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Introduction

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In September 1985, nine members of Argentina's military junta, whose successive regimes covered the period in Argentine history known as the "dirty war," walked into a courtroom in downtown Buenos Aires. Until that day, they had absented themselves from their trial, which had already gone on for months and during which hundreds of witnesses testified about their torture, the disappearance of loved ones, arbitrary arrest, cruel detention, and even crueler methods of extrajudicial execution. The city was mesmerized by the trial. Long lines for seats in the observation gallery formed days in advance of each court session. By eight in the morning, all the copies of *El Diario del Juicio*, the unofficial newspaper report of the testimony of the previous day, were sold out.

Entering the courtroom, some of the generals and admirals were stone-faced. Others whispered among themselves. None displayed any signs of remorse, and only one, Lieutenant General Lami Dozo (who later was acquitted), appeared agitated. The two most notorious of the accused made the greatest impression on the gallery. Admiral Emilio Eduardo Massera, an imposing figure who had been head of the navy – which ran the Navy Mechanics School where some five thousand disappeared persons were held between 1976 and 1979 – appeared in court in full navy dress regalia. By contrast, his army co-junta member, General Jorge Videla, appeared in court in civilian clothes and refused to appoint counsel for his defense (a court-appointed defender represented him). He buried his nose in a book while the prosecutor read out the indictment and described the evidence against him. Some thought it was a Bible; others suggested it was a mystery novel. Whichever it was, Videla made clear his contempt for the proceedings that ultimately condemned him and became the springboard for the global transitional justice movement.

Fast forward to October 2006: Saddam Hussein, whose reign of terror spanned nearly a quarter century, shuffled into a Bagdad courtroom to learn his fate. Although he might have been put on trial for waging aggressive wars

against Iran and Kuwait, for using chemical weapons against both Iranians and tens of thousands of Iraqi Kurds, or for murdering countless Iraqi Shiites, this trial focused on a single set allegations relating to the attacks against 148 Shiite men and boys from the town of Dujail in the 1980s in retaliation for an alleged assassination attempt on his life. A five-judge Iraqi judicial panel of a tribunal that was funded and heavily influenced by the United States had found Hussein and his codefendants responsible for crimes against humanity for the attack on the Dujail villagers.

As Hussein sank into his seat, presiding judge Ra'uf Rashid Abd al-Rahman commanded, "Make him stand up!" Six guards hustled the ex-dictator to his feet and held his arms behind him while the judge read out his sentence of death. Hussein shouted defiance in reply: "Go to hell! You and the court! You don't decide anything, you are servants of occupiers and lackeys!" The judge shouted back, "Take him out!" As he was led away, Hussein bellowed, "Long live the Kurds! Long live the Arabs!"[1]

Before 1990, only a handful of former or current heads of state or government had ever been indicted for serious human rights violations or other abuses of authority while in power. As a rule, former chief executives who had committed crimes, like those who had fallen from political favor, went into exile or in some cases were summarily executed. Since then, no fewer than sixty-seven heads of state or government from around the globe have been, at a minimum, criminally charged for their misconduct while in office.

This book is an effort to understand what changed, and why. Has humanity indeed entered an era in which heads of state and other senior government officials are as vulnerable as common criminals to arrest, trial, and punishment for their crimes? Is this a global phenomenon, or one of selective application? If the latter, which leaders are "at risk" and which are likely to escape with impunity?

The book builds on the body of work that examines criminal trials as a means of achieving accountability for serious violations of international human rights or humanitarian law. It also builds on work that explores the creation and development of the various international criminal tribunals over the past decade, as well as the contemporary willingness of some states to exercise "universal jurisdiction" for the most heinous of such crimes. It considers the interface between domestic decision making regarding criminal prosecutions and international interest in trying government leaders, including the establishment of international tribunals with jurisdiction to do so. In addition, it examines the international movement against political corruption that began to gain traction during the same time period. It explores the extent to which these trends have influenced sovereign states to create the political space for independent

domestic courts to try senior officials for human rights and economic crimes. Ultimately, this book considers the significance of pursuing these leaders for their victims and for the societies they once ruled.

Hundreds of government and military officials around the globe have now been indicted for the kinds of crimes covered in this book. We limited our study to heads of state or government so that we could examine a complete data set without the need for statistical sampling. Although indictments and trials of heads of state or government are inevitably more politicized than those of their underlings, there is no other global subset of perpetrators who are similarly situated that we could have selected.

