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Implementing International Law:
The Criminalization of Atrocities in Domestic Legal Systems Since World War II

DISSERTATION

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DOCTOR OF PHILOSOPHY

in Political Science

by

Mark Samuel Berlin

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DEDICATION

To my parents,
who have always supported me
in all of my pursuits

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ACKNOWLEDGMENTS

Part of what attracted me to pursuing an academic career was my (naïve) belief that it promised me a life free of dependence on others: a vocation in which I alone could maintain control over my work and thus be solely responsible for its quality. In the end, I learned that would only be partly true; while my failures throughout my time as a graduate student have indeed been attributable only to me, my successes have undoubtedly been the result of the assistance I received from what seem like countless individuals and institutions.

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ABSTRACT OF THE DISSERTATION

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Large bodies of research examine why states construct and ratify international legal agreements, yet little research has investigated the conditions under which states are likely to go further and legislate international legal norms into their domestic laws. The question is important, because the creation and ratification of treaties are often not enough for them to work as they are designed to – the enforcement of international law today increasingly depends on states enacting domestic implementing legislation that incorporates international legal rules into their domestic laws. To investigate why they do so, I examine the conditions under which states worldwide have legislated one set of international legal norms into their domestic laws: criminal prohibitions against genocide, war crimes, and crimes against humanity – also known collectively as "atrocity crimes." Drawing on research on norm diffusion and professional communities in policymaking, I propose a new theory to explain the spread of these laws. In brief, I argue that the adoption of domestic anti-atrocity laws around the globe since World War II has largely been the result of choices made by technocratic legal experts who were appointed by governments to lead national criminal code reform projects. Though implementing international law has not motivated governments to

initiate such reforms in the first place, legal experts have nonetheless used their delegated authority to codify norms – like anti-atrocity laws – that they believed embodied how a "modern" criminal code should look.

To test this theory, I use a multi-method research design. First, using time-series statistical methods and an original dataset I constructed documenting the existence and timing of national criminal laws against genocide, war crimes, and crimes against humanity in every country in the world that has adopted them since World War II, I find strong support for my hypothesis that states that undertake wholesale reforms of their national criminal codes are more likely to adopt national anti-atrocity laws. Second, drawing on interviews and archival research in the field, I conduct an in-depth case study of a particularly puzzling case of atrocity criminalization – Guatemala in 1973 – and find strong support for the causal mechanisms I theorize to be underlying these statistical correlations.

CHAPTER ONE

Introduction

Global politics has grown increasingly "legalized."[1] Since World War II, international legal regimes have proliferated, regulating issue areas ranging from gender discrimination to intellectual property to nuclear weapons. Yet as the importance of international law to global politics has grown, its function has also expanded. Traditionally, states established international legal agreements to regulate relations among themselves. Examples within this "classical" model of international law include treaties governing the protection of diplomats, the use of military force, and the arbitration of international investment disputes. But increasingly the kinds of international legal agreements states are constructing today go beyond this classical function and instead aim to govern *domestic* issue areas, such as civil rights, environmental protection, and labor regulations. In order for these latter types of agreements to work as they are designed to, states must usually do more than merely ratify them; states must often legislate – or "implement" – these treaty rules into formal domestic laws and institutions. Yet despite large bodies of literature on why states construct and ratify international legal agreements, very little research has focused specifically on the question of under what conditions states are likely to go further and implement international legal norms into domestic law.

This dissertation addresses this question by focusing on one set of international legal norms that the majority of states around the world have incorporated into domestic law: criminal prohibitions against so-called "atrocity crimes" – genocide, war crimes, and crimes against humanity.[2] States implement these norms by adopting national criminal laws that enable their

[1] Goldstein et al. 2000.
[2] Scheffer 2001.

domestic courts to prosecute individuals for these crimes, a step that is crucial for the international anti-atrocity regime to function as it is designed to. Since these norms were first codified in international law following World War II, over two thirds of states have adopted a domestic criminal statute for at least one of these three categories of atrocity crime.[3]

This trend is particularly puzzling for two reasons. First, these laws impose criminal liability on government and military officials for state-sponsored abuses, which presumably conflicts with governments' own interests. Second, for at least the first few decades during which states adopted them, these laws were the focus of very little advocacy from the actors to whom scholars typically attribute the spread of human rights norms, that is, activist civil society organizations. Why then have states adopted these laws and what explains the patterns over space and time by which they have done so?

