

PROSECUTING HEADS OF STATE

Since 1990, at least sixty-seven former heads of state or government have been prosecuted for serious human rights or financial crimes. The majority of these leaders were brought to trial in free and fair judicial processes, and some served time in prison as a result. This book explores the reasons for the meteoric rise in trials of senior leaders and the motivations, public dramas, and intrigues that accompanied efforts to bring them to justice. Drawing on an analysis of the sixty-seven cases, the book examines the emergence of regional trends in Europe and Latin America and contains eight case studies of high-profile trials of former government leaders – Augusto Pinochet (Chile), Alberto Fujimori (Peru), Joseph “Erap” Ejercito Estrada (the Philippines), Frederick Chiluba (Zambia), Pasteur Bizimungu (Rwanda), Slobodan Milošević (former Yugoslavia), Charles Taylor (Liberia and Sierra Leone), and Saddam Hussein (Iraq) – studies written by experts who closely followed the trials and their societal impacts. This is the first published book to examine the global rise in the number of domestic and international trials, telling the tales in readable prose and with fascinating details.

Ellen L. Lutz is the executive director of Cultural Survival, an international human rights organization that works on behalf of indigenous peoples. She previously directed the Center for Human Rights and Conflict Resolution and taught international human rights law, international criminal law, and other international law subjects at Tufts University’s Fletcher School. From 1989 to 1994, she served as the California director for Human Rights Watch and as that organization’s principal researcher on Mexico. She has written widely on human rights and conflict resolution, international and transnational accountability for human rights violations, indigenous rights, and human rights in Latin America. Lutz received her J.D. from the University of California, Berkeley (1985), and her M.A. in anthropology from Bryn Mawr College (1978).

Caitlin Reiger, a recognized expert on international prosecutions, is deputy director of the Prosecutions Program at the International Center for Transitional Justice (ICTJ). From 2003 to 2005, she was the chambers senior legal advisor to the judges of the Special Court for Sierra Leone. In 2001, she cofounded and served as legal research coordinator of the Judicial System Monitoring Program in East Timor and later appeared as defense counsel before East Timor’s Special Panels for Serious Crimes. Reiger has provided extensive policy advice and comparative research on national-international tribunals for serious human rights violations. Reiger manages the ICTJ’s Cambodia program and managed the ICTJ’s former Yugoslavia program. She received a B.A. in history and an LL.B. from the University of Melbourne (1996) and an LL.M. (in international law/human rights) from the London School of Economics (2003).

Prosecuting Heads of State

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List of Contributors

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About the International Center for Transitional Justice

The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for past mass atrocity or human rights abuse. The center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved.

To promote justice, peace, and reconciliation, government officials and nongovernmental advocates are likely to consider a variety of transitional justice approaches including both judicial and nonjudicial responses to human rights crimes. The ICTJ assists in the development of integrated, comprehensive, and localized approaches to transitional justice comprising five key elements: prosecuting perpetrators, documenting and acknowledging violations through nonjudicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and facilitating reconciliation processes.

The center is committed to building local capacity and generally strengthening the emerging field of transitional justice, and it works closely with organizations and experts around the world to do so. By working in the field through local languages, the ICTJ provides comparative information, legal and policy analysis, documentation, and strategic research to justice and truth-seeking institutions, nongovernmental organizations, governments, and others.

The ICTJ Prosecutions Program has worked for several years with domestic and international justice initiatives, drawing on staff with experience in such tribunals. It maintains as its goals the promotion and strengthening of domestic and international(ized) criminal prosecutions for systemic crimes, seeking to define further the concept of a “fair trial,” and influencing policy makers by producing high-quality analysis of key developments in the field, including

monitoring of significant trials such as those of Alberto Fujimori, Charles Taylor, and Hissène Habré. The program is also dedicated to analysis and advice on the impact of the International Criminal Court on the countries and regions where it is active and the strengthening of the capacity of local actors to engage in informed decision making on prosecution options and strategies.

Foreword

by Mary Robinson

One of the most important developments in the slow but determined journey of the international community toward a system of justice and accountability is the increasing acceptance of the duty to prosecute those responsible for mass human rights violations, regardless of rank or position. The historical unspoken presumption that heads of state may act with impunity has finally begun to crumble, but progress continues to be extremely difficult, unsteady, and hard fought.

The strong and conflicting reactions in Sudan and elsewhere to the request by the prosecutor of the International Criminal Court for the arrest of President Omar Hassan Ahmad al-Bashir of Sudan, and the response in Bosnia and Herzegovina to the arrest of Radovan Karadžić, show the political sensitivities that can become significant bumps in the road.

