under universal civil jurisdiction for narrating political violence. It also makes a methodological argument for case studies in the tradition of "law and history" when studying the ways law can legitimate or challenge power relations.

I. From the Martial Law of the "U.S.-Marcos Regime" to the Alien Tort Statute

A. Martial Law

"NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers vested upon me by Article VII, Section 10, Paragraph (2) of the Constitution, do hereby place the entire Philippines as defined in Article I, Section 1 of the Constitution under martial law and, in my capacity as their commander-in-chief, do hereby command the armed forces of the Philippines, to maintain law and order throughout the Philippines, prevent or suppress all forms of lawless violence as well as any act of insurrection or rebellion and to enforce obedience to all the laws and decrees, orders and regulations promulgated by me personally or upon my direction."

Ferdinand Marcos, Proclamation 1081, September 22, 1972.

"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."

TRENDS, a Task Force Detainees Philippines Report on Political Detention, Salvaging and Disappearances, January-June 1984, 15.

Ferdinand Marcos declared martial law in September 1972, before the end of his second term as elected president of the Philippines. Until February 1986, when he was peacefully deposed by a popular movement led by the moderate political opposition, he ruled in an authoritarian manner. The pre-martial law political system had been dominated by oligarchical parties competing for power according to democratic rules.[28] With the declaration of martial law, Marcos not only suspended Congress and eliminated freedom of the press and the other democratic constraints on the system. He also transformed the system of patronage, monopolizing state resources for himself, his family and close circle.[29]

Marcos concentrated power through adroit maneuvering. He won an unprecedented second term as president in 1969 by using state budgets to fund his campaign.[30] He then tried to perpetuate his power by convening a constitutional convention that would amend the 1935 Constitution to allow him more than two terms in office. When this failed, he imposed martial law in September 1972 to ensure he could ratify a new constitution.[31] To justify his imposition of martial law, he invoked a number of recent violent incidents in the country, and used "red scare" tactics.[32] All the while a more efficient and decentralized government was proclaimed, government offices proliferated, and centralization increased. This allowed Marcos to award official positions to local elites and consolidate his control of regions.[33]

Authoritarian uses of law

Known as an exceptionally brilliant lawyer,[34] Marcos insisted on providing legal legitimacy to his regime. Proclamation 1081, in which martial law was declared, explored lengthily the factual and legal justifications for the declaration, insisting on Philippine Supreme Court holdings regarding the existence of an insurrection and quoting extensively from the Court.[35] Marcos bribed the members of the Constitutional

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[28] Mark R. Thompson, *The Anti-Marcos Struggle: Personalistic Rule and Democratic Transition in the Philippines* (Yale University Press, 1995), 19.
[29] Ibid, 11.
[30] Albert F. Celoza, *Ferdinand Marcos and the Philippines: The Political Economy of Authoritarianism* (Praeger, 1997), 24-26.
[31] Ibid, 43.
[32] Ibid, 47.
[33] Ibid, 95-6.
[34] While a law student in Manila, Marcos was tried and found guilty of killing the opponent of his father, who was a politician. In jail, he studied for the bar exam and earned the top grade in the bar exam, gaining sympathizers and admirers. Thereafter, the Philippine Supreme Court acquitted him. Ibid, 23.
[35] "WHEREAS, the Supreme Court in the cases brought before it, docketed as G.R. Nos. L-33964, L-33965, L-33973, L-33982, L-34004, L-34013, L-34039, L-34265, and L-34339, as a consequence of the suspension of the privilege of the writ of habeas corpus by me as President of the Philippines in my Proclamation No.889, dated August 21, 1971, as amended, has found that in truth and in fact there exists an actual insurrection and rebellion in the

Convention into approving a new constitution providing for a parliamentary government (in the hope that he would be elected prime minister and avoid the prohibition on a third presidential term).[36] He then called for a plebiscite on the new constitution. When the opposition petitioned the Supreme Court, arguing that only Congress had the power to call a plebiscite, he issued a presidential decree creating Citizens' Assemblies across the country, which reportedly approved the new constitution and the way Marcos ran government by shows of hands.[37] A subservient Supreme Court held that new constitution had been approved, notwithstanding irregularities in the process. He held fraudulent referendums on whether he should continue as president, and was announced to have won every time by 90% of the votes.[38]

On January 17, 1981, following hints by one of Ronald Reagan's aides to Imelda Marcos that "it would be good if Marcos could get a fresh mandate from the people"[39] Marcos formally announced the lifting of Martial law. Yet the martial law decrees and the president's law-making powers were retained. A constitutional commission approved the shift back from a parliamentary to a presidential system, with the presidential term extended to six years without limits to reelection.[40] Marcos won presidential elections in June 1981 officially with 92% of the votes.[41]

U.S. Support

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.[42] Both were at least partly geared toward international support: the technocratic discourse impressed international lenders, while the attachment to legal and democratic form pleased the U.S. At Marcos' 1981 inauguration, U.S. Vice-President George Bush praised Marcos, stating: "We love your adherence to democratic processes."[43]

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country by a sizeable group of men who have publicly risen in arms to overthrow the government. Here is what the Supreme Court said in its decision promulgated on December 11, 1971: […]"

[36] Thompson, *supra* note 28, 45.

[37] Celoza, *supra* note 30, 50-52.

[38] Ibid, 57.

[39] Far Eastern Economic Review, Jan 2 1981 p. 26 cited in ibid, 73.

[40] The constitution also granted Marcos and his subordinates permanent immunity from lawsuit for official acts. Ibid, 74.

[41] Ibid, 74.

[42] Thompson, *supra* note 28.

[43] Celoza, *supra* note 30, 110.

Throughout most of martial law rule, Marcos benefitted from unfailing U.S. support.[44] Before martial law, Marcos had cultivated a close relationship with the U.S., which had earned him being called by U.S. president Lyndon B. Johnson his "right arm in Asia."[45] His support of the Vietnam war helped the United States in their claim that people in Asia supported the U.S. stance. In exchange, the Philippines received extensive economic and military aid, enabling him to satisfy the demand on public resources by his circle.[46]

Successive U.S. presidents – including Jimmy Carter[47] - perceived their relations to the Philippines as furthering key security interests. This was because two U.S. military bases in the Philippines constituted the biggest U.S. military presence outside U.S. territory.[48] U.S. administrations therefore overlooked the undemocratic character of the country's government, which seemed preferable to communism. To these security interests must be added significant economic interests. At the time martial law was declared, approximately 800 U.S. companies were doing business in the Philippines.[49] Upon reaching independence, a so called "1947 parity amendment" to the Philippine constitution had given U.S. citizens and corporations the same rights as Filipinos in ownership and exploitation of natural resources until July 3, 1974.[50] Attempts to nationalize key industries and court decisions against U.S. business interests had led to worries among the U.S. business community in Manila. As president, Marcos repeatedly reassured U.S. businesses that there would be no nationalizations.[51] It is therefore no surprise that American businesses were pleased with the declaration of martial law.[52] To further attract multinational corporations, Marcos decreed incentives

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[44] Marcos made a number of moves designed to create the impression that he was pursing a foreign policy independent of the US, such as establishing diplomatic relations with numerous states in the Eastern bloc, including the PRC and USSR. These moves have been dismissed by scholars as posturing, both to please domestic public opinion and to improve Philippine's bargaining power vis-a-vis U.S. Congress and obtain increased economic and military aid. The disjuncture between the rhetoric of independence and actual dependence on US foreign aid was made possible by the absence of free press. Benjamin N. Muego, *Spectator Society: The Philippines under Martial Rule* (Ohio University Center for International Studies, 1988), 129-30.

[45] Celoza, *supra* note 30, 102.

[46] Thompson, *supra* note 28, 66. Even when a scandal erupted over the funding of the Filipino military contingent in Vietnam, a U.S. Senate Subcommittee on U.S. Security Agreements having failed to establish what the Philippine government had done with the funding sent by the U.S. between 1966 and 1969, the U.S. overlooked the scandal and continued to maintain good relations with the Philippines. Celoza, *supra* note 30, 105.

[47] Ibid, 109-110.

[48] By 1980, about 14,000 permanent US military personnel were stationed at the Clark and Subic bases, with an average of 9,000 sailors and marines in port at any given time, in addition to U.S. civilian employees and 20,000 Filipino personnel. Ibid, 108-9.

[49] Ibid, 42.

[50] Ibid, 110.

[51] Ibid, 115.

[52] The U.S. Chamber of Commerce in Manila praised Marcos' program upon the declaration of martial law. Ibid, 114.

to foreign investors, enacted favorable labor and wage law, and banned strikes.[53] Wages in the Philippines were the lowest in Asia.[54] In fact, in 1980, multinational corporations expressed concern when the possibility of lifting martial law was raised.[55]

Extensive U.S. military aid enabled Marcos to radically alter the relationship between military and civilian government. In order to gain and retain army loyalty, Marcos increased the status, resources, budget, and sphere of influence of the military. The army was assigned activities previously reserved to national and local police, such as the monitoring of elections.[56] The military also came to exercise judicial functions through the newly created military courts to try "subversion" and other crimes threatening national security.[57] U.S. involvement in repression was not limited to funding and political support. The U.S. sent Green Berets (Army Special Forces) to participate in military activities in provinces with a perceived potential for insurgency. In addition, in the 1984 report cited at the beginning of this Part, TFDP suggested that Filipino torturers received training in torture techniques in the United States. Historian Alfred McCoy similarly suggests that the CIA may have provided torture training, though he cautions that a definitive answer can be given only upon release of classified documents.[58]

The transition to democracy.