In this dissertation, I propose a new theory to explain the adoption of national anti-atrocity laws. In brief, I argue that the domestic legislation of anti-atrocity laws around the world over the past sixty years has largely been the result of choices made by technocratic legal experts who were appointed by governments to lead national criminal code reform projects. Though implementing international law has not motivated governments to initiate such reforms in the first place, these experts nonetheless used their delegated authority to codify norms – like anti-atrocity laws – that they believed embodied how a "modern" criminal code should look. At the same time, the technocratic character of these reform processes has helped depoliticize these laws, thus provoking less scrutiny from policymakers than we would expect had these laws been proposed as standalone legislation.

[3] This number is based on original data I have collected for this study. These data are discussed in more detail in Chapter Four.

This argument helps explain some puzzling aspects of the patterns by which states have adopted anti-atrocity laws. On the one hand, the adoption of anti-atrocity laws has occurred in what the existing literature would consider unlikely places, that is, states that at the time of adoption either lacked strong civil societies or routinely violated their citizens' human rights. The explanation for this puzzle is that the aims of modernization that typically characterize criminal code reform projects helps imbue these processes with a depoliticized, technocratic character that leads governments to grant experts a high degree of deference to mold designs around what they deem to be modern standards. On the other hand, adoption has either taken decades or never occurred in some countries that presumably would be most likely to embrace these norms, that is, states that have traditionally been strong advocates for human rights. The explanation for this puzzle is that the legislation of anti-atrocity laws is typically, at minimum, a low priority for governments and, at most, contrary to their interests. Therefore, it is often not until these states initiate large-scale reforms that a class of actors who are likely to be aware of and favor these norms is empowered to put them on the legislative agenda.

In the broadest terms, this dissertation has two agendas, each of which speaks to a growing body of political science scholarship. The first agenda concerns the general question of why states implement international law. Despite a proliferation of research over the past two decades on why states establish and commit to international legal agreements, relatively little research has examined why states take the next step and legislate international legal norms into domestic law. Meanwhile, a growing body of research on state compliance with international law has mostly overlooked implementation as an explanatory factor, even though implementation is meant to facilitate compliance. In other words, research on the dynamics of international law has mostly ignored a phenomenon – implementation – that is crucial for how international law is

designed to work. By explaining why states have adopted national anti-atrocity laws*, the first aim of this study is to contribute to our more general understanding of under what conditions states are likely to implement international law.* To that end, this study identifies one, so far unexamined pathway to implementation – what I term "institutional redesign" – that is potentially generalizable to other international legal norms.

The second agenda concerns the more specific question of how international human rights norms have emerged and spread since the end of World War II. Recently researchers have focused specifically on the rise of norms relating to the criminal accountability of individuals for state-sponsored atrocities. The shift from impunity to criminal accountability for state-sponsored abuses – embodied in developments like the proliferation of post-conflict justice processes and the establishment of the International Criminal Court – represents one of the most significant changes to the norms of global politics since World War II.[4] Yet despite research on various components of this shift, scholars have yet to systematically examine how and why states have formally institutionalized individual criminal accountability norms into their domestic legal systems. By documenting and explaining for the first time the patterns by which states have adopted national anti-atrocity laws, *the second aim of this study is to shed new light on how norms relating to individual criminal accountability have spread around the world since World War II.* To that end, my theory contrasts with a large body of empirical studies that attribute the spread of human rights norms to bottom-up political pressure on national governments from civil society actors. Instead, my account highlights the more top-down role of government-appointed technocratic legal experts in advancing these norms – in the face of what is often a lack of civil society activity around them – as well as the moments of opportunity and sources of influence that spur these experts to do so.

[4] Teitel 2011; Sikkink 2011.

This remainder of this chapter has four sections. The first section elaborates on why implementation is so important to international law today, and the second section relates these issues to the international anti-atrocity regime in particular. The third section examines what is arguably the leading explanation for the diffusion of human rights norms, that is, pressure from civil society actors, and makes a case for why this explanation is unlikely to account well for the spread of domestic anti-atrocity laws. The fourth section presents my research design and outlines the plan of the dissertation.

