Since 1990, nearly seventy heads of state have been prosecuted for crimes committed while in office. From a legal perspective, the prosecutions have been possible largely due to an erosion of the state immunity principle and the emergence of specialized courts with a mandate to prosecute political figures. Interesting questions arise as to why the legal landscape shifted and whether the trend towards greater numbers of prosecutions has enhanced the rule of law. In their book, Prosecuting Heads of State, editors Ellen L Lutz and Caitlin Reiger shed light on these larger questions. In this review, the author explores Lutz and Reiger’s premise that the increased willingness to prosecute heads of state has been the direct result of activist lawyering, and questions whether the rule of law can truly be enhanced by prosecutions that are inextricably linked to political motivations. The author concludes by cautioning against the over-reliance on judicial accountability mechanisms in transitional justice contexts.

Keywords: international criminal law/heads of state/prosecutions/rule of law/impunity/transnational justice

1 Introduction

To commit crimes with impunity, heads of state have historically relied on the customary international-law principle of state immunity, ineffective domestic court systems, and weak international institutions. It seems, however, that the rules have changed. Between 1990 and 2008, at least sixty-seven heads of state or government have been prosecuted for human rights or financial crimes committed while in office (12). From a legal perspective, the prosecutions have been possible largely due to

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2 The ‘Appendix’ to Prosecuting Heads of State lists prosecutions of heads of state or government between January 1990 and June 2008 and includes information regarding the nature of the alleged crime and ultimate disposition.
an erosion of the state immunity principle and the emergence of specialized courts (whether domestic, foreign, international, or hybrid) with a mandate to prosecute political figures.

Interesting questions arise as to why the legal landscape shifted and whether the trend towards greater numbers of prosecutions has enhanced the rule of law. In their book, *Prosecuting Heads of State*, editors Ellen L Lutz and Caitlin Reiger shed light on these larger questions through a series of on-the-ground accounts of recent trials. Through these case studies, the reader is able to draw larger conclusions regarding the nature of such trials, including the common hurdles faced by prosecutors and factors influencing success.

The editors, one of whom is affiliated with the International Center for Transitional Justice, a non-governmental organization, have compiled a roster of contributors who offer invaluable first-hand insights. These contributors include not only academics but practising lawyers, a journalist, members of civil society, survivors, and former court staff. Perhaps as a result of their varied backgrounds, the contributors are less focused on legal analysis than on providing an insider’s perspective on the often politically driven and tumultuous prosecution of heads of state.

II *The shift towards prosecuting heads of state: The ‘justice cascade’*

In a previously published article, Ellen Lutz and Kathryn Sikkink argue that the recent willingness to prosecute heads of state was ‘neither spontaneous, nor the result of the natural evolution of law in the countries

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3 While the state immunity principle was once an iron-clad defence, it is now a mere hurdle for prosecutors and an opportunity for creative legal reasoning by judges. Typically, courts reason that immunity is not available either because international crimes cannot appropriately be considered acts of state, because affording immunity would fly in the face of the *jus cogens* nature of international criminal law, or due to a treaty obligation that specifically grants universal jurisdiction for the crimes in question (e.g., p 86, ref’ing to the Convention against Torture and *R v Bow Street Metropolitan Stipendiary Magistrates, ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147 HL(Eng)*).

4 The trials discussed are those of Augusto Pinochet of Chile, Alberto Fujimori of Peru, Joseph Estrada of the Philippines, Frederick Chiluwa of Zambia, Pasteur Bizimungu of Rwanda, Slobodan Milosevic of the former Yugoslavia, Charles Taylor of Liberia, and Saddam Hussein of Iraq.

5 These hurdles include the state immunity doctrine, jurisdictional issues, a lack of political will, the retroactive application of treaty obligations, issues of national sovereignty (which most often arise in relation to extradition requests), the long-standing practice of granting exile to former leaders, domestic amnesty laws, and limitation periods.

6 These are discussed in more detail below.
where the trial occurred." Instead, ‘it was the result of the concerted efforts of small groups of activist lawyers’ who capitalized on the broader shift in international norms towards greater protection of human rights. The work of these advocates ushered in what Lutz and Sikkink dub a ‘justice cascade’: a ‘rapid shift towards recognizing the legitimacy of human rights norms and an increase in international and regional action to effect compliance with those norms.’