Contrary to Argentina where there was an attempt to completely annihilate the left, in the Philippines, "the Marcos regime used the spectacle of violence for civil control, becoming a theater state of terror".[59] Yet a particularly shocking display of violence would come to signal the beginning of the end of the Marcos regime - the assassination in August 21, 1983 of opposition leader Benigno Aquino in broad daylight at Manila International Airport before a crowd of foreign journalists as he returned from three years of exile in the U.S. to lead the opposition. Aquino's assassination turned the

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[53] Ibid, 117-8.
[54] Ibid, 118.
[55] Ibid, 118.
[56] Ibid, 77.
[57] Ibid, 80.
[58] Reflecting upon the similarity between torture techniques in Latin America and under Marcos, McCoy asks, "Are these techniques, so similar in their psychological refinement, independent improvisations in the torture chambers of disparate continents? Or was there, I asked myself in 1993 when first comparing these Chilean and Filipino torture transcripts, a single set of classified manuals, distributed by U.S. agents or attaches on both sides of the Pacific? Four years later, the *Baltimore Sun* published extracts from the CIA's *Human Resource Exploitation Training Manual* – 1983, the latest edition of a thousand-page torture textbook distributed to Latin American armies for twenty years." Alfred W. McCoy, *Closer Than Brothers: Manhood at the Philippine Military Academy* (Yale University Press, 1999), 189-190.
[59] Ibid, 205-6.

existing economic decline into a financial disaster for businesses in the Philippines, by creating a crisis of confidence among international bankers.[60] The murder also shocked the elite by showing that one of their own could be killed on government orders.[61] The U.S. government grew worried about the lack of successor given Marcos's failing health, the growing communist insurgency, and crony capitalism.[62] Reagan's administration therefore urged Marcos to implement reform, and to hold free elections in order to help clarify succession, promote economic stability, and restore Marcos' political legitimacy.[63] Marcos announced the holding of new elections for February 1986, and did so on American television.

Marcos was announced winner of the elections against Aquino's widow, Corazon Aquino, but the polls had been clearly rigged, and were publicly denounced by the Catholic Church. Aquino launched a successful civil disobedience campaign a few days after the election. When a group of rebel army officers' plans for a military coup were leaked, the group barricaded itself in army barracks. The Church soon called the public to protect the rebels. Priests and nuns prevented loyalist soldiers from attacking while women and children handed out flowers. After receiving assurances that Aquino was a moderate, Reagan decided to abandon Marcos, and by the 3rd day of "people power," as the movement was called, he asked Marcos to resign, arranging for his flight out of Manila to Hawaii.[64]

B. The ATS Class Action.

One month after Marcos and his entourage fled to Hawaii, five lawsuits, including one class action led by Philadelphia attorney Robert Swift, were filed against him in federal courts in California and Hawaii pursuant to the ATS, alleging torture, disappearances, and extrajudicial killing.[65] Neither criminal nor civil proceedings were possible in the Philippines because the law there required the defendant to be physically present in the jurisdiction, and President Corazon Aquino had refused to allow his

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[60] Thompson, *supra* note 28, 119.
[61] Ibid, 120.
[62] Thompson, *supra* note 28, 140.
[63] Ibid, 141.
[64] Ibid, 160-1.
[65]The five cases are: 1) *Sison v. Marcos*, No. CV-86-225-HMF (D. Haw. filed Mar. 26, 1986), in which Florentina Sison, Ramon Sison and Jose Maria Sison sued for the disappearance of their son and brother Francisco Sison, and the torture and prolonged arbitrary detention of Jose Maria Sison; 2) *Trajano v. Marcos*, No. CV-86-207- HMF (D. Haw. filed Mar. 20, 1986), in which the mother of Archimedes Trajano sued Imee Marcos-Manotoc, Marcos' daughter, for the kidnapping, torture and murder of her son, who had questioned Marcos-Manotoc at a university meeting; 3) *Hilao v. Marcos*, No. CV-86-390-HMF (D. Haw. filed June 3, 1986) (originally filed in March 1986, E.D. Pa., but transferred pursuant to 28 U.S.C. § 1631), a class action of torture victims; 4) *Ortigas v. Marcos*, No. CV-86-975-SW (N.D. Cal. filed Mar. 4, 198, an action by thirteen plaintiffs for arbitrary detention and torture and 5) *Clemente v. Marcos*, No. CV-86-1449-SW (N.D. Cal. filed Mar. 20, 1986), a lawsuit filed by eight plaintiffs for arbitrary detention and torture.

repatriation even though he expressed willingness to return. Two governmental human rights commissions charged with addressing past human rights abuses did not yield any results, as Aquino's regime was busy securing its stability in reliance on certain factions of the military, whose role in ousting Marcos from power had granted them legitimacy.[66] Marcos died in 1989 while the litigation was pending, and was replaced thereafter by his estate, represented by his widow and son.

The expectations of plaintiffs and lawyers varied. Robert Swift had bought himself a ticket to Manila upon learning of the dictator's demise. Since 1980, there had been a number of ATS cases resulting in default judgments, none of which had been collected. Swift thought that a class action against a rich defendant such as Marcos would provide an opportunity for ATS plaintiffs to actually receive damages,[67] an opportunity no doubt attractive to a lawyer working on a contingency fee arrangement. In Manila, he contacted victim groups, which eventually convinced over 9,000 victims to file claims. The leaders of Filipino victim groups who joined the class action were not, for their part, primarily interested in damages. As explained by Marie Hilao-Enriquez, one of the lead plaintiffs in the class action and current Chairperson of SELDA, the organization of former political prisoners with whom Swift initially made contact, the objective in filing the lawsuit 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."[68] If monetary compensation could be obtained, that would be a "bonus."[69] In interviews, other plaintiffs involved in the first stages of the lawsuit echoed this understanding of the lawsuit as a way to assert justice and establish the extent of human rights violations under Marcos.[70] Few of the plaintiffs believed they would win the case (for plaintiff Dr. Aurora Parong, the lawsuit was like "shooting at the moon,"[71]), especially since the United States had supported Marcos, but they hoped that the very filing of the lawsuit could serve to document the widespread character of repression under Marcos.[72]

[66] Aquino, *supra* note 4, 236-8.
[67] Telephone interview, December 4, 2014.
[68] Interview, Quezon City, Philippines, July 30, 2014.
[69] Ibid.
[70] Interview, M, Baguio City, July 25, 2014. Interview, F and J, Quezon City, July 30, 2014.
[71] Interview, Aurora Parong, Quezon City, August 5, 2014.
[72] "and of course the discussions, the many discussions, convince people, and so… if there's nothing at least it will be documented, in a court of law. And it's not just here in the Philippines but also outside the country." Ibid.

All five cases were initially dismissed on grounds of the act of state doctrine, a defense that prevents courts from judging the public acts of another sovereign state committed within that sovereign's territory.[73] In 1989 the Court of Appeals for the Ninth Circuit reversed the dismissals,[74] and the cases were consolidated for trial in the District of Hawaii. According to one commentator, in finding that the act of state doctrine was inapplicable, the Ninth Circuit "seemed driven primarily by the attitudes of political actors, the United States and current Philippine governments, neither of which had raised the act of state or other objections to the justiciability of the human rights claim."[75] The Philippine government had filed an amicus curiae brief with the Ninth Circuit in February 1987, urging the court to allow the cases to proceed.[76] The United States, 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 as the case would not embarrass relations between the U.S. and the Philippines.[77]

The case proceeded as a combination of individual lawsuits and the Hilao 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".[78] The case was tried in three phases: liability, exemplary damages, and compensatory damages. In the liability phase, Marcos' liability for the alleged violations of international law was determined by a six-member jury after two weeks of trial.

While forty-four victims testified in person (most of them physically present in court and some by video), the case rested largely on circumstantial evidence.[79] This was not a traditional mass tort action, where plaintiffs claim damages from a single product or accident, and proving liability towards the class members who were not named plaintiffs required establishing a pattern of human rights violations that would indicate

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[73] *Trajano v. Marcos*, No. 86-2448, 1989 WL 76892 (9th Cir. July 10, 1989) (reported in table at 878 F.2d 1438). (unpublished decision).
[74] *Ibid*.
[75] Joan Fitzpatrick, "The Future of the Alien Tort Claims Act of 1789: Lessons from in Re Marcos Human Rights Litigation" 67 *John's L. Rev*. 491 (1993), 498 (fn omitted).
[76] Amicus Curiae Brief of the Republic of the Philippines, Trajano v. Marcos and Hilao v. Marcos, 1986 WL 732853 (C.A.9).
[77] Brief for the United States of America as Amicus Curiae. Trajano v. Marcos and Hilao v. Marcos, 1986 WL 732853 (C.A.9).
[78] In re Estate of Marcos Litigation, D.C. No. MDL 840, Order Granting Class Certification (D. Haw. April 8, 1991), cited in Beth Stephens et. al, *International Human Rights Litigation in U.S. Courts* (Martinus Nijhoff, 2008), 241.
[79] Fitzpatrick, *supra* note 75, 499.

that thousands of similar violations had likely occurred,[80] incidentally matching the plaintiff organizations' goal of establishing the wide extent of abuses under Marcos. Evidence was provided through the testimony of eight expert witnesses, comprising members of international and Philippine human rights organizations, Philippine academics, and U.S. State Department officials, tens of legal documents, including legislation and decrees issued by Marcos, as well as arrest orders and certificates of release issued to individual victims. Through this evidence, the plaintiffs tried to establish not only the historical context, but also the pattern of human rights abuses and Marcos' close relationship with the Philippine military.

On September 22, 1992, the jury found the defendant liable for torture, summary execution and disappearance.[81] Following the second stage of the trial, on February 23, 1994, the jury awarded plaintiffs $1.2 billion in exemplary damages, to "serve as a warning or deterrence to others that they should not copy or emulate the conduct" of Ferdinand Marcos.[82] The third and compensatory damages phase of the litigation ended with an award of close to $800,000 to 9541 claimants. These rulings were challenged by Marcos' estate but affirmed by the Ninth Circuit.[83]

Legal scholars and practitioners have applauded the Marcos litigation for breaking new ground in international law and for the success represented by the high amount of the award.[84] Yet the story was far from over in 1995. The Marcos' fortune, estimated at many billion dollars,[85] is spread around the world in various assets, many of which the Marcos family has succeeded in concealing. Even those assets that are known have become the subject of a fierce competition between the ATS plaintiffs and the Republic of the Philippines, which has brought most of the Marcos' vast American and Swiss fortunes - which it sees as the fruit of Marcos' plunder of state coffers - under its control through legal proceedings.[86] I examine this conflict over redistribution of Marcos' ill-gotten gains in my dissertation.

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[80] *Ibid*.

[81] *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, U.S. District Court (Hawaii), 910 F. Supp. 1460 (November 30, 1995), 1463 and 1464.

[82] Jury instructions, transcript of February 22, 1994, 111-112.

[83] *In re Estate*, *supra* note 81, affirmed in *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996)).

[84] *Supra* notes 5-6.

[85] Luz Baguioro, "Fighting for Justice and Marcos' Millions", *The Straits Times (Singapore)*, March 3, 2005. It is difficult to give a close estimate as the Marcos family has dissipated and transferred its assets in an attempt to avoid having to comply with judgments.