In addition to the cases we examine here, there have been many more in which a former head of state or government has been the subject of some sort of criminal investigation. For example, after Belgium enacted its universal jurisdiction law in 1993, victim complaints flooded in against former dictators and even sitting heads of state, including Mauritanian president Maaouya Ould Sid'Ahmed Taya, Iraqi president Saddam Hussein, Israeli prime minister Ariel Sharon, Ivory Coast president Laurent Gbagbo, Rwandan president Paul Kagame, Cuban president Fidel Castro, Central African Republic president Ange-Felix Patassé, Republic of Congo president Denis Sassou Nguesso, Palestinian Authority president Yasir Arafat, former Chadian president Hissène Habré, former Chilean president General Augusto Pinochet, and former Iranian president Ali Akbar Hashemi-Rafsanjani.[2] Official investigations into these cases were opened, but most never progressed beyond this exploratory phase. We limited our analysis to those instances in which a leader was the subject of some level of formal charges or was indicted, depending on the requirements of the particular legal system, to ensure that we were addressing only those cases for which there was official intent to prosecute the accused.

Because of the high publicity value of prosecutions of top political figures, the news media carries more information about criminal prosecutions of heads of state or government than it does for prosecutions of lower-ranking officials. In terms of responsibility, heads of state or government are at the top of the chain of command. In cases of corruption crimes, which are usually committed for personal gain, these leaders most likely were directly involved in the criminal acts. In cases of human rights crimes, even if they did not directly order them or carry them out, they often were in positions to know what was going on, even if they deliberately insulated themselves from knowledge of the facts. Finally, at a symbolic level, these cases often represent far more than the individuals on trial. Especially in situations in which the prosecutions have followed a political transition or the end of a regime, pursuing the highest individual

in the hierarchy is also about marking a break with the past and sometimes condemning an entire system that facilitated the commission of serious crimes in the name of the state.

FROM AMNESTIES TO ADJUDICATION: NATIONAL RESPONSES TO HUMAN RIGHTS CRIMES

Since the trial of the nine junta members in Argentina during the 1980s, the subject of trying senior governmental officials for serious violations of human rights has riveted the attention of the international human rights movement. Before then, aside from hesitant efforts in Western Europe to punish those responsible for atrocities committed during World War II and Greece's trial of the leaders of its authoritarian regime, which fell in 1974, the world gave little thought to what consequences should be brought to bear against dictators and others who were responsible for egregious wrongs. The transitions from dictatorship to democracy that took place in Latin America throughout the 1980s, and particularly Argentina's conviction and sentencing of five of the former junta members to lengthy prison terms, changed that. Overnight, the human rights movement embraced the aim of ensuring that leaders who perpetrated human rights abuses faced justice. The issue was no longer whether there should be accountability, but how much and what kind of accountability, as well as what compromises were acceptable to keep the peace or prevent a return to authoritarian rule.

In 1988, the Aspen Institute's Justice and Society Program hosted a groundbreaking conference to explore the dimensions of meaningful accountability for gross violations of human rights. The participants, mostly scholars and human rights advocates, agreed that accountability minimally requires a successor government to investigate and establish the facts so that the truth is known and acknowledged as a part of the nation's history. Although there was disagreement about acceptable trade-offs, there was consensus that meaningful accountability requires individuals who perpetrated the abuses to be held responsible. The participants also recognized that accountability, by itself, is neither sufficient nor possible absent other functioning democratic institutions, including an independent judiciary, the removal of impediments to a flourishing civil society, and a commitment to the rule of law.[3]

Over the next few years, the subject of accountability continued to gain traction. With the end of the Cold War, many Eastern European countries were compelled to confront what to do about those who had committed human rights abuses during decades of Communist rule. Their responses varied widely. Some states opted for nonjudicial accountability solutions such as

"lustration," or banishment from political life. Romania summarily executed its former dictator Nicolae Ceausescu and his wife Elena, although the generals who had taken charge of the country claimed that they had first convicted them in a military trial. Others filed charges against ex-leaders – some for financial and others for human rights crimes. A fuller analysis of the newly democratic governments' responses to Cold War–era crimes can be found in Chapter 2.