In *Prosecuting Heads of State*, Lutz and Reiger lend further support to this argument: their introduction, the first two chapters of the book (which provide a broad overview of prosecutions in both Latin America and Europe), and their conclusion provide a snapshot of the meteoric rise in numbers of prosecutions since the 1990s and offer interesting insights into the justice cascade. The editors point to the transitions from dictatorship to democracy in Latin America as marking a turning point wherein human rights advocates began to embrace the idea of accountability through the courts (4). This ideal of accountability spread beyond Latin America due to the commitment and work of civil society (especially the Aspen Institute and Human Rights Watch) and spurred the creation of specialized criminal tribunals (first in relation to the former Yugoslavia and then in Rwanda) (6–8). The justice cascade culminated in the push to create a permanent international criminal court after the relative success of various specialized courts (4–8). The editors note that, in Europe and Latin America at least, the justice cascade has been so successful that, ‘if a state decides not to try a senior government official for human rights or corruption crimes, it must justify its decision not to do so to civil society and the regional and international community, not the other way around’ (288).

In their conclusion, the editors elaborate on the justice cascade by noting that:

> the fact that several of the most high-profile developments in recent years occurred within close proximity in time from each other meant that explicit reference was often made to the influence of one case on the next, and at the same time a sense of normative momentum building. (287)

They point to the cases of Milosevic, Pinochet, and Taylor as both temporally and normatively connected (287).

Some of the case studies support the theory that the justice cascade was initiated and perpetuated by civil society. For example, in the case

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8 Ibid at 2.
9 Ibid at 2–4.
10 Ibid at 4.
of Augusto Pinochet, contributor Naomi Roht-Arriaza highlights the extent to which Spanish human rights advocates were instrumental in initiating criminal charges against the former dictator (78–9). She also notes how Chilean human rights groups were deeply involved in the witness and evidence preparation for the European and domestic cases against Pinochet (92). Throughout the book, the integral role of civil society in terms of pressuring domestic prosecutors and the international community to end impunity is made clear. 11

Finally, the editors are careful to note that the justice cascade cannot fully explain the trend towards prosecutions, especially outside Latin America and Europe. Rather than resulting from a shift in international norms, some prosecutions may be a means of making a ‘fresh start’ when transitioning from authoritarian rule to democracy (287); or they may be due to pressure from a hegemonic state or be a means of asserting hegemony (288). Moreover, trials are more likely to occur in democratic countries and in states that have joined the International Criminal Court (ICC) (289). 12 Indeed, the various case studies illustrate how multiple forces often work in concert to bring about a prosecution.

III Do trials enhance the rule of law?

In her foreword, Mary Robinson, the former United Nations High Commissioner for Human Rights and a former head of state, notes that Prosecuting Heads of State ‘illustrates the increasing institutionalization and respect for the rule of law throughout the world’ (xv). The editors, in their conclusion, find that prosecutions are part of a larger trend:

Something bigger has occurred – something that is at least in part normatively grounded . . . the findings presented in this book show that the justice norm is becoming embedded around the globe and that politicians should assume high office only if they are prepared to govern honestly and justly. For if they sanction human rights violations or dip their hands into public coffers, they can no longer assume they will get away with it. (291)

On its face, stripping former heads of state of their long-held immunity from prosecution would, indeed, seem to enhance the rule of law: it is consistent with the basic principle that no person is above or beyond the law. However, the devil is in the details.

11 For example, in the chapter focusing on Latin America, the editors illustrate how legal theories and ideas were diffused by non-governmental-organization networks and human rights lawyers who strengthened and widened victims’ demands for justices (48). In Zambia, the Oasis Forum, a Zambian umbrella organization for civil society groups, initiated the push to prosecute Frederick Chiluba of Zambia (133–4).
12 According to the editors, of the forty-one states that have indicted heads of state, thirty-five have joined the ICC (more than 85%).
A THE DIFFICULTY OF ENSURING SUCCESSFUL TRIALS

To truly enhance the rule of law, trials of heads of state must be successful—not necessarily in terms of securing a conviction but rather in terms of ensuring fairness and legitimacy. The editors rightly acknowledge that there is a confluence of socio-political factors circumstances necessary to ensure a successful prosecution:

(1) the new government must be eager to differentiate itself from the conduct of its predecessor; (2) the country, as a whole, must have embraced democracy and the rule of law as the governance principles to which it should adhere; (3) the new leaders must be relatively untainted by histories of significant involvement in past crimes; (4) civil society, by and large, must support (or at least not passionately oppose) trials; and (5) the judicial system must be reasonably efficient and independent. (275)