[86] First, to settle a separate lawsuit by the Philippines against the Marcos estate, the estate transferred to the Republic the bulk of the estate's assets that had been impounded by U.S. customs officials. Second, in August 1995 the Republic of the Philippines asked Switzerland's federal government to transfer frozen assets held in the estate's Swiss

Despite these enforcement difficulties, the finding of liability fulfilled the plaintiffs' objective of officially documenting the extent and violence of abuses under Marcos. The liability phase of the trial in September 1992 coincided with the twentieth anniversary of the declaration of Martial Law, and during the trial the Philippine press referred to the case when discussing the legacy of the martial law regime.[87] The universal jurisdiction offered by the ATS gave Filipino victims access to the pro-plaintiff features of civil litigation in U.S. federal courts at the time of the lawsuit, in particular class action procedure. [88] One commentator has even pointed out that the courts in the *Marcos* case applied federal rules relating to class actions more leniently than in regular mass tort cases,[89] suggesting that the purpose of human rights litigation and lack of feasible alternatives may have led the courts to scrutinize the case less strictly.

Here we see the inclusive facet of the ATS' postcoloniality, as the universalism on which the ATS rested opened U.S. courts to the Philippine victims' claims and personal stories. This universalism is well summed up by lead plaintiff attorney Robert Swift's closing statements to the jury in the exemplary damages phase of the trial: "Human rights abuses are violations of the basic right of people to exist free of physical harm. They're basic to <u>all human beings</u>, whether <u>we</u> live in the United States or <u>we</u> live in the Philippines or other parts of the world."[90] The jury was presented with the intensely personal stories of studies and careers cut short by repression.[91] It was repeatedly told of the suffering and anguish of victims and their family members, who

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banks to a Philippine National Bank escrow account pending adjudication by a Philippine court of the ownership of those assets. The Swiss Federal Supreme Court approved the Republic's request in December 1997. *Hilao v. Estate of Ferdinand Marcos*, 393 F.3d 987 (9th Circ. 2004), 989.

[87] Eg. *Philippine Daily Inquirer* editorial, "Black September," Tuesday Sept 22, 1992 p. 4: "Marcos gave the orders that resulted in the killing of 2,500 people, the torture and maiming of 7,000 others, the disappearance of 750, the rape of scores of women detainees and the incarceration of more than 8,000 political detainees – people who would have risen in protest against his imposition of martial law. …Recently, a court in Hawaii started trying a class suit filed by 10,000 victims of the military machine of Marcos' martial law rule."

[88] Leora Bilsky, "Transnational Holocaust Litigation," 23 *European Journal of International Law* 349 (2012) (discussing the pro-plaintiff features of civil litigation in the United States that make it an attractive legal tool to address human rights violations). Note that the U.S. Supreme Court has recently restricted the availability of class actions. See Judith Resnik, "Fairness in Numbers: A Comment on ATT&T v. Concepcion, Wal-Mart V. Dukes, and Turner V. Rogers." 125 *Harv. L. Rev*. 78 (2011).

[89] Margaret G. Perl, "Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations," 88 *The Georgetown Law Journal* 773(2000) (arguing that the Ninth Circuit's ruling that sustained class certification, trifurcation of trial and use of sampling to calculate damages suggests a more lenient treatment of class actions for international human rights cases).

[90] *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, U.S. District Court (Hawaii) trial transcript (hereafter "Trial Transcript"), February 22, 1994, 80 (emphasis added).

[91] Victims were often presented as promising students or owners of a thriving business whose dreams were cut short by repression. Eg. "Liliosa Hilao… was about ready to graduate summa cum laude from a college in Manila, and she was tortured in her own home, taken to Camp John Hay, and, after three days, her sister was brought to the infirmary to identify her body." Robert Swift, Trial Transcript, February 22, 2994, 67.

were portrayed in a humanizing way that the jury could relate to.[92] In this sense, the trial treated Filipinos as equal to Americans. However, if we look more closely at the narrative that emerged during the litigation, we see how U.S. neo-colonialism was legitimated. The next two parts turn to examine how U.S. support and the possibilities for repression opened by law were represented in the litigation.

II. The United States as Savior

U.S. foreign policy was not monolithic in relation to the Marcos regime. It changed over time, from strong support to increasing criticism in the 1980s. There was also a clear split, in the 1980s in particular, between on the one hand the administration of Ronald Reagan who strongly supported Marcos until the very last days of his rule, and on the other the State Department and many members of U.S. Congress who supported the Philippine opposition.[93] During the trial, however, the image of U.S. involvement in the regime was sharply distorted. Not only did the plaintiff lawyers emphasize how the U.S. had pressured Marcos on the issue of human rights and even withdrawn small amounts of aid in protest at human rights violations; through objections on the ground of relevance, they also silenced attempts by defense lawyers to show the substantial U.S. support enjoyed by the regime even as it was criticized. This led to the familiar representation of the United States as "savior" of human rights victims.[94] To the extent U.S. administrations were recognized to have made compromises in the struggle to protect human rights, these compromises were justified by American expert-witnesses as deriving from lofty principles such as humanitarianism, the protection of world security, and the fulfillment of the United States' contractual duties.

A. U.S. Criticism of the Regime as Proof of Marcos' Knowledge.

The legal theory of liability adopted by the District Court trying the case was that of "command responsibility," a doctrine developed by the international military tribunals at Nuremberg and Tokyo, whereby defendants are held responsible for the

[92] "There's nothing that can bring Francisco Sison back. There's nothing that could possibly solve the heartache that his mother and sister felt because they didn't see him again, because they don't know what happened to him, as they testified to you. But the purpose of this award is to make sure that others in the situation of these claims of the families don't have to go through this." Paul Hoffman, Trial Transcript, February 22, 1994, 89.

[93] Thompson, *supra* note 28, 140.

[94] Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights." 42 Harvard International Law Journal. 201 (2001).

actions of their subordinates.[95] Thus, to establish Marcos' personal liability, 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 prevent them was a sufficient basis for liability.[96] With respect to some victims, the plaintiffs presented arrest orders signed by Marcos himself. Yet in relation to most plaintiffs, liability rested not on direct ordering but on failing to prevent abuses. The plaintiffs therefore presented evidence tending to show that Marcos tightly controlled the military and paramilitary forces that directly committed the abuses (the "power" element). To show that he had knowledge of the abuses, the plaintiffs spent much time trying to prove that he knew of the pattern of violations or even specific violations. This was done by showing either that the victims were famous opponents (such as communist party leader Jose Maria Sison),[97] or in the majority of cases, that international human rights organizations and the U.S. government had approached Marcos and his circle to discuss the violations. Thus, Robert Swift stated in his opening statement:

> "We will prove – plaintiffs will prove that Marcos was confronted with the enormity of these human rights abuses in repeated meetings with U.S. diplomats and congressmen, as well as published reports and books prepared by International Domestic Human Rights Abuses (*sic*) which documented specific cases, like Amnesty International, Lawyers Committee for Human Rights, and Task Force Detainees of the Philippines. We will show you these books and reports as well as USC, state department cables, detailing meetings with Marcos and other high profile Filipino officials that reported to Marcos."[98]

During the course of the trial, the plaintiffs and their experts testified to the U.S. role in confronting Marcos about the abuses in order to prove that Marcos knew about them. For example, the third witness called by the plaintiffs, slum activist Trinidad Herrera-Repuno, after crying while recounting having been horribly tortured in 1977, ended her testimony with the more positive note of having been visited in prison by her

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[95] Stephens et. al, *supra* note 78, 257-8.

[96] "You may find the defendant Estate liable to plaintiffs if you find, by a preponderance of the evidence, that Ferdinand Marcos acting under color law either (1) directed, ordered, conspired with or aided Philippine military, paramilitary and/or intelligence forces to torture, summarily execute or cause the disappearance of plaintiffs and the class or (2) had knowledge that Philippine military, paramilitary and/or intelligence forces tortured, summarily executed, caused the disappearance of, or arbitrary detention plaintiffs and the class, and having the power failed to take effective measures to prevent the practices." Final In re Estate of Marcos Litigation, D.C. No. MDL 840, Final Jury Instructions (D. Haw. September 22, 1992), 10. The simple formulation of command responsibility in the Marcos case would come to be refined in subsequent ATS case-law. Stephens et. al, *supra* note 78, 257-258.

[97] "Mr Sison was one of the leading opponents of the regime." Paul Hoffman, Trial Transcript, September 9, 1992, 25. "During [the late 1960s to 1977], he was one of Marcos' most prominent targets. Marcos talked about him on the news media, he talked about him on the radio, he talked about him on television. Capturing Jose Maria Sison was one of the main objects of the Marcos regime at the time." Ibid, 26.

[98] Trial Transcript, September 9, 1992 18-19.

friend Charles Salmon, employee of the U.S. embassy, to whom she showed her scars.[99] Salmon testified in court the following day to having reported Mrs. Herrera's abuses to the embassy, and that as a result of exchanges with the Philippine government, "the maltreatment ceased, that is was confined to that initial period of interrogation, that there was no more maltreatment and, eventually, as I recall, Mrs. Herrera was released."[100] Diplomat Stephen Cohen also testified a few days later that "Miss Herrera's torture resulted in immediate action by the U.S. Embassy and direct complaint to Marcos."[101] Expert witnesses did not only testify regarding individual cases. Both Cohen and Salmon explained that their responsibilities included monitoring the human rights situation in the Philippines,[102] and portrayed the United States as having set up a broad and organized effort to improve the situation.[103] In order to prove Marcos' knowledge of the abuses, these diplomats testified extensively to the numerous meetings held by high-ranking U.S. officials with Marcos in order to discuss human rights abuses.[104] These meetings were explained as part of the centrality of human rights to US foreign policy. As explained by ambassador Stephen Bosworth:

> "[H]uman rights abuses in the Philippines had been a source of concern for us for some time. My assignment, basically, was to try to assist in the political transformation of the Philippines to a point at which human rights abuses would not occur as broadly as they had been. In other words, more transparency about what the government was doing and more accountability, more bringing to justice of people who violate human rights. Our ultimate answer to the problem of human rights violations in the Philippines was our support for democracy in the Philippines, our belief that democratic governments by and large do not abuse the human rights of their citizens….. Now on a case by case basis, I did, on occasion, raise both with Marcos and with his key ministers, particularly the then Minister of National Defense Juan Ponce Enrile, raised with them individual cases that had been brought to my attention… and asked that they investigate those cases because we had understood that there had been violations of human rights."[105]