In South Africa, the negotiated end of apartheid created a similar quandary. In coming to terms with the necessity of compromising to achieve peace, both the ruling National Party and the African National Congress (ANC) embraced international human rights discourse and norms as the best means to achieve common ground, write a constitution, and craft a power-sharing agreement.[4] Yet as is so often the case in negotiated ends to long-standing conflicts,[5] throughout the process the topic of how to deal with criminal violations of human rights during the apartheid era was shelved until all other contentious issues were resolved and the parties had agreed on a draft constitution text. Only then did National Party and ANC negotiators, in a secret process, craft the language of "National Unity and Reconciliation" that laid the groundwork for South Africa's 1994 interim constitution and the subsequent enactment of legislation that mandated the establishment of the Truth and Reconciliation Commission (TRC).[6] An integral part of the agreement was the provision of a conditional amnesty that enabled perpetrators of past violations to apply to swap criminal and civil liability for testimony before the TRC's Amnesty Committee. Amnesty would only be granted upon satisfaction of various conditions, including disclosure of all known aspects of their crimes that were related to "a political objective," including the names of those higher up in the chain of command. Somewhat counterintuitively, remorse was not among the determinative criteria for amnesty.[7] Despite the fact that the "amnesty for truth" deal was predicated on the basis that prosecutions would follow for those who did not submit to the process or were refused amnesty, with the exception of the 1996 conviction of former Vlakplaas commander Eugene de Kock, South Africa's apartheid-era leaders all managed to escape indictment.[8] While the South African TRC amnesty arrangements were much lauded at the time, the question of prosecution for those who escaped the process continues to be a live one, and it is questionable whether such a compromise would be acceptable under international law today.[9]

In Latin America, sensing the turning tide toward greater accountability, authoritarian leaders of countries transitioning to democracy went to great lengths to issue decrees, pass laws, and even hold national referenda to immunize themselves from prosecution. These "self-amnesties" became

topics of interest for the Organization of American States' (OAS) human rights machinery.[10] Indeed, the rulings of the Inter-American Commission and Court both reflected and helped to stimulate the global attitude shift toward greater accountability. Thus, in its 1985–86 Annual Report, the Inter-American Commission on Human Rights adopted the measured view that it was up to the appropriate democratic institutions of the state concerned to determine whether and to what extent amnesty was to be granted.[11] Yet even then the commission took the view that amnesties should not be used as a shield to prevent victims from obtaining information about human rights abuses.

As more and more American states passed amnesty laws in the late 1980s, the commission found itself inundated with petitions from human rights victims alleging that amnesty laws violated their right to judicial protection. In its 1992 Annual Report regarding a massacre by security forces of seventy-four people in El Salvador, the commission concluded that the Salvadoran government had a duty to investigate and punish the perpetrators, notwithstanding an El Salvadoran Supreme Court ruling that those who carried out the massacre were protected from prosecution by that country's amnesty laws.[12] In the same report, in recommendations concerning amnesty laws in two other countries – Uruguay and Argentina, the commission reemphasized that regardless of whether amnesty laws had been adopted, states had a duty under the American Convention on Human Rights to clarify the facts and identify those responsible for human rights abuses.[13] In September 2006, in a case involving Chile, the Inter-American Court of Human Rights ended this legal ambiguity by holding that amnesties for those responsible for crimes against humanity violated the American Convention on Human Rights.[14]

As these national developments were slowly taking form in Latin America, there was a parallel development in national courts in Europe that helped continue the momentum for change during the late 1990s. Victims, human rights advocates, and investigating magistrates creatively used universal jurisdiction laws that were on the books in Spain, Belgium, and other European countries. These are discussed further in Chapter 2 of this volume.