The importance of implementation of international law generally

International Relations (IR) scholars over the past two decades have taken note of increasing international "legalization," or a "move to law," in virtually all areas of global politics.[5] But international law has not only increased in sheer volume; its reach has also expanded. "Classical" international legal agreements were meant to regulate *international* relations, that is, interactions between sovereign states.[6] Classical treaties governed issues like trade, interstate dispute resolution, and limits on the use of military force. Such treaties still constitute much of international law today, yet increasingly treaties now go beyond interstate relations and instead seek to govern what are traditionally considered to be domestic issue areas. Treaties in this "post-classical" model govern issues like environmental protection, labor standards, and civil and political rights, and these have less to do with how states interact with one another and more to do with how states govern their own populations and resources.[7]

[5] Goldstein et al. 2000; Koremenos, Lipson, and Snidal 2001.
[6] Slaughter and Burke-White 2006, 327.
[7] Ibid., 328–329; Diehl, Ku, and Zamora 2003, 49.

When it comes to these "post-classical" treaties, compliance and enforcement typically require states to do more than merely ratify a treaty.[8] Because post-classical international law is meant to govern domestic policy areas, its rules must be enforced at the domestic level, operating through domestic laws and institutions. That means that states must usually adopt new domestic legislation or formally modify existing institutions in order to comply with and enforce these agreements. Therefore, such treaties usually include a provision that obligates states to make the necessary changes to their domestic laws to make treaty rules enforceable. Obviously, this is not to say that formal legal and policy changes are sufficient conditions to ensure states comply with treaty obligations – but they *are* usually necessary.[9] For example, environmental treaties that establish regimes to protect endangered wildlife largely cannot be enforced unless state parties adopt national regulatory frameworks that turn international rules into actionable domestic laws.[10] Similarly, human rights treaties that define minimum standards of criminal due process often cannot be enforced unless states incorporate these standards into either their constitutions or criminal procedure codes.[11]

International law thus increasingly depends on implementation in order to effect compliance and enable enforcement. By "implementation," I mean "measures that states take to make international accords effective in their domestic law."[12] Implementation consists of a

[8] For the purpose of this study, compliance is defined as behavior that conforms to legally obligatory prescriptions. Enforcement refers to the set of official actions designed to effect compliance and remedy noncompliance. See note 12 below for more discussion of the differences between implementation, compliance, and enforcement.
[9] Diehl, Ku, and Zamora 2003, 49.
[10] Raustiala 1997.
[11] Harland 2000. In some cases, treaties can be self-executing, that is, they can be directly applied in domestic law, particularly by courts, absent new, specific legislation incorporating treaty rules. Nevertheless, law and practice regarding this so-called "direct application" of treaties in domestic law differ from state to state and are often ambiguous or inconsistent. In any case, even in many systems that supposedly allow direct application, judges are often unwilling to apply treaty rules absent specific implementing legislation. Heyns and Viljoen 2001, 490.
[12] Jacobson and Weiss 2000, 4. An example can help clarify the differences between implementation, compliance, and enforcement. *Implementing* an anti-pollution treaty would entail passing domestic legislation that establishes criminal penalties for certain polluting behavior. *Compliance* would result if a potential polluter adhered to the law's

variety of official actions, but most commonly involves adopting new domestic laws and regulations, or modifying existing institutions.[13] My use of the term thus restricts implementation to these formal legal actions, as opposed to a broader definition that might include additional measures, like mobilizing interest groups to promote new legal obligations or third party monitoring by international organizations to oversee domestic compliance and enforcement. To the extent that these activities ultimately help produce compliance, they could also be seen as part of the implementation process.[14] However, I define the concept of implementation more narrowly for two reasons. First, as mentioned above, the adoption of new formal legal provisions is usually the necessary minimum action states must take in order make their obligations effective. Thus, in many cases, the other components of implementation have little import in the absence of formal legal change. Second, limiting the concept of implementation in this way helps focus this study on the particular behavioral logics that are distinctive to the act of adopting new formal legal provisions.

Despite its importance for the effective operation of international law, scholars have devoted relatively little attention to uncovering the particular explanatory logics of implementation.[15] To be sure, scholars often acknowledge the importance of implementation, but they usually subsume it under the explanandum of compliance, as opposed to isolating it as a phenomenon that is subject to its own distinctive explanations. For example, leading rationalist and constructivist studies on compliance with human rights treaties both agree that the mobilization of civil society to pressure governments is often key to moving states "from [treaty]

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provisions. That law might be *enforced* through a domestic monitoring and reporting regime, and if the polluter broke the law, *enforcement* would entail criminal punishment for its noncompliance.

[13] Ibid.

[14] Victor, Raustiala, and Skolnikoff 1998a, 4.