[99] Trial Transcript September 9, 1992, 146-7.
[100] Ibid, 110.
[101] Trial Transcript, September 17, 1992, 13.
[102] Trial Transcript, September 10, 1992, 99.
[103] For instance, diplomat Stephen Cohen testified that Congress created in 1978 a new office in the State Department, the Bureau of Human Rights, to ensure human rights would form a central part of U.S. foreign policy, and that in that bureau he was responsible for monitoring the human rights situation in Asia and Africa. Trial Transcript, September 17, 1992, 9.
[104] "The U.S. Ambassador to the Philippines met personally with Marcos at least several times each year to present evidence of abuses and to ask that action be taken to stop them.' Testimony of Stephen Cohen, ibid, 14-15. "On a special visit to Manila in May 1978, Vice-President Walter Mondale raised these human rights concerns with Marcos…. Each year a dozen or more members of Congress who visit in Manila and also raised directly with Marcos the evidence of abuses and ask that action be taken. A cable dated September 17, 1979 from Ambassador Murphy in Manila, marked Exhibit 53, summarized 19 meetings of U.S. officials with Marcos or his chief ministers in a 14 month period to press them to improve the human rights situation." Ibid, 15.
[105] Trial Transcript, September 21, 1992, 23-4

Even Sister Mariani Dimaranan, the expert witness on behalf of TFDP, the Philippine human rights organizations that just a few years earlier had denounced the "US-Marcos regime" in its reports, depicted Americans not as enablers but as denouncers of human rights abuses:

"When former U.S. 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."[106]

This scene is strikingly similar to the one described in TFDP's report cited at the beginning of Part I of this paper as having occurred in 1979 – except that at trial, Dimaranan did not mention an "unabashed officer" informing Clark that he had learned the torture techniques in military training schools in the U.S. Instead, she emphasized Clark's active stance in documenting human rights abuses.

B. Discussions of U.S. Support are Silenced.

In what was probably an attempt to affect her credibility in the eyes of the jury, the defense attorneys tried to show the contradiction between Dimaranan's testimony on U.S. involvement and the anti-American rhetoric of TFDP's reports. When cross-examining her, defense counsel Johnson referred her to one of TFDP's reports that had been placed in exhibit. The following exchange ensued:

"Q. The third paragraph of that page refers to the U.S. Marcos regime, is that correct?
….
A. Yes
Q. The third paragraph, do you see that?
A. Yes.
Q. The U.S. 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."[107]

Conversely to the plaintiffs who tried to prove Marcos' knowledge of human rights abuses through the existence of U.S. pressure on the government, the lawyers for Marcos' estate tried to use the U.S. support for the Marcos regime in its defense.

[106] Trial Transcript, September 10, 1992, 58.
[107] Ibid, 79-80.

Though never formulated clearly, the overall defense can be reconstructed as follows: Martial law was declared in accordance with the constitution, and was necessary given the instability in the country; Marcos did not personally order or know about the abuses, for which the responsibility lies fully with the military;[108] and the human rights abuses were not as numerous as claimed by the plaintiffs.[109] To prove these points, defense counsel argued in its opening statement that victims of abuse had legal recourses in the Philippines, and that the U.S. support for and reports on the regime suggested that Marcos was not personally responsible for the violations. As summarized in the defense's opening statement:

"[W]e will be introducing some evidence regarding the United States' involvement in this matter. In 1978, the United States passed a statute which prohibited the United States from giving military or economic aid to any country that was engaged in a consistent or gross pattern of human rights violations. To implement this statute, the Congress also required that an annual report on the human rights condition be submitted each year in order that the State Department determine on whether or not the particular country was engaged in these human rights violations. Between 1978 and 1986, the United States gave the Philippines over a billion dollars in military and economic aid. Each year a report was submitted to Congress. Those will be introduced into evidence. None of these reports have anything about Marcos being personally responsible for the abuses. All of the reports indicate that the government was trying to do something about the human rights conditions. And, as I said, every year the United States government continued to fund the Philippines and President Marcos."[110]

Extraordinarily, the defense never introduced any such evidence – in fact, they did not introduce any evidence at all, and one can only wonder whether defense counsel's lack of diligence stemmed from professional incompetence or a fee arrangement that created little incentive to do more than appear in court and argue the

[108] "It is undisputed in this case that Ferdinand Marcos declared martial law in September of 1972 and declared that the country was in a state of rebellion and insurrection. This declaration was upheld by the Philippine Supreme Court. It was upheld by the Filipinos themselves and time and time again the conduct of Marcos was upheld by the Philippine Supreme Court. He issued arrest, search and seizure orders, that were referred to as ASSOs by Mr. Swift, presidential commitment orders, all of these thing that allowed for the arrests of Filipinos were upheld by the Philippine Supreme Court. Mr. Swift made a reference to the fact that Marcos had declared martial law and tortured these people in order to maintain himself in power. The evidence will show in this case that martial law was declared in September of 1972 and the Philippines was in a state of rebellion. At the same time, the military was caught in an armed conflict with insurgence in Mindanao, a southern part of the Philippines, and in the northern part of the country they were engaged with an army of over 25,000. There were bombings in Manila… random bombings where 9 candidates of the political parties were murdered. With that in mind, Marcos declared martial law. He knew he was going to arrest thousands of people… he knew there would be problems as he established the command for the administration of detainees. He set up specific guidelines where people that were arrested would have the right to counsel, they would have the right to see their family, they would have the right to an inquest authority. … From the time that Marcos declared martial law until time that he lifted martial law in 1981, when he was re-elected by the Filipinos, he attempted to comply with every request of the state department, every request of the human rights organizations, anyone who had problems with the human rights records in the Philippines. The problem was that the military, which was not under the complete and dominant control of Marcos, did not follow orders." Trial Transcript, September 9, 1992, 45-47.

[109] Ibid, 45.

[110] Trial Transcript, September 9, 1992, 52-3.

case.[111] Nevertheless, through protracted cross-examination of expert witnesses, defense counsel tried to bring up the issue of U.S. 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, defense counsel asked about U.S. 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."[112]

Johnson's cross-examination of Political Science professor Benjamin Muego, 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.
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."[113]

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.[114] In his opinion, "[t]his

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[111] The Ninth Circuit actually commented on the poor quality of defense counsel arguments. In Hilao v. Marcos, 103 F.3d 767 (9th Cir. 1996) the court stated that "Although poorly presented, the Estate's due-process claim does raise serious questions."
[112] Trial Transcript, September 15, 1992, 79.
[113] Trial Transcript, September 16, 1992, 27-28.
[114] Trial Transcript, September 17, 1992, 16-17.

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."[115] When defense counsel Johnson probed him on this issue, pointing out that during those years the United States continued to provide hundreds of millions of dollars in *direct* military and economic aid, Cohen explained that aid as a form of "rent" paid by the U.S. for the use of military bases in the Philippines, which were key to the security not only of the United States "but the entire free world". [116] As to the American support for Asian Development Bank loans 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."[117] Stephens explained the lack of formal finding in Congress that the Marcos regime had committed gross human rights violations, as a product of diplomatic practice, according to which "[s]ensitive issues which involve criticizing other governments are deal with privately, … which we thought would allow the U.S. government to be as effective as possible."[118]

Defense counsel tried again to bring up the subject of U.S. aid in the cross-examination of international law professor Diane Orentlicher, who testified in her capacity as former monitor of human rights abuses in the Philippines about "the nature, extent and causes of human rights violations in the Philippines during the period from 1982 to February of 1986."[119] Similarly to Cohen's explanation of aid as "rent," Orentlicher explained that the "package of [economic and military aid] was clearly intended to be, in effect, compensation for continued access to military bases."[120]

Thus, though the expert-witnesses were able to present evidence that U.S. officials had confronted Marcos on the issue of human rights violations, that indirect aid had been reduced and to provide justifications for direct U.S. aid, defense counsel was not permitted by the court to explore whether this aid might indicate that the U.S. did not believe gross human rights violations had occurred. Defense counsel nevertheless persevered, to no avail. When on September 17, 1992, Johnson asked Orentlicher

[115] Ibid.
[116] Ibid, 21-22.
[117] Ibid, 30-31.
[118] Ibid, 52-3.
[119] Ibid, 107.
[120] Trial Transcript, September 18, 1992, 14.

whether, in her past testimony about the Philippines before the U.S. 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. This jury has nothing to do with whether or not Congress was right or wrong."[121] When the next morning defense counsel Rothbaum asked the court to either strike Cohen's testimony on the reduction of indirect U.S. aid or allow the defense to cross-examine Orentlicher on this issue, the court refused again, answering in apparent exasperation: "It's beyond the scope. It's been beyond the scope so much that it's been delaying this trial somewhat. It would have been finished already if it would not be going way beyond the scope of examination with all the witnesses. "[122] Undeterred, Rothbaum moved to subpoena Orentlicher as defense witness, in order to examine her about "the question of the United States aid and its continuance."[123] The court quashed the motion, repeating that U.S. aid bore no relevance to the case.[124]

In summary, the United States were presented as having actively fought for human rights victims under Marcos. American support of the Marcos regime was obscured at trial and to the extent it was discussed, it was actually justified by reference to good diplomatic practice, humanitarian and security concerns, or the United States' fulfillment of contractual duties (paying "rent" or "compensation"). This legitimation of U.S. complicity derived from the plaintiffs' theory of liability (the plaintiffs described the U.S. pressure on Marcos to prove Marcos' knowledge under the doctrine of command responsibility) and rules of relevance (the topic of U.S. aid, when raised by the defense, was found by the court to be "beyond the scope" of the trial).[125]

Yet these legal constraints did not operate mechanically to distort the historical narrative. Cultural assumptions and strategic factors were also at work. Notice that both sides' cases turned in large part on Marcos' relationship to the United States. That is, the U.S. position on the Marcos regime implicitly operated as the measure of wrongdoing, perhaps reflecting ethnocentric assumptions on the part of the U.S. lawyers arguing the case. Moreover, the plaintiffs would clearly have wanted to present the case

[121] Trial Transcript, September 17, 1992, 172.
[122] Trial Transcript, September 18, 1992, 10.
[123] Ibid, 91.
[124]Trial Transcript, September 18, 1992, 91-93.
[125] It is also possible that an imaginative defense counsel could have presented the U.S. contribution to the repression as reducing Marcos' liability or at least the amount of damages under the theory of joint tortfeasors or joint venture. "Because the ATS is a tort statute, traditional theories of tort liability that are well established as part of the federal common law also provide a basis for liability." Stephens et. al, *supra* note 78, 276.

as in line with U.S. interests and policies in order to avoid alienating the jury. For Robert Swift, avoiding discussions of U.S. support of the regime was necessary in order to win the case. Comparing the issue of U.S. support for Marcos as well as discussions of 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."[126]

In addition, in Swift's view, open recognition of the political aspects of the case would have triggered immunity doctrines or other doctrines protective of the separation of powers within the U.S. government, further endangering the case.[127] These doctrines probably motivated the court to similarly bar discussions of political issues. Indeed, the court's consistent rulings that the defense's discussions of U.S. aid to the regime were beyond the scope of the case are highly questionable, given that the court allowed the plaintiffs to introduce Cohen's testimony that indirect aid had been reduced, and this in support of the plaintiffs' argument that Marcos knew of the human rights violations. Given the inconsistency, it is probable that the court's silencing of discussions of U.S. aid was meant to protect the court's jurisdiction, if not its legitimacy. In order for these inevitably political cases to be accepted in foreign domestic courts, the strategy of whitewashing the forum's dirty hands is useful to deploy.