Unfortunately, many of the case studies included in Prosecuting Heads of State illustrate the extent to which these conditions are rarely met.13 Perhaps the best example of a prosecution riddled with problems is the recent trial of Saddam Hussein of Iraq. Almost none of the factors noted by the editors as essential to success were present; moreover, additional complicating factors were at play:

- First, there were questions as to the legitimacy of the new government, which many acknowledged to be heavily influenced by the United States (246). More particularly, there was also a widespread perception that the United States controlled the prosecution of Hussein (246).
- Second, there was little support for the trial from civil society due to general unease with the US-led invasion of Iraq and the availability of the death penalty if Hussein were convicted (245).
- Third, the Iraqi judicial system was not sufficiently independent: there were many executive interventions in the process, including pressuring unpopular judges to resign (253).
- Fourth, the trial failed to live up to international standards for the rights of the accused, with the defence encountering many roadblocks in preparing its case (254).
- Fifth, the public had not fully embraced the idea of procedural fairness and, as a result, was dismayed at the length of the trial (251).
- Sixth, due to problems with trial fairness, there were questions as to the legitimacy of the verdict reached (255–6).
- Finally, since the trial only focused on a single event (the retributive attack ordered by Hussein on the residents of Dujail), it did not

13 Of course, the book also chronicles some relatively successful prosecutions, including those of Fujimori and Chiluba.
function as a historical record or acknowledge the harm done to the
general population (247). 14

While the prosecution of Saddam Hussein was particularly difficult due
to the factors noted above, other prosecutions profiled in Prosecuting
Heads of State share at least some of these complicating issues. For example, in the trial of Joseph Estrada of the Philippines, there was an
exceedingly slow prosecution (212) coupled with allegations of political
interference with the judiciary (115) and waning interest from civil
society (116). Though Estrada was eventually convicted, he was pardoned
just forty-three days later by the then-current President Arroyo (123). To
the extent that prosecutions of heads of state are often not sufficiently fair
or legitimate, it is difficult to fully embrace them as a means of enhancing
the rule of law.

B LAW OR POLITICS?
On reading the on-the-ground accounts of the eight trials considered,
one surmises that the question of whether or not a leader is prosecuted
and the success or failure of his or her trial is heavily influenced by
politics – whether domestic, regional, or international.

At the outset, the courts and tribunals specifically set up to try heads of
state often are created through political processes and, therefore, reflect
gopolitics:

War crimes tribunals are created by political bodies and processes, be they
decisions of the United Nations Security Council in the case of the ad hoc inter-
national criminal tribunals for the former Yugoslavia and Rwanda, agreements
between sovereign states and international organizations such as the UN in the
case of the Special Court for Sierra Leone, domestic war crimes tribunals such
as the Iraq Special Tribunal, or multilateral treaties in the case of the permanent
International Criminal Court. The political and strategic considerations of states
are thus frequently factored into decisions and negotiations on the formation of
international war crimes tribunals. 15

14 According to contributors Miranda Sissons & Marieke Wierda, ‘In 2003–2004 tribunal
staff argued that Iraqi criminal procedure required them to adopt a strategy in which
Hussein and other alleged violators were tried in multiple cases relating to multiple
incidents. Rather than face trial once for a number of crimes, leading regime figures
who were involved in more than one crime would have to undergo multiple trials.
The regime’s crimes would be exposed, and individual accountability would emerge
over the course of several cases’ (248). Of course, the practical effect of the
availability of the death penalty meant that Hussein never faced trial for other
atrocities committed while in power.

15 Kingsley Chiedu Moghalu, Global Justice: The Politics of War Crimes Trials (Westport:
Again, the case against Saddam Hussein is illustrative. The very existence of the Iraq Special Tribunal, its form, and ultimately its decision were all heavily influenced by politics. Prior to the US-led invasion of Iraq, Hussein was allegedly offered amnesty if he stepped down from power: ‘Although administration rhetoric stressed the need for accountability for Hussein’s crimes, it appears that accountability would have been abandoned if impunity was of greater political power’ (241). Moreover, many felt that the United States preferred a domestic Iraqi tribunal (rather than an international one) because it could control the process so as to minimize details of the United States’s earlier support for Hussein and ensure that the United States was not held to account for crimes committed in 2003 or in earlier conflicts (241). In a stark example, the judgment in the Dujail trial was handed down just two days before the US 2006 mid-term elections, which resulted in worldwide scepticism about the independence of the proceedings (255–6).