[15] A handful of exceptions exist: Victor, Raustiala, and Skolnikoff 1998b; Weiss and Jacobson 2000; Grugel and Peruzzotti 2012; McGann and Sandholtz 2012; Betts and Orchard 2014; Yoo and Boyle Forthcoming.

commitment to compliance."[16] In making this argument, these studies show that one path through which mobilization leads to compliance is through pressure on governments by activists to implement human rights treaty commitments into domestic law. By establishing new legal bases for litigation or focal points for political pressure, implementation can then lead to improved compliance.[17] In other words, implementation in these accounts appears as an intervening variable between mobilization and compliance. Thus, explanations for implementation and compliance in these studies lead back to the same factor: mobilization. Yet as I illustrate in my own theory, sometimes implementation occurs independently from the factors that produce compliance, so in these cases understanding implementation requires attention to its distinctive logics.

In sum, implementation plays an increasingly important role in the operation of international law today. Yet despite research on other aspects of how international law works, very little attention has been paid to explaining formal, domestic implementation. By making sense of the patterns by which states have implemented one particular set of international legal norms, the purpose of this study is to learn about the more general conditions under which states are likely to implement international law.

The importance of implementation of atrocity law specifically

The substantive focus of this study is the implementation of a set of international legal norms pertaining to so-called "atrocity crimes." The term "atrocity crimes," or "atrocity law," refers to a set of prohibitions that are codified in international law and which establish individual criminal

[16] Risse, Ropp, and Sikkink 2013; Simmons 2009.
[17] Risse, Ropp, and Sikkink 1999, 15. For example, Simmons argues that one reason Colombia improved its compliance with the Convention to Eliminate All Forms of Discrimination Against Women was because civil society groups pushed the government to implement its treaty commitments into the country's new constitution. Simmons 2009, 245–253.

liability of government and military actors for state-sponsored human rights violations.[18] The most prominent atrocity crimes in both political and scholarly discourses are what are sometimes referred as the "core" international crimes: genocide, war crimes, and crimes against humanity.[19] These crimes are defined in a set of treaties and international court statutes that can be thought of as constituting an international anti-atrocity regime.[20] Table 1.1 lists the international legal instruments that make up this regime.

Atrocity law is a good place to examine why and how states implement international law, because, since its origins in the wake of World War II, atrocity law has been designed to depend primarily on domestic implementation for its enforcement.[21] When it comes to prosecutions for atrocity crimes, *international* courts, like the Nuremberg Military Tribunal or the international criminal tribunals for Rwanda or the former Yugoslavia, tend to receive most of the public and scholarly attention. Yet atrocity law treaties are designed to rely on enforcement – that is, criminal prosecution of individuals for these acts – primarily through *domestic* courts, not international ones. For example, the 1949 Geneva Conventions – which for the first time established an international criminal liability regime for war crimes – created an enforcement regime that relies exclusively on domestic courts. Even the centerpiece of the international anti-atrocity regime today, the International Criminal Court (ICC), which has jurisdiction over genocide, war crimes, and crimes against humanity, is legally allowed to act only as a court of last resort. That is, it is activated only when member states are either unable or unwilling to

[18] Scheffer 2001; Ratner, Abrams, and Bischoff 2009. More specifically, these prohibitions refer to violations of a set of human rights norms known as "physical integrity" rights. Physical integrity rights are "rights individuals have to be free from arbitrary physical harm and coercion by their government," such as "the rights to not be subjected to torture, political imprisonment, extrajudicial killing, and disappearance." Cingranelli and Richards 2010, 404.
[19] Cryer 2005, 4.
[20] Abbott 1999; Rudolph 2001.
[21] Bassiouni 1983, 29–30; El Zeidy 2008.

Table 1.1: International legal instruments in the international anti-atrocity regime

Short title	Official title	Year adopted
Nuremberg Charter	Charter of the International Military Tribunal	1945
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide	1948
First Geneva Convention	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	1949
Second Geneva Convention	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	1949
Third Geneva Convention	Geneva Convention relative to the Treatment of Prisoners of War	1949
Fourth Geneva Convention	Geneva Convention relative to the Protection of Civilian Persons in Time of War	1949
1956 Slavery Convention	Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery	1956
Statutory Limits Convention	Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity	1968
Apartheid Convention	International Convention on the Suppression and Punishment of the Crime of Apartheid	1974
Additional Protocols I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts	1977
Additional Protocols II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts	1977
Convention against Torture	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	1984
ICTY Statute	Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991	1993
ICTR Statute	Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994	1994
Rome Statute	Rome Statute of the International Criminal Court	1998
Enforced Disappearances Convention	International Convention for the Protection of All Persons from Enforced Disappearance	2006

pursue cases in their domestic courts. (This is referred to as the ICC's "complementarity regime").[22]