It is worth noting that in 1992, the plaintiffs themselves do not appear to have been disturbed by the distorted historical narrative. While assigning a record-setting function to the trial, leaders of victim organizations were more interested in establishing the fact that human rights violations had been extensively committed under Marcos than in promoting a certain narrative about those violations. As related by one SELDA member and plaintiff, prior to the trial, upon hearing that the Hawaii District Court had acceded to plaintiffs' demand that the word "communist" not be pronounced before the jury,[128] SELDA board members clapped their hands at what saw as a sign that judge Real was enabling them to win their case.[129]

Later, in 1999, four victims would appear before the District Court to vehemently oppose a settlement agreement reached between the Marcos estate and

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[126] Telephone interview, December 4, 2014.
[127] Ibid.
[128] Swift explained to me that he worried that defense counsel would insist on the communist sympathies of many victims to win over the jury. Ibid.
[129] Interview, M, Quezon City, Philippines, July 30, 2014.

Swift on behalf of the class, arguing that some provisions of the agreement in which the Marcoses maintained their innocence were likely to be used by the Marcoses as "propaganda," "distort[ing] the truth and history."[130] Judge Real nevertheless approved the settlement (which was ultimately invalidated), offering in his exchanges with victims a strictly legal vision of the litigation. Responding to plaintiff Neri Colmenares, who had likened the proposed settlement to the Jewish people releasing the Nazis of responsibility, Real answered:

> "Well, unfortunately, in the law we deal with a lot of words that really don't mean anything, and always I've never seen a settlement agreement in which the defendant does not deny any liability. It just doesn't happen. It just does not happen.
> Mr. Meri (sic) Colmenares: Well, Your Honor, this is a different case, Your Honor. In –
> The Court: No, it isn't."[131]

Furthermore, when plaintiff Aurora Parong, by then head of TFDP, insisted that the settlement's provisions would be used by the Marcoses in the Philippine press to distort the historical record, 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."[132]

If the American class action 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 Ferdinand Marcos' responsibility for systematic and widespread abuses, even the most principled victims within the class were willing to sacrifice the details of the historical narrative, including U.S. involvement.

The point made here is not that the U.S. support for Marcos was somehow legally relevant and should have been addressed as such by the parties or the court. Neither am I advocating opening courtrooms to lengthy and legally-irrelevant discussions of history. Rather, I wish to point to a tension between legal accountability and historical narrative in Alien Tort Statute litigation.

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[130] Settlement Hearing Transcript, April 29, 1999, 30.
[131] Ibid, 35-6.
[132] Ibid, 45.

III. Martial Law – Real or Mock Law?

"The evidence will show that martial law created the opportunity for Ferdinand Marcos to commit human rights abuses."
Robert Swift, opening statement at trial, September 9, 1992.[133]

The repressive uses made of law under the Marcos regime were a far cry from what liberals understand as the rule of law.[134] The Marcos regime used legal discourse and formality to mask the arbitrariness of the President's concentrated powers, and therefore cannot fall under even a narrow definition of the rule of law as "a government bound by fixed rules applicable to all".[135] This paper is not meant to equate law under authoritarian regimes with law under democracy. Moreover, martial law has proven to be extremely difficult to categorize as legal or non-legal - as it is a legally provided-for mechanism that suspends the operation of the law.[136] By "law," I am simply pointing here to the formal legality and legal discourse which, as I argued in Part I, provided the regime some legitimacy. These forms of legality offered the Marcos regime an appearance of rationality that made repression appear more acceptable to outsiders, as well as to members of the public in the Philippines, and, one might imagine, to the perpetrators themselves.[137]

This part shows that the role of law in the Marcos regime's violent repression of critics was the subject of more open discussion at trial, perhaps because the "law" is a more abstract force than the U.S. government and assigning responsibility to the law for violence was less likely to alienate jurors. Moreover, here legal constraints played in the opposite direction – law provided the plaintiffs with a useful tool to connect Marcos to the acts of individual torturers and to prove a pattern of abuses that would apply to the entire class, in addition to being a form of documentary – and therefore "objective" - evidence. Thus, the plaintiffs presented law as a facilitator of abuses, as a legal-bureaucratic structure that enabled Marcos to concentrate all power and suppress dissent. In fact, in some of the testimony, the relationship between law and violence was made much clearer than in academic scholarship on the Marcos regime. However, the

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[133] Trial Transcript, September 9, 1992, 17.
[134] "The Rule of Law is a multi-faceted ideal. Most conceptions of this ideal, however, give central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong." Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1 (2008), 9.
[135] Nasser Hussain, The Jurisprudence of Emergency: Colonialism and the Rule of Law (University of Michigan Press. 2003), 8.
[136] For an analysis of martial law as a legacy of British colonialism, and the difficulties of apprehending martial law from a jurisprudential perspective, see Hussain, *supra* note 135.
[137] I thank José Brunner for pointing out the latter possibility.

trial's success in revealing law's "dark side"[138] was limited as plaintiff lawyers and witnesses presented martial law as a degenerate form of U.S. law, resulting from the Philippines' failure to properly follow the U.S. legal model. Moreover, the courts in the case had difficulty discussing in a principled manner law's responsibility for violence, and therefore the Ninth Circuit in particular ended up conceptualizing the human rights abuses as personal acts of Marcos.

A. Law as Facilitator of Abuses

At trial, plaintiffs presented the human rights violations as having been perpetrated by "a dictator",[139] in a "systematic and repetitive"[140] manner. This notion of systematic state action derived from the definitions of torture, summary execution and disappearance under international law, which require official action,[141] combined with the nature of class actions, where plaintiffs must prove a pattern of wrongdoing in the absence of evidence regarding every single victim. Given that the defendant was at the top of a hierarchy of perpetrators, it would also have been impossible to connect him to most victims without establishing a policy of repression.[142] In order to convince the jury that Marcos had the power to prevent the abuses, the plaintiffs insisted that Marcos "was a micro manager, a hands-on person."[143] The jury was told that "Marcos received daily intelligence briefings and Marcos was informed of the fruits of the torture of high profile dissidents."[144]

The plaintiffs' theory of a tightly managed policy of repression might excessively concentrate blame on Marcos and erase the responsibility of his

[138] In using the expression "dark side" I draw on David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2005).
[139] Trial Transcript, September 9, 1992, 17.
[140] Trial Transcript, September 9, 1992, 13. In closing argument Swift stated: "Plaintiffs have presented graphic evidence that torture, summary execution, and disappearance by the military and paramilitary under Marcos' direct control was routine, systematic, widespread and brutal." Ibid, 14.
[141] In his opening statement, Swift told the jury that "[t]orture is the intentional infliction of severe pain or suffering, mental or physical, by the government, usually for the purpose of obtaining information. Summary execution, also known as extra-judicial execution, and known in the Philippines as salvaging, is the execution of a person by the government without any trial or hearing. A disappearance is the taking of a person into custody by the government while denying custody… Much of the evidence you will hear in my case [*the class action, ND*.] and the other cases is common to all cases. That is, all the three separate cases. You will hear evidence of systematic and repetitive torture by the Philippine military under Marcos, and especially the intelligence agency." Ibid, 12-13.
[142] Thus, plaintiff counsel Scarlett explained to the jury: "the evidence that you will hear is like Mosaic, like a puzzle. We cannot bring in one witness from beginning to end that will tell the entire story, so I ask you to bare (*sic*) with us because witnesses will testify over the next several weeks and each witness adds to a new piece to the puzzle." Ibid, 44. Thus, even when arguing that Marcos' acts had been "malicious, wanton or oppressive" to fit the court's instructions on exemplary damages, the plaintiffs insisted that the brutal acts of torture, disappearance and execution formed part of a systematic policy in order to connect these acts to Marcos: "Abuse like this doesn't happen out of spite or by accident; it happens out of direction and it happens because of an attempt to instill torture within the population." Trial Transcript, February 22, 1994, 67-8.
[143] Swift opening statement, Trial Transcript, September 9, 1992, 18.
[144] Ibid.

collaborators in the Philippines. For our purposes, however, this theory had the advantage of attributing to law a crucial facilitative role. First, the plaintiffs explained that Marcos' constitutional maneuvers allowed him to concentrate power. In fact, as shall be explained shortly, constitutional law provided the overarching framework to understand the case. Second, the plaintiffs showed how legal formalism served to mask arbitrariness.

After the opening statements, during which Swift explained that "martial law created the opportunity for Ferdinand Marcos to commit human rights abuses,"[145] the first expert witness called by the plaintiffs was constitutional law professor Father Joaquin Bernas, who testified "about the structure and practical legal effect of Philippine constitutional law and proclamations, decrees, general orders and letter of instruction enacted by Ferdinand E. Marcos between 1972 through 1986."[146] Bernas opined that:

> "between September 21, 1972 and February 25, 1986, by virtue of the constitution which Mr. Marcos had declared ratified, and by virtue of his proclamations, decrees and other enactments, he exercised complete control over both the executive and legislative branches of government. He also significantly weakened the judicial system by transferring much of its jurisdiction to the military tribunals under his control. Moreover, the atmosphere he created seriously undermined the independence of the Supreme Court and other courts. He alone could appoint justices and judges. In effect, therefore, Marcos had the power of a dictator, although he declined to accept such title."[147]

In order to explain his opinion, Bernas described in detail Marcos' maneuvers to revise the constitution, ensuring his continued tenure and the expansion of his powers.[148] He explained the coherent and hierarchical legal structure of repression, from the constitution down through the declaration of Martial law, General Orders 2 and 2-A that authorized the arrest by the military of listed individuals, to the individual arrest orders signed by Marcos.[149] In redirect examination, he explained how Marcos removed

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[145] Ibid, 17. Swift described Marcos' extensive powers to order arrests and detention orders: "The chief among his powers that he gave himself was the power to order the arrest of persons and hold them in indefinite detention. There are three types of orders that he issued. They are listed on the chart. They're known as ASSOs, PCOs and PDAs, and they changed over time. The ASSO was issued between 1972 and 1980. It's known as an Arrest, Search and Seizure Order. The PCO was a Presidential Commitment Order issued in 1981 and 1983. PDA was the Preventive Detention Action that was issued between 1983 and 1986. During the trial we'll show you examples of these with the signature of Ferdinand Marcos." Ibid.