The end goals of prosecuting heads of state can also be characterized as political: to perpetuate or solidify liberal democracy and/or ‘build or maintain international peace.’ Unlike in an ordinary criminal prosecution, individual culpability is secondary to the primary purpose of breaking with the past. Moreover, once the leader is finally brought before a court, a guilty verdict seems foregone. In Iraq, it is arguable that the primary purpose of the trial was not to prosecute Hussein for crimes against humanity but to mark an end to the Ba’athist regime and usher in a US-backed liberal democracy. Indeed, once the trial commenced, the final verdict could not have been surprising to many.

Perhaps as a result of these political underpinnings, in the case of heads of state, the assumed logic inherent in formal justice (that no one or no interest is above the law and that justice is completely impartial) frequently clashes with political considerations that are not so pure, and tensions develop between justice and these other interests.’

Lutz and Reiger put it more starkly: ‘Politics can still trump legal process’ (290).

To the extent that prosecutions of heads of state have an added and ever-present political dimension, they may not, in practice, enhance the rule of law. More often than not, initiation of proceedings, conduct of the trial, and the verdict are heavily influenced by politics and thus lack independence. It seems that justice is rarely meted out fairly and impartially when the person on trial stands accused of crimes affecting masses of people while he or she was at the pinnacle of power. Such

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16 Ibid at 7–9.
17 Ibid at 7.
trials may advance the rule of law on the face of it insofar as they hold heads of state to accountable; however, they are often too fraught with political interventions to do so in an unbiased way.

This does not mean, however, that there is no justification for prosecuting heads of state; it simply means that the justification put forward by the editors (of enhancing the rule of law) may not be the most convincing one. Enhancing democracy and peace provide a more compelling rationale for the prosecution of former heads of state. If enhancing the rule of law remains a goal of such prosecutions, then perhaps there must be additional mechanisms for ensuring their independence from political considerations.

IV Conclusion: Are trials effective in achieving justice?

One looming question that *Prosecuting Heads of State* leaves largely unanswered is whether criminal prosecutions modelled on the adversarial system are the most effective means for achieving justice in countries that have suffered years of human rights abuses or are otherwise in transition. Do these trials prevent the recurrence of such abuses?\(^\text{18}\) Do they repair the damage caused to victims (to the extent possible)?\(^\text{19}\) Do they facilitate inquiry into how such events could have happened?\(^\text{20}\) Alternatively, do they undermine the transition to democracy by delaying reconciliation and highlighting divisions in society?\(^\text{21}\) Do they create an incentive for powerful groups to interrupt the democratic process to avoid criminal prosecution?\(^\text{22}\)

While the editors rightly note some of the problems with applying ordinary judicial processes to extraordinary cases,\(^\text{23}\) they do not go on


\(^\text{19}\) Zalaquett, ibid at 5; Lutz, ‘Lessons Learned,’ ibid at 325.


\(^\text{21}\) Moghalu, supra note 15 at 127.

\(^\text{22}\) Ibid at 127.

\(^\text{23}\) For example, the emphasis on procedural fairness for the accused and the right to self-representation can complicate and lengthen trials in situations where the population seeks speedy justice (282–4). With the heightened media attention, trials can be used by the accused as a pulpit to claim their innocence (283). The fact that prosecutors must prove the various charges with evidence means that the cases tend to focus on discrete events, which means the trial does not and cannot function as a
to consider whether other processes may be more desirable in terms of ensuring accountability, providing reparations to victims, creating an accurate historical record, preventing future abuses, and enhancing the rule of law.\textsuperscript{24} Nor do the editors include case studies that focus on such alternative processes. While this is appropriate given the aims of the book, readers new to the area of transitional justice should not assume that there is a general consensus in the international law community as to the desirability of trials.\textsuperscript{25} Indeed, the case studies themselves illustrate some of the shortcomings of such prosecutions, even if Lutz and Reiger ultimately conclude that criminal trials have an overall positive impact in transitional contexts. Whatever view one takes, this book contributes a current, readable, and uniquely grounded perspective to the debate.

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\item These alternative processes include civil proceedings, truth commissions, reparations programs, security system reforms, and memorialization efforts; see What Is Transitional Justice (December 2008), online: International Centre for Transitional Justice <http://www.ictj.org/en/tj/.
\item See pp xxi–xxvii, 33; and Kritz, supra note 18.
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