In order for states' domestic courts to fulfill the role that the anti-atrocity regime assigns to them, states' legal systems must be legally competent to prosecute these crimes. Typically, this capacity requires the existence of a domestic statute that defines and criminalizes each of these crimes. In theory, states with so-called "monist" legal systems – that is, states that consider international law to be one with their domestic legal systems – should be able to enforce international law absent domestic implementing legislation. The reality, however, is more complicated. As leading scholars have pointed out, the direct application of criminal treaties is neither so simple nor desirable, and thus domestic implementation is still crucial.[23] While some states have carried out domestic prosecutions for atrocity crimes in the absence of specific atrocity legislation, the widely accepted norm against retroactive prosecutions – also known as the "principle of legality" – presents major legal and ethical challenges to doing so. Indeed in some cases, countries like Norway and Switzerland, for example, have been forced to abandon genocide prosecutions based on universal jurisdiction because their legal systems lacked a domestic genocide statute.[24] Given this requirement, atrocity law treaties virtually always contain some type of provision that obligates states to enact the legislation necessary to ensure their domestic courts can carry out relevant prosecutions. For example, Article 5 of the Genocide Convention stipulates: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention." The act of adopting such domestic legislation – specifically, domestic criminal

[22] Schabas 2011, 190–199. See also the Preamble and Articles 1 and 17 of the Rome Statute.
[23] Schabas 2009, 404–409; Wouters and Verhoeven 2010, 3–6; Dörmann and Geiß 2009, 707–710.
[24] Reydams 2003, 198; Schabas 2009, 408–409.

statutes against particular atrocity crimes – is the specific form of implementation that I examine in this study.

But examining why states implement the international anti-atrocity regime is important not merely because of its practical implications; accounting for such laws can also shed light on a broader phenomenon to which scholars have begun to pay increasing attention, that is, the more general rise of global norms related to individual criminal accountability for atrocities. The idea of individual criminal accountability of government officials for state-sponsored human rights abuses was once considered antithetical to both the principles of international law and the norms of global politics. Traditionally, government actors were considered immune from criminal liability for official actions.[25] Yet, as social scientists and legal scholars have now begun to document, the idea of individual criminal accountability, if still highly controversial, has come to pervade and shape both the discourse and practice of global politics.[26] For example, since first emerging in the 1970s, post-conflict and post-transition domestic prosecutions of government officials have occurred far more frequently, rising rapidly since the end of the Cold War, while the adoption of amnesty laws for government officials has become far rarer.[27] Meanwhile, since being established as the world's first permanent international criminal court in 1998, the ICC has indicted 36 individuals, including the unprecedented indictments of two sitting and one former head of state.[28] Thus, according to Kathryn Sikkink, the world is witnessing what she and her co-authors refer to as a "justice cascade," that is, a "shift in the legitimacy of the norm of individual

[25] Ratner, Abrams, and Bischoff 2009, 3–6; Sikkink 2011, 14.
[26] Lutz and Sikkink 2001; Meron 1998; Sikkink 2011; Teitel 2002; Teitel 2011; Vinjamuri 2010; Anderson 2009; Kim and Sharman 2014.
[27] Sikkink and Kim 2013, 273–274. According to data collected by Kathryn Sikkink, Carrie Booth Walling, and Hun Joon Kim, out of 71 countries that transitioned to democracy between 1980 and 2006, 33 carried out prosecutions for human rights violations. Kim 2012, 309.
[28] The two indicted sitting heads of state were Sudanese president Omar al-Bashir (still at large) and Libyan leader Muammar Gaddafi (now deceased). The one indicted former head of state was former Ivory Coast president Laurent Gbagbo. See the website of the ICC, http://www.icc-cpi.int.

criminal accountability for human rights violations and an increase in prosecutions on behalf of that norm."[29] This shift is remarkable because the core ideas underlying it – that government officials can and should be held accountable for human rights abuses – challenge older, long-protected doctrines, such as sovereignty and sovereign immunity, that have traditionally conferred immunity on state officials from such prosecutions.[30]

The rise of individual criminal accountability norms has prompted scholars to devote increasing attention to its various particular manifestations.[31] In one stream of literature, scholars have examined the international institutionalization of atrocity law, asking questions such as why states establish international criminal tribunals or join treaties that criminalize human rights violations.[32] In another stream of literature, scholars have examined domestic, post-transition prosecutions of government officials. These studies have sought to explain why some transitional societies pursue such prosecutions while others do not, as well as why such prosecutions proliferated beginning in the 1980s and 90s.[33]