[146] Trial Transcript, September 10, 1992, 10.

[147] Ibid, 11.

[148] Ibid, 13

[149] "under authority of these general orders, the Arrest, Search and Seizure order, or ASSO for short, was created…. Persons arrested pursuant to the ASSO were subject to indefinite detention, even if never formally charged, and could not be released on bail or pursuant to a petition for habeas corpus. Such persons would only be released upon order of Marcos or his delegate. Marcos later placed [sic] the ASSO with the Presidential Commitment Order, or PCO, in

the judiciary's independence through formal legality – by requiring all judges outside the Supreme Court "to submit their letter of resignation for acceptance or rejection by the President, so the President would hold it as long as he wanted to, or act on it whenever it was opportune for him to act on it."[150] Legal events – the declaration of martial law in September 1972, the cosmetic lifting of martial law in January 1981, and the "notorious Amendment 6, which gave [Marcos] full legislative powers parallel and superior to that of the national assembly" - were presented as the milestones of repression.[151] During his testimony, twelve laws, orders, decrees and letter of instruction signed by Marcos were introduced as exhibits – in other words, legal texts were offered as evidence of wrongdoing.

By recounting one of the jokes common in Philippine political culture, Bernas also conveyed the gap between the legal formality of the constitutional system and the arbitrariness of Marcos' powers:

"In Proclamation 1081, in which Marcos declared martial law, he stated that, and I quote, "all persons presently detained, as well as all others who may hereafter be similarly detained for the crimes of insurrection or rebellion, and all other crimes and offenses committed in furtherance or on the occasion thereof, or incident thereto, or in connection therewith, for crimes against national security and the law of the nations, crimes against public order, crimes involving the usurpation of authority, rank, title and the improper use of names, uniforms and insignia, crimes committed by public officers, and for such other crimes as will be enumerated in orders that I shall subsequently promulgate, as well as crimes as a consequence of any violation of any decree, order or regulation promulgated by me personally, or promulgated upon my direction, shall be kept under detention until otherwise ordered released by me or by my duly designated representative". Whereas, the current joke had it, "until released by me or by Julie"."[152]

It was important for the plaintiffs to show that law provided a cover for arbitrariness in order to explain the context of the human rights violations, but also to counter the line of defense. In order to support their claim that blame for any abuses lay among lower-level officers and not at the level of policy, defense counsel often made reference to the holding of elections and the formal legality of Marcos' rule as well as to the complaints procedures put in place by the regime to address claims of abuse by the military.[153]

May 1981. The PCO was then replaced with Preventative Detention Action, or PDA in August 1983. The PCO and PDA, like the ASSO, were all issued on authority of Marco [sic] except that they requires his signature." Ibid, 15.

[150] Ibid, 43.

[151] Ibid, 18-19.

[152] Ibid, 14.

[153] Eg in Johnson's opening statement: "[Marcos] set up specific guidelines where people that were arrested would have the right to counsel, they would have the right to see their family, they would have the right to an inquest authority. … From the time that Marcos declared martial law until time that he lifted martial law in 1981, when he

Other experts echoed Bernas' understanding of law as having facilitated repression under Marcos, and this in order to link Marcos to the human rights violations committed by his subordinates. Describing Decree 1850 that gave military courts exclusive jurisdiction over cases involving human rights violations committed by Philippine security forced, Orentlicher insisted that "[t]his decree exemplifies a general characteristic of Ferdinand Marcos's leadership, one that is critical to understanding his personal responsibility for the violations that I've described. Marcos created a legal framework that enabled abuses to occur and enabled them to occur based on the predilections of one man."[154]

Professor Muego, testifying on the organizational structure of the Philippine military, went so far as to conflate the legal and the military in order to explain Marcos' actions:

> "Consistent with his legal and punitive military background, Marcos was a cautious "hands-on" manager and decision maker, whose meticulous attention to detail and knowledge of both the law and military strategy was close to legendary. It is significant to note, for example, that Marcos' speeches and other public pronouncements from 1972 to 1986 were generously interspersed or embellished with legal military jargon and terminology."[155]

This constitutional framework or "legal atmosphere" having been established by the experts, the individual victim testimonies and exhibits continued to add evidence about law's repressive uses under Marcos. For each victim testifying about abuse, an arrest or temporary release order was put in evidence to prove the arrest had taken place.[156] Many victims were similarly asked if they recalled when martial law was declared – that legal event being the defining moment of the dictatorship.[157] Through the testimonies of victims, law even appears as a pervasive presence in the everyday experience of repression. Through the more than forty testimonies of victims, a pattern of suppression of dissent emerges: potential critics of the regime were arrested with an arrest order, "broken" through torture and months – sometimes years – of detention in

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was re-elected by the Filipinos, he attempted to comply with every request of the state department, every request of the human rights organizations, anyone who had problems with the human rights records in the Philippines. The problem was that the military, which was not under the complete and dominant control of Marcos, did not follow orders." Trial Transcript, September 9, 1992, 47.

[154] Trial Transcript, September 18, 1992, 126.

[155] Trial Transcript, September 16, 1992, 15.

[156] Eg. Joseph Duran testified as follows: "When they came in, they had these arrests, search and seizure order, or ASSO, and in that ASSO my name was listed, among others. At the bottom of the ASSO, I saw the signature of the late President Ferdinand Marcos." Trial Transcript, September 9, 1992, 91.

[157] Eg. testimony of Ramon Jalipa, Trial Transcript, September 17, 1992, 57.

euphemistically termed “rehabilitation centers”,[158] and released with a Temporary Release Order, which often required them to report regularly to the military or police. While on temporary release, it was close to impossible for them to find employment, as they lacked security clearance. Following years of good behavior, they would sometimes be granted a final release order and finally be left alone by the security services. In this way, torture and the terror created by the salvaging and disappearance of other dissidents were only the initial stages of a long-term bureaucratic system of suppression of dissent.

The testimony of Adora Faye de Vera, a student activist for the women and the poor who was arrested, and continuously tortured and raped during nine months, after which she was turned into an agent for the government, provides a vivid account of the formal use of law by the regime in its relations with its victims. She described how upon becoming an agent, she was made to sign a number of absurd-sounding documents:

“In March 1977, I signed an agent’s agreement, I signed a purchase of information agreement, I signed a sworn statement saying I was arrested alone, that I didn’t know where Flora and Rolando [*the friends arrested with her and later killed, N.D.*] were, and admitting that I was a subversive, and I also signed a waiver saying that I wasn’t tortured and that everything I was signing was not under duress.”[159]

Expert witness Michael Posner, Executive Director of the Lawyers Committee for Human Rights, also testified that “[t]orture victims were regularly forced to sign statements that they had not been badly treated.”[160] These documents signed by torture victims cannot be viewed simply as tools for the regime to cover its traces, counter-evidence to be provided to human rights monitors, courts or governmental commissions in the event of accusations of human rights abuses, though that is undoubtedly part of the story. Some of these documents, such as the “agent’s agreement” and “purchase of information agreement” were unlikely to ever be shown to a third party. Moreover, one witness testified to having signed, upon release from detention and torture, a “pledge of allegiance where we need not to, you know, be interviewed, to talk with anybody.”[161] One can only surmise that the regime believed such documents would have some

[158] Eg testimony of Fluellen Ortigas: “I was transferred to a place called the Youth Rehabilitation Center, which was actually a euphemism for a very horrifying structure of a prison which was considered the most secure prison in the penal whole system of the Philippines.” Trial Transcript, September 16, 1992, 167.
[159] Trial Transcript, September 14, 1992, 41.
[160] Trial Transcript, September 15, 1992, 26-7.
[161] Testimony of Ramon Castaneda, Trial Transcript, September 18, 1992, 42.

persuasive force in silencing people. If that was the case, then law was not only used to centralize power and legitimate the regime, but also to impose obligations on victims.

B. Martial Law as Degenerate Law

However, these insights about the potential dark side of law were understood to be limited to non-Western law. Indeed, in order to explain the intricacies of Philippine constitutional law to a jury of ordinary Americans (who for the most part had only completed high school education),[162] the plaintiff lawyers and expert witnesses drew comparisons with the U.S. constitution. The result was a representation of martial law as a distortion or degenerate form of U.S. law. Typical of such a comparison was the opening speech of Randall Scarlett, counsel for the Ortigas and Clemente plaintiffs:

> Just as President Reagan only had two terms here, under their constitution, we will learn, that President Marcos could only do two terms there. That term was to end in 1973. What he did instead was a systematic or system wide change to the entire government that allowed him to remain in power for 13 years beyond 1973 and become a consummate dictator of the Republic of the Philippines."[163] (emphasis added)

Bernas explained that before Marcos' revised the constitution,

> "[t]he 1935, Philippine Constitution closely resembled the American Constitution as to the structure of government. It provided for three branches of government, executive, legislative and judicial, and for an elected president. The president was given a term of 4 years with a maximum of two terms for a total maximum of 8 consecutive years. It also contained a bill of rights borrowed largely from the United States Federal Constitution."[164] (emphasis added)

Similarly, in testifying about the Philippine military, Muego emphasized that its structure is identical to the U.S. military.[165] The didactic advantages of such a comparative approach are clear, and none of the cited statements are inaccurate. However the picture that emerges from these statements is distorted, as the experts failed to mention that not only the separation of powers and the bill of rights, but also the very possibility of declaring martial law and suspending rights, were a legacy of U.S. colonialism. Indeed, this possibility had been introduced into Philippine law by the U.S. Congress in 1916,[166] and the provision of the 1935 Constitution copied the wording of the U.S. legislation.[167] Similarly, the possibility of suspending the writ of

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[162] Trial Transcript, September 9, 1992, 56-79.
[163] Trial Transcript, September 9, 1992, 40.
[164] Trial Transcript, September 10, 1992, 11-12.
[165] Trial Transcript, September 16, 1992, 10.
[166] P.L. 240 (Organic Act for the Philippine Islands), which granted the right to declare martial law to the Governor-General of the Philippines. Muego, *supra* note 44, 29.
[167] Ibid.

habeas corpus was initially granted to the American Governor General by the 1902 Philippine Bill, and had been used by him in 1905.[168] In the 1970s and 1980s the United States had also contributed to the Marcos regime's parody of the rule of law by insisting that the regime periodically provide appearances of electoral democracy and legality.[169] By offering a very partial picture of the American legal legacy in the Philippines, the litigation made the United States appear as a paragon of the rule of law.