THE RAPID EVOLUTION OF INTERNATIONAL CRIMINAL TRIBUNALS

By 1993, just five years after the Aspen Institute conference, accountability became the subject of debate at the pinnacle of global political power. The international community was under pressure to forge an effective response to what was becoming a bloody and intractable conflict in the former Yugoslavia,

yet it was reluctant to send in troops. In July 1992, Human Rights Watch had issued a report concluding that the war was an international armed conflict to which the Geneva Conventions applied – including the requirement that war criminals be tried.[15] Around the same time, journalist Roy Gutman published an article in *Newsday* exposing, for the first time, the Bosnian Serb death camps.[16] In response, the Security Council commissioned a panel of experts to investigate, and two major human rights funders – the Soros Foundation and the MacArthur Foundation – ensured that the commission was adequately funded.[17] Meanwhile, the administration of U.S. President George H. W. Bush, having lost a tough election battle, began to worry about its legacy if it did not take positive action to stop the violence that was tearing Bosnia apart. At a December 1992 conference in London, U.S. acting Secretary of State Lawrence Eagleburger called for a war crimes tribunal for the former Yugoslavia. The incoming Clinton administration endorsed Eagleburger's proposal.[18]

In the spring of 1993, the United Nations Security Council established the Ad Hoc Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) in response to the continuing widespread and systematic murder, rape, and ethnic cleansing of civilians in Bosnia.[19] In doing so, the Security Council asserted that massive human rights abuses were a threat to international peace and security and judicial accountability for perpetrators was a prerequisite for ensuring that peace and the protection of human rights are guaranteed in the future.[20] Although the establishment of the ICTY did not bring about peace in the region, its existence did alter the playing field.

In 1999, at the height of the war in Kosovo, that tribunal became the first international court to announce that it had indicted a sitting head of state – Slobodan Milošević – for war crimes and crimes against humanity in connection with the deportation and murder of Kosovo Albanians. These charges were later expanded to include genocide and crimes against humanity and to cover the earlier conflicts in Bosnia and Croatia. Even though Milošević was ousted from power six months later, Serbia took almost two years before it turned him over to the ICTY for trial. A detailed analysis of the Milošević trial before the ICTY and its implications for the former Yugoslavia and international justice can be found in Chapter 9.

Eighteen months after the establishment of the ICTY, the Security Council, again pressed to respond to an international crisis to which it was reluctant to send troops, established a similar court to prosecute genocide and other systematic, widespread violations of international humanitarian law in Rwanda.[21]

The Rwanda Tribunal faced the challenge of coordinating its efforts with those of domestic courts in Rwanda that also had jurisdiction and a powerful interest in trying those responsible for the genocide. Tensions arose between the two systems over resources, jurisdiction, and punishment, and for a while the tribunal was plagued with scandal and inefficiency. However, the tribunal also issued the first-ever decision that a former head of government was guilty of genocide. On May 1, 1998, at his initial appearance before the ICTR, Jean Kambanda, who was prime minister of Rwanda from April 8 to July 17, 1994, pleaded guilty to charges of genocide, crimes against humanity, and related crimes.[22] He was sentenced to life imprisonment.

In subsequent years the international community has established an assortment of other ad hoc judicial processes, including hybrid domestic-international courts like the Special Panels for Serious Crimes in East Timor, the Special Court for Sierra Leone, a specialized war crimes chamber in Bosnia, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon.[23] These courts either have already faced or will face similar challenges in tackling high-level leaders, as shown by the current proceedings against Liberia's Charles Taylor and Cambodia's Khieu Samphan.

The creation of the Yugoslav and Rwandan tribunals in the mid-1990s also stimulated international efforts to establish a permanent international criminal court. The United Nations sponsored an international diplomatic conference in Rome in 1998 where the statute of the International Criminal Court (ICC) was adopted. Today the ICC is a fully functioning court. Judges and prosecutors have been selected, and, notwithstanding U.S. government efforts to undermine it, 106 states have committed themselves, and their financial wherewithal, to making the ICC a meaningful institution. The new court has the benefit of the jurisprudence and the experience of the ad hoc tribunals for the former Yugoslavia and Rwanda, as well as the hybrid tribunals. At this writing, three cases are under investigation: Uganda and the Democratic Republic of the Congo (DRC), which were referred by those states parties, and the Darfur region of Sudan, which was referred by the UN Security Council. Three defendants from the DRC and Jean-Pierre Bemba Gombo from the Central African Republic, Thomas Lubanga Dyilo, Germain Katanga, and Mathieu Ngudjolo Chuiof, have been arrested and surrendered to the court in the Hague.