It is important that the lessons learned on this difficult journey are available to us all. However, until now there has been no detailed review of major attempts at bringing national leaders to justice.

Prosecuting Heads of State fills this void and is a fascinating and readable account of efforts to bring senior political leaders to justice for human rights and financial crimes. It considers the background and political circumstances that have enabled these cases to proceed and the effect they have had on transitions to peace and democracy in the countries concerned. The book analyzes the broader impact of these prosecutions within the affected communities in terms of satisfying victims' demands for justice, establishing an historical record of the crimes, and reestablishing a normative framework of respect for human rights and trust in state institutions. *Prosecuting Heads of State* illustrates the increasing institutionalization and respect for the rule of law throughout the world.

While serving as president of Ireland, I traveled to Rwanda soon after the genocide of 1994 in the hope of bringing attention to the tragedy that occurred

there and focusing on the collective responsibility of those who caused such appalling brutality. My concern for putting an end to impunity in the case of gross violations of human rights continued when I had the honor to serve as United Nations High Commissioner for Human Rights. With my colleagues, our work included striving to achieve accountability and assistance to victims of numerous atrocities throughout the world, and we often felt frustrated.

Visiting East Timor in late 1999, I heard firsthand accounts from victims of their suffering at the hands of the Indonesian military and militias and urged the Indonesian government to help bring senior leaders to account for the systematic violence they inflicted during this period. Other situations of mass human rights violations during my tenure included Chechnya, the Great Lakes region of Africa, Sierra Leone, the Balkans, and the Middle East. In each situation of conflict, the tragic reality is that those who are least powerful – very often women and children – routinely become innocent victims of those who abuse the power with which they have been entrusted.

The growing international consensus toward prosecuting heads of state that is evidenced by the creation of the UN-backed and hybrid tribunals, as well as indictments from regional and domestic courts, is encouraging. Before 1990, only a handful of ex-leaders throughout history had been prosecuted, and most of them in “political trials” without the benefit of due process or an independent judiciary. Since 1990, more than sixty former heads of state have been indicted in various jurisdictions. Most were accused of egregious human rights or financial crimes for which there was legitimate evidence and were tried in free and fair judicial processes. Many have served time in prison. Side by side with this transformation has been increasing state willingness to overturn or find loopholes in past amnesties, to waive official immunities, and to remove other impediments to trial.

All individuals, regardless of official rank or capacity, are legally bound to refrain from committing such horrific crimes as genocide, war crimes, and crimes against humanity. This principle is rooted in the ancient laws and customs of almost all cultures and throughout history. A strong global response announces to all those in positions of power and leadership that they can no longer use terror tactics, systematic rape, ethnic cleansing, mutilation, and indiscriminate killing of noncombatants as weapons of war or for any other purpose. The deterrent effect of prosecuting those in power cannot be underestimated. The marked increase of indictments since the fall of the Berlin Wall should send a strong message to those in power to conduct themselves within the framework of the norms of international law. Impunity for committing crimes while in office is no longer guaranteed, and the contemporary

movement toward prosecuting heads of state indicates that no one is above the law.

The cases described in this volume show that we still have some way to go, yet as a former head of state, I can attest to the fact that, symbolically at least, the successful examples detailed herein send a very powerful message indeed.

Preface

This book owes its origins to Ferdinand Marcos, former dictator of the Philippines and a tyrant who died with the blood of some ten thousand victims of torture, disappearance, and extrajudicial execution on his hands. In early 1986, just a few months after an Argentine court found five of that country's nine former dictators guilty of torture, disappearance, and extrajudicial execution, Marcos was deposed by a populist uprising and fled to Honolulu. Then an idealistic new lawyer with some human rights experience, I was determined that he would pay for his crimes, if not in the Philippines then in the United States. In law school, I had studied the landmark *Filártiga v. Peña-Irala* decision, in which a U.S. appellate court ruled that an alien can be sued for human rights abuses that violate "the law of nations" even if those acts took place in another country. If Marcos could not be criminally charged in the United States, his victims could at least enjoy a measure of justice by suing him here for damages.

One of America's great human rights lawyers, Paul Hoffman, a colleague who then was the legal director at the American Civil Liberties Union of Southern California, offered to lead the litigation team and our twelve-year battle against Marcos in U.S. federal courts began. Our odyssey was so fraught with legal challenges that a good professor could base an entire year of law school instruction on that case alone. It was the political challenges that arose during the Honolulu-based trial that were most perturbing, however.