Moreover, the possibility that the American counterparts could also degenerate into repression was implicitly denied. Expert witness Michael Posner stated in his testimony on the subservience of the judiciary to Marcos: "It may be difficult for U.S. citizens to comprehend how a strong and independent civilian court system was seriously undermined by a series of martial law decrees issued by Mr. Marcos himself."[170] Similarly, when witness Ramon Mappala, a former member of the ROTC[171] in the Philippines, testified about his arrest after he had given a lecture "about the Marcos regime tendency towards going towards martial law", he was asked by Swift whether the lecture was critical of the Marcos regime. He answered: "I was highly critical, yes, sir. I'm very much familiar with democratic process of the United States."[172]

C. Human Rights Abuses as Abuses of Law

The courts in the case had even more difficulty conceptualizing law's dark side. In background descriptions of the facts of the case, the courts at times reproduced the plaintiffs' narrative of the Marcos regime as grounded in a constitutional arrangement.[173] Moreover, the courts sometimes discussed the human rights violations as having been state-sponsored, as required by doctrinal considerations, such as the

[168] The only other suspension of the writ occurred in 1950 when President Quirino had used it to cope with a peasant insurgency. Ibid, 31.
[169] Eg. *supra* note 39 and accompanying text.
[170] Trial Transcript, September 15, 1992, 24.
[171] Reserve Officers' Training Corps, a program based in universities for training officers, modeled on the U.S. program of the same name.
[172] Trial Transcript, September 17, 1992, 87.
[173] Eg. "MARCOS ordered ratification of a revised Constitution, tailor-made for his maintenance of power. With those actions MARCOS planted the seeds for what grew into a virtual dictatorship in the Philippines. The new Constitution nullified the term limits for the President and provided that MARCOS could function as President, using his own judgment, for as long as necessary. Until he convened a new legislative body, MARCOS also had sole authority to rule in the Philippines. Proclamation 1081 not only declared martial law, but also set the stage for what plaintiffs alleged, and the jury found, to be acts of torture, summary execution, disappearance, arbitrary detention, and numerous other atrocities for which the jury found MARCOS personally responsible." *In re Estate*, *supra* note 81, 1462.

definition of torture under international law.[174] Yet in their discussions of legal doctrine, in general the courts portrayed the violations in a manner that is difficult to reconcile with an understanding of law as a facilitator of violence. I would like to suggest two main reasons for this. First, the structure of legal argumentation requires showing a violation of a legal norm, leading the violation itself to be portrayed as non-law. Thus, even when the District Court discussed the element in the definition of torture that connects it to the law (the requirement the court had crafted that torture be done "under color of law"),[175] it explained that element as an abuse or imitation of law. In the court's instructions to the jury, in a section titled "Under Color of Law," the court wrote:

> "Torture, summary execution, disappearance or arbitrary detention committed by a person under color of law violates international law, United States law and Philippine law and renders that person liable to the victim. The phrase "under color of law" means that the person allegedly responsible, here Ferdinand Marcos, used his government position as President of the Philippines and Commander-in-Chief of the military, paramilitary and intelligence forces to act beyond the bounds of his lawful authority. In order for Marco's (sic) alleged unlawful acts to have been done "under color of law," the unlawful acts must have been done while Marcos was purporting or pretending to act in the performance of his official duties. That is to say, the unlawful acts must consist of an abuse or misuse of power which is possessed by Marcos only because he was a government official. Color of law as used in these instructions means action purported to be taken by an official of a government under any law of that country."[176] (emphases added)

[174] To reject the estate's argument that federal courts did not have jurisdiction over the case, the Ninth Circuit insisted on the official character of the torture to fit the definition of international law and thus trigger ATS jurisdiction. "The right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of *jus cogens*." Hilao v. Marcos, 25 F.3d 1467 (9th Cir. 1994), 1475. Moreover, the Ninth Circuit drew parallels between the lawsuit and constitutional torts against the government in U.S. law, for instance to reject the Estate's argument that the claims against Marcos abated with the death of the defendant. For the court, "plaintiffs' claims are most closely analogous to a claim that government officials violated the Eighth Amendment right of freedom from cruel and unusual punishment" which claim survives the death of a party. Ibid, 1476. Eg Hilao v. Marcos, 103 F. 3d 767 (9th Cir. 1996) in describing the factual background to the case: ""This case arises from human-rights abuses - specifically, torture, summary execution, and "disappearance" - committed by the Philippine military and paramilitary forces under the command of Ferdinand E. Marcos during his nearly 14-year rule of the Philippines." 771.

[175] The generally accepted definition of torture in international law provided by the Torture Convention does not contain the expression "color of law." The expression "under color of law" is used however in the Torture Victims Protection Act (28 U.S.C.§ 1350) which defines liability as follows: "An individual who, under actual or apparent authority, or under color of law, of any foreign nation – (a) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death." The "color of law" phrase was borrowed in ATS litigation from the jurisprudence of federal constitutional torts litigation, based on 19th century federal statutes which employ that phrase. See Stephens et. al, *supra* note 78, 251-257. According to Steven Winter, the phrase was already found in 13th century English law, and "the central idea conveyed by the phrase had remained remarkably constant for six centuries: *Under color of law* referred to official action *without* authority of law, in the nineteenth as in the thirteenth century." Winter, Steven L. "The Meaning of" Under Color of" Law." *Michigan Law Review* (1992): 323-418, 327. For Winter, even today, through use of the metaphors "under" and "color", "The legal metaphor *under color of state law* connotes action by an officer that appears in a false light: it has the appearance of lawful authority, but that appearance is deceptive." 328. The power of the "color" metaphor in U.S. socio-linguistic practice would explain why martial law was described by the court as a mock or imitation of law.

[176] Final Jury Instructions, *supra* note 96, 9.

A second reason for the courts' failure to conceptualize martial law as authentic law is the existence of specific doctrines in U.S. law – as in other jurisdictions and in international law- that preclude U.S. courts from adjudicating the acts of foreign states. Similarly to the act of state doctrine, under which the lawsuits had originally been dismissed, courts can decline to hear a case under the "political question doctrine," where the dispute presents issues assigned by the U.S. Constitution to the executive.[177] Moreover, under the Foreign Sovereign Immunities Act of 1976 (FSIA), foreign governments are immune from suit in the U.S. except for categories of claims that reflect liability arising out of private law transactions.[178] Though the plain language of the FSIA suggests that it is not applicable to individual defendants,[179] and that is indeed how it was interpreted in 2011 by the U.S. Supreme Court,[180] this was not clear at the time of the *Marcos* case. In fact, in an earlier case also involving the Philippines, the Ninth Circuit itself had held that the FSIA could be invoked by individual defendants,[181] and Marcos' estate argued that Marcos' acts were immunized under the FSIA.[182] In the *Marcos* case, as we shall see shortly, the courts rejected the applicability of the act of state and immunity doctrines by presenting the human rights abuses as personal wrongdoing abusive of the constitutional and legal framework rather than as repression enabled by that framework.

Such a conceptualization of the human rights violations is of course at odds with the image of the hierarchical and systematic governmental policy of repression that the plaintiffs conveyed at trial. Judge Fong of the District Court of Hawaii, dismissing in 1986 three of the cases on the basis of the act of state doctrine, clearly expressed the contradiction:

> "The dilemma faced by the plaintiffs here was illustrated in oral argument. For purposes of arguing that jurisdiction existed under section 1350, Marcos' actions were characterized as a "systematic governmental operation to suppress dissent." In contrast, when the issue of act of state arose, this case was characterized as one involving "discrete violations" of international human rights. Plaintiffs cannot have it both ways."[183]

[177] Stephens et. al, *supra* note 78, 338.
[178] 28 U.S.C §§ 1330, 1602-1611.
[179] Immunity is to be granted only to a foreign state, its political subdivisions, or "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(b).
[180] *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010).
[181] *Chuidian v Philippine National Bank*, 912. F.2d 1095 (9th Cir. 1990).
[182] *Hilao v. Marcos*, *supra* note 174.
[183] *Trajano v. Marcos*, No. CV-86-207-HMF (D. Haw. July 18, 1986), 21.

For Fong, it was "beyond the capacity or function of the federal courts to subject the official acts or policies of the head of a foreign state to traditional standards of judicial review."[184] When in 1989, the Ninth Circuit overturned that decision, it also altered the characterization of the facts. It portrayed Marcos' acts as having been more personal than official in nature. In determining that the act of state doctrine was not applicable to Marcos because he was a former dictator, the court referred to its 1988 decision in *Republic of the Philippines v. Marcos* in which it had insisted that "Marcos is a private citizen residing in the United States. Neither the present government of the Republic of the Philippines nor the United States government objects to judicial resolution of these claims, or sees any resulting potential embarrassment to any government."[185]

Similarly, in adjudicating an appeal from Marcos' daughter Imee Marcos-Manotoc from an appeal judgment entered against her in connection with the torture and death of Archimedes Trajano in 1977, the Ninth Circuit dismissed the applicability of the FSIA on the ground that her actions were personal and not those of the Republic of the Philippines for purposes of sovereign immunity. The Court held that by virtue of her default, Marcos-Manotoc "admitted acting on her own authority, not on the authority of the Republic of the Philippines. Under these circumstances, her acts cannot have been taken within any official mandate and therefore cannot have been acts of an agent or instrumentality of a foreign state within the meaning of the FSIA.[186]

In the human rights class action, the Ninth Circuit applied the same reasoning in a 1994 appeal by Marcos' estate from a District Court decision enjoining the estate from transferring or dissipating assets pending litigation:

"Like Marcos-Manotoc, the Estate argues that Marcos' acts were premised on his official authority, and thus fall within FSIA. However, because the allegations of the complaint are taken as true for purposes of determining whether an action should be dismissed, … Marcos' actions should be treated as taken without official mandate pursuant to his own authority.[187]

The Court also cited its own decision in *Republic of the Philippines v. Marcos*, referring to the comparison to rape, a crime with intensely personal connotations:

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[184] Ibid., 20-21.
[185] *Trajano v. Marcos, supra* note 73.
[186] *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992), 497.
[187] *Hilao v. Marcos*, *supra* note 174, 1470-1.