DOMESTIC CORRUPTION PROSECUTIONS

The institutionalization of international criminal judicial processes coincided with a less-heralded phenomenon in national courts: the rise in indictments,

prosecutions, and convictions of often high-level public officials for corruption crimes including bribery, extortion, misappropriation of public or private funds, and other acts that involved using public power for private gain. Corruption is as old as war, and in many cases nearly as devastating. The World Bank estimated that in 2006 the global cost of corruption reached $1 trillion. Yet until the end of the Cold War, prosecution of top public officials for corruption was no more common than their prosecution for human rights or humanitarian law violations.

The shift owes its origin, in part, to the Watergate scandal at the end of the Vietnam War. In its aftermath, the U.S. Congress uncovered slush funds used by U.S. multinational corporations to finance U.S. elections, as well as to bribe foreign government officials. In the same reform-driven mind-set that led to the first federal laws governing U.S. foreign policy with respect to countries engaged in violations of human rights, the Congress unanimously passed the Foreign Corrupt Practices Act (FCPA) in 1977, which was aimed at curbing corrupt business practices by U.S. corporations overseas.[24]

However, it quickly became apparent that the United States' good intentions were undermining the competitive position of U.S. businesses in the international marketplace. In 1988, the Congress amended the FCPA. Proclaiming the need for a global response to foreign bribery, the Congress called on the president to pursue the negotiation of an international agreement, "among the largest possible number of countries," to govern acts now prohibited under FCPA.[25]

Meanwhile, in Europe during the 1990s, a string of corruption scandals touching senior officials, including heads of state and government, was creating embarrassment. Allegations of corruption cost some leaders their public offices, including President Felipe González of Spain and Helmut Kohl of Germany, both of whom were voted out of office in the wake of corruption scandals.[26] In Italy, long a haven for official corruption, a group of Milanese prosecutors and magistrates initiated a campaign in 1992, called Mani Pulite (Clean Hands), to undercut institutionalized corruption that transcended political parties and allegedly was linked to the Mafia. Several prime ministers, including Silvio Berlusconi, found themselves in the dock for corruption, as is detailed in Chapter 2.

By the turn of the millennium, what began as an American housecleaning exercise had become a global movement. First the Americas (1996), then Europe (1999) adopted treaties criminalizing corruption.[27] The 1997 treaty of the intergovernmental Organization for Economic Cooperation and Development (OECD), the thirty member countries of which are home to the majority of the world's multinational corporations, requires members to enact

laws prohibiting corporate bribery and extortion. It entered into force in 1999.[28] Africa followed in 2003, and in the interim, Asia, the Pacific Island states, and the Middle East declared interest in creating regional instruments or structures to impede corruption. Meanwhile, the United Nations promulgated the UN Convention against Corruption (UNCAC), which entered into force on December 14, 2005.[29] As of February 4, 2008, 107 countries had ratified it, and 140 had signed it.

Although UNCAC does not define "corruption," it does require, among other means to curb corruption, states to criminalize intentional bribery of national or foreign public officials, and intentional embezzlement, misappropriation, or other diversion for private gain by a public official of any property, funds, or anything else entrusted to the official by virtue of his or her position. It also requires states to criminalize influence trading and calls on them to "consider adopting legislation" to criminalize other official abuse of functions and illicit enrichment. Responding to a spate of cases in which public officials used legal maneuvers to evade the administration of justice, UNCAC calls on states to establish long statutes of limitations for corruption or adequate suspensions of existing statutes, to ensure that those accused of corruption cannot outrun the clock.

Corruption is a complex issue. It necessarily involves multiple actors and can take place on many levels. Official corruption is often seen as a victimless crime, because it usually is hard to measure the costs to individual members of the public. Depending on the corrupt activity, the cost to the public at large can range from modest to monumental, but is often outweighed by the expense of investigating it, particularly when the parties control all the relevant evidence and have no incentive to cooperate with investigators.

Although the coincidence of the trends to prosecute perpetrators of human rights abuses and government officials who engage in corruption has been largely unremarked by the international justice movement, its significance is worth exploring, particularly on account of the avenue that corruption cases have opened for holding heads of state or government accountable for at least some of the excesses of their regimes, as several of the cases in this volume demonstrate.

A NEW KIND OF POLITICAL TRIAL

Those in possession of power have long used courts to humiliate or distract their political opponents. In 1964, Judith N. Shklar defined a political trial as "a trial in which the prosecuting party, usually the regime in power aided by a cooperative judiciary, tries to eliminate its political enemies. It pursues