Although the creation of an international tribunal was unimaginable when we first filed our lawsuit, by the time the litigation wound down (technically it still hasn't ended; even though a jury awarded Marcos' victims a \$1.2 billion judgment, his assets have yet to be recovered), the international community was in active negotiations to establish an International Criminal Court (ICC) with jurisdiction to try future leaders who behaved as Marcos had done. As an observer at the 1998 Rome conference that established the ICC, I couldn't help pondering that the planned new court was bound to face the same problems

we had faced in the Marcos case. What was most amiss with that litigation was its location, far away from where the crimes had occurred or where the victims still lived. In contrast to the junta trial in Buenos Aires, where the counsel and judges were Argentine, the media had a stake in closely monitoring the proceedings, and the survivors and the loved ones of those who died could testify or be present in the courtroom, only a handful of the Marcos regime's ten thousand victims had any connection with the proceedings, and the media barely noticed the trial was taking place.

For me the most important lessons learned from the Marcos lawsuit were that whenever possible, justice for human rights crimes must be as accessible as possible to those who suffered most and that the best kind of justice leads to national acknowledgment of the wrongs that occurred and societal involvement in righting them. Those lessons prompted me to begin asking some of the questions that this book addresses: To what extent were sovereign states trying leaders who had committed serious human rights or other crimes while in power? What were their motivations? What were the outcomes of such cases? What was the impact on society of doing so or not doing so?

Queries of this magnitude cannot be fully explored in isolation, and I was fortunate to have many friends and colleagues who were wrestling with related questions and were eager to confer or collaborate. My deepest gratitude goes to Naomi Roht-Arriaza and Kathryn Sikkink, both dear friends and sometimes coauthors, who were as captivated by these issues as I was and always eager to reexamine them from a fresh perspective.

Despite several years of preliminary exploration, this book did not begin to take shape until 2004 when the U.S. Institute of Peace (USIP) awarded me a grant to write it. Then, just as the work was getting off the ground, the circumstances of my life changed, forcing me to face the fact that it would be impossible for me to write the book I had originally proposed. Fortunately, I also realized that there was a much better book to be written by collaborating with the International Center for Transitional Justice (ICTJ), and particularly the deputy director of the ICTJ's Prosecutions Program, Caitlin Reiger. To my eternal gratitude, USIP grant officer Taylor Seybolt, a champion throughout, agreed to the revised project plan, and the present volume was born.

Since evolving into a joint project, the collaboration between us – and the ICTJ as a whole – has been a joy. Marieke Wierda, Pablo de Greiff, and Graeme Simpson deserve particular thanks for encouraging Caitlin to take on the project. In October 2006, drawing on the ICTJ network of prosecution experts working on mass crimes, Caitlin and I cohosted a conference to enable the chapter authors to discuss their cases with one another and benefit from the insights and feedback of practitioners, many of whom had been

involved in litigation against heads of state as prosecutors, activists, monitors, or victims' representatives. For their firsthand insights and reflections, we both thank Geoffrey Nice, Stuart Alford, Reed Brody, Nehal Bhuta, as well as ICTJ colleagues Ruben Carranza, Eduardo Gonzalez, Vasuki Nesiah, and Marieke Wierda. Tiasha Palikovic undertook the painstaking task of recording the conference proceedings, and the ICTJ's Richard Bailey and Laila Pedro pitched in during the conference and well beyond in ways too numerous to count, as did Nisma Zaman. Caitlin and I are deeply grateful for the help they provided.

The project also benefited enormously from the research assistance of Cambridge, Massachusetts-based research assistants Adam Day, Laura Roht-Arriaza, William Brennan Thomas, Abby Wood, and Paul Lewis, who researched the sixty-seven cases, and, in the case of Abby and Paul, contributed chapters to the volume. ICTJ interns Niki Ganz Moss and Eric Vang provided extraordinary service in the final days of the project, checking references and filling in missing citations, and Geoff Dancy assisted with the preparation of the charts and provided a fresh perspective on making sense of the numbers. Extra special thanks are due to our editor, Mark Cherrington, who is a grand master at saying things as simply as they can be said, and no simpler.

Thanks also are due to my former colleagues at Tufts University's Fletcher School, particularly Peter Uvin, director of the Institute for Humanitarian Studies, which sponsored the USIP grant and identified many of the outstanding interns who worked on the project; the many Fletcher students who assisted with the pre-grant research; Wendy Lekan and Fran Parisi who helped prepare the grant proposal and manage the grant; and Eileen Babbitt for her support throughout.

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