"Although sometimes criticized as a ruler and at times invested with extraordinary powers, Ferdinand Marcos does not appear to have had the authority of an absolute autocrat. He was not the state, but the head of the state, bound by the laws that applied to him. Our courts have had no difficulty in distinguishing the legal acts of a deposed ruler from his acts for personal profit that lack a basis in law. As in the case of the deposed Venezuelan ruler, Marcos Perez Jimenez, the latter acts are as adjudicable and redressable as would be a dictator's act of rape."[188]

"In conclusion, Marcos' acts of torture, execution, and disappearance were clearly acts outside of his authority as President. Like those of Marcos-Manotoc, Marcos' acts were not taken within any official mandate and were therefore not the acts of an agency or instrumentality of a foreign state within the meaning of FSIA."[189]

Joan Fitzpatrick criticized the Ninth Circuit for failing to develop a principled approach to the act of state and sovereign immunity doctrines. With respect to both, the court appears to have distinguished the Marcos case on the facts – namely the supposedly personal nature of the defendant's acts – instead of carving out a human rights exception to the doctrines,[190] as the English House of Lords would later do in the Pinochet case, where it held that torture could not be considered a state function for the purposes of functional immunity.[191] However, such a pioneering approach might have been too much to ask in the *Marcos* case, where the U.S. courts' legitimacy in exercising an extraordinary form of jurisdiction was more questionable than in *Pinochet*,[192] and the courts were exposed to the charge of intruding on U.S. foreign

[188] Ibid, 1471.
[189] Ibid, 1472.
[190] Fitzpatrick, *supra* note 75, 511.
[191] *R. v. Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [1999] UKHL 17. Note that English courts and the International Court of Justice, when holding that immunity precludes civil litigation of gross human rights violations, have distinguished the Pinochet holding on the ground, inter alia, that it applies only to criminal not civil proceedings, thereby halting the development of transnational tort human rights litigation outside the United States. See *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, 3 February 2012 International Court of Justice, par. 87, referring to *Jones* v. *Saudi Arabia* ([2007] 1 *AC* 270; *ILR*, Vol. 129, p. 629, in which "Lord Bingham describe[ed] the distinction between criminal and civil proceedings as "fundamental to the decision" in *Pinochet* (para. 32)."
[192] The Pinochet case did not raise as many questions about the court's legitimacy since it was based on an interpretation of the Convention against Torture, which explicitly provided universal jurisdiction, and in 1988 the United Kingdom had changed its criminal code to grant its courts universal jurisdiction (*Marcos*, in contrast, was grounded on the general prohibition of torture under international law). Thus, Lord Browne-Wilkinson, the presiding judge in Pinochet, writes "I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as jus cogens was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as performance of an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. But in my judgment the Torture Convention did provide what was missing: a worldwide universal jurisdiction. Further, it required all member states to ban and outlaw torture: Article 2. How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises? Thirdly, an essential feature of the international crime of torture is that it must be committed "by or with the acquiesence of a public official or other person acting in an official capacity." As a result all defendants in torture cases will be state officials. Yet, if the former head of state has immunity, the man most responsible will escape liability while his inferiors (the chiefs of police, junior army officers) who carried out his orders will be liable. I find it impossible to accept that this was the intention."

policy.[193] Marcos was thus held liable, but because of legal and political constraints in the exercise of an extraordinary form of transnational jurisdiction, this liability was portrayed as more personal than institutional.

Conclusion

Mattei and Lena presented class actions filed under the ATS as a form of U.S. imperialism. Through a close study of the *Marcos* class action, this paper has shown that the ATS has indeed served to legitimate the neo-colonial relationship between the United States and the Philippines. However, this chapter examined *Marcos* using the in-depth approach of law and history, interpreting the representation of the past that emerges during the litigation, and the reasons – legal and other – for such representation. As a result, it avoided depicting the transnational human rights class action as an abstract hegemonizing force. Instead, it revealed the web of doctrinal limitations, litigation strategies and cultural assumptions that shaped the representation of the Marcos regime. As Lawrence Douglas showed with respect to Holocaust trials,[194] we see in *Marcos* that the historical narrative was shaped by legal constraints, but that these legal constraints did not operate mechanically. The narrative was greatly influenced by the need of the participants in the litigation to convince their audiences and retain legitimacy.

Moreover, we see that while proceedings before first instance courts offered opportunities for in-depth discussion of context and structural causes, the more abstract and principled discussions of higher courts led to historical simplification. Yet it is precisely these higher court decisions that are published and diffused throughout the legal community, concealing the insights gleaned during the lower court proceedings, such as the way law enabled violence. This paper tried to recover those insights, in the belief that understanding law's potential "dark side" should become central to the project of fighting state-sponsored violence. The need for lawyers to adequately conceptualize the role of legal discourse in violence appears all the more pressing now that political scientists have begun mapping authoritarian regimes' substantial reliance

[193] The Reagan administration had begun urging courts to decline jurisdiction of human rights-related ATS claims in 1984. Beth Stephens, "The Curious History of the Alien Tort Statute." 89 Notre Dame Law Review 1467 (2014), 1485-1488.
[194] S*upra* note 24.

on courts,[195] and anthropologists point to the growing and paradoxical obsession with legal form (legal fetishism) accompanying widespread violence and corruption.[196] Such an inquiry should however abandon the assumption implicit in much of the *Marcos* litigation that law in the U.S. and by extension other Northern democracies cannot be used to such repressive ends.[197]

The detailed approach adopted in this paper also allows to point to institutional benefits and limitations of universal civil jurisdiction for narrating political violence. The fact that the lawsuit took the form of civil litigation that does not expire upon the death of the defendant is a substantial advantage over criminal proceedings, not only for the plaintiffs' quest for accountability, but also in terms of the production of a historical narrative. The fact that it was a class action significantly contributed to the representation of political violence as state-sponsored and structural. The need to prove a pattern of human rights violations that could reach all members of the class led the plaintiffs to offer numerous testimonies of experts, witnesses and victims themselves. It also led to discussions of violence as policy, and opened the way for discussion of law's role in repression. This is a well-known feature of class actions, which since their role in desegregation in the U.S. have been deployed to address injustice perpetrated by bureaucracies.[198] We see in the *Marcos* case that the same holds in the ATS context, further disproving claims that law is generally incapable of dealing with its "own" responsibility in violence.[199]

Yet the present analysis also reveals serious limitations of universal civil jurisdiction. The need to convince the judge or jury of the legitimacy of the litigation in this most controversial of legal processes leads to obscuring the role of the North in violence. Moreover, doctrines meant to protect foreign state sovereignty and preserve the forum government's control of foreign affairs, such as immunity, the Act of State doctrine and the Political Question doctrine also lead to a portrayal of the violence as

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[195] P.H. Solomon, "Courts and Judges in Authoritarian Regimes" 60 *World Politics*, 122 (2007); Juan Antonio Mayoral Diaz-Asensio, "¿Por qué los autócratas limitan judicialmente su poder? Un análisis comparado del establecimiento de altos tribunales en regímenes autoritarios", *Revista de Estudios Politicos*, Oct-Dic 2012, 41-71.
[196] John L. Comaroff and Jean Comaroff, "Law and Disorder in the Postcolony: An Introduction." in *Law and Disorder in the Postcolony*, edited by Jean Comaroff and John L. Comaroff, 1-56 (University of Chicago Press, 2006).
[197] This assumption has recently been challenged in discussions of the part played by government lawyers in the administration of George W. Bush in justifying torture in the "war on terror." See David Cole, ed., *The Torture Memos: Rationalizing the Unthinkable* (The New Press, 2013).
[198] For an exposition of the theory of "structural reform litigation," see Owen M. Fiss, "The Supreme Court, 1978 Term - Foreword: The Forms of Justice." 93 *Harvard Law Review* 1 (1979-1980).
[199] Fraser, *supra* note 16.

personal. In fact, it is precisely where U.S. courts have refused to adjudicate ATS claims because of such prudential doctrines that U.S. support for violence has been made most explicit. In *Corrie v. Caterpillar* (2007), for instance, the Ninth Circuit upheld a district court ruling which had dismissed claims against the manufacturer of bulldozers used by the Israel Defense Forces to demolish homes in the Palestinian territories. The Court held that because the manufacturer's sales to Israel were paid for by the United States, allowing the action to proceed would require the judicial branch to question the political branches' decision to grant extensive military aid to Israel.[200] To admit that transnational human rights claims implicate the U.S. government is to risk triggering doctrines meant to protect the separation of powers among branches of the U.S. government, and to risk alienating the judge or jury. Conversely, to accept a case is to abide by the fiction that there are no political issues involved.

Historian Barbara Keys recently argued that human rights were given a dominant place in U.S. foreign policy from the late 1970s in order for the United States to reclaim the mantle of virtue it had lost during the Vietnam War.[201] She writes, "[f]or moderate liberals who had come to see the war as immoral and a stain on the country's honor, promoting human rights in America's allies spotlighted evil abroad and offered a way to distance the United States from it, alleviating their sense of responsibility."[202] In *Marcos*, ATS litigation appears to have offered a site in which such a distancing could be carried out. We should therefore be careful when drawing generalizations about universal civil jurisdiction from this and other ATS cases, which are embedded in a particular historical constellation. If this type of lawsuit is entertained in the courts of a country with a highly developed critical memory of its own past, the resulting narrative could be different. But because a political will for self-criticism is currently rare, it is likely that the difficulties exposing the forum's responsibility in this type of lawsuit will continue to appear even in other countries. This is particularly true given that many (though of course not all) universal jurisdiction cases have involved judging events occurring in the forum's former colonies or allies (Belgium and France with respect to African states; Spain with respect to Latin American states), as the immigration and travel patterns of both state officials and their victims follow former colonial paths.

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[200] Corrie v. Caterpillar, 503 F.3d 974 (Ninth Cir. 2007).
[201] Barbara J. Keys, *Reclaiming American Virtue* (Harvard University Press, 2014).
[202] Ibid, 3-4.