Nevertheless scholars have mostly overlooked the more general issue of why and by what patterns states have incorporated anti-atrocity laws into their domestic legal systems. This is surprising given the crucial function domestic implementation is meant to – and does – play in the functioning of this regime. According to Sikkink and Kim, there is "a decentralized but interactive system of accountability that is emerging around the world for violations of core political rights," and according to the authors' data, domestic courts have carried out the bulk of

[29] Sikkink 2011, 5. The concept of the justice cascade draws on the broader notion of "norm cascades," which refers to a particular, widely applied model of norm diffusion whereby the influence and adoption rate of a particular norm increases over time, finally reaching a point after which its legitimacy is taken-for-granted. See Finnemore and Sikkink 1998.
[30] Sikkink 2011, 14–18.
[31] Sikkink and Kim 2013.
[32] Bass 2000; Smith 2012; Rudolph 2001; Struett 2008; Simmons and Danner 2010; Goodliffe and Hawkins 2006.
[33] Backer 2003; Kim 2012; Sikkink 2011.

these prosecutions.[34] Yet since domestic courts largely cannot carry out prosecutions for atrocity crimes absent national criminal laws that define and prohibit them, the spread of such laws calls out for explanation.

Thus the criminalization of atrocities in domestic legal systems is important not just for what it tells as about why and when states will implement international law, but also for what it reveals about how the idea of individual criminal accountability for atrocities has achieved its current status. For scholars of norm diffusion the spread of international norms to domestic institutions is a key mechanism by which norms gain international legitimacy. According to the norm cascade model of diffusion, the adoption of a new norm by an increasing number of states contributes to redefining global standards of how states are expected to look and act.[35] When states adopt domestic anti-atrocity laws – even for insincere or cynical motivations – they effectively endorse the idea that it is appropriate and desirable to hold government officials criminally accountable for violent abuses, an idea they have traditionally resisted. Thus, as with the other components of the justice cascade that scholars have examined, the domestic implementation of atrocity law helps redefine global understandings regarding the appropriate limits of state behavior and official accountability as well as solidify the norm of individual criminal accountability. Therefore, by accounting for the spread of these particular laws, this study sheds new light on how the anti-atrocity regime more generally has garnered the legitimacy it now enjoys.

[34] Sikkink and Kim 2013, 271–272.
[35] Finnemore and Sikkink 1998, 902.

Civil society: The leading explanation for the implementation of human rights norms

International human rights law fundamentally differs from most other bodies of international law in that it does not depend on reciprocity. In the case of an international trade agreement, for example, what states lose in domestic policymaking autonomy over issues like tariff rates, they presumably make up in gains from the reciprocal compliance of others, thus ensuring incentives for all parties to comply over time. If states commit to treaties to get the benefits of reciprocal compliance, then it reasons that states likely implement those treaties to ensure they receive those benefits. But human rights law is different. As Simmons has noted, states do not need the cooperation of other states to enforce human rights standards in their own territories, so from a collective action standpoint, there appear to be no mutual gains from ensuring the proper operation of a human rights treaty regime.[36] From this perspective, a state should be likely to implement a human rights treaty only if it is sincerely committed to improving its own human rights performance. Yet much research suggests that because the enforcement provisions of human rights treaties are weak, states often view ratification as a relatively costless act. Cross-national studies that find little direct link between ratification and subsequent practice thus suggest that states often ratify these treaties for reasons other than a sincere commitment to improving their human rights performance, such as to appease international organizations or to present themselves as a modern, progressive states.[37] Therefore, we should expect that many states that ratify human rights treaties will assign low priority to implementing them, thus making their widespread implementation puzzling.

Though little research has focused specifically on the question of why states implement international law, existing literature on the more general question of how and why international

[36] Simmons 2009, 123.
[37] Hathaway 2007; Smith-Cannoy 2012; Goodliffe and Hawkins 2006; Cole 2005; Hafner-Burton and Tsutsui 2007.

human rights norms diffuse around the world would seem to offer plausible hypotheses for the domestic legislation of international atrocity law. These studies suggest several such hypotheses – and I test many of them in the analyses in subsequent chapters – but in this chapter I focus on assessing what is arguably the most prevalent and well-supported explanation: civil society influence.

By "civil society," I am referring to nonstate actors who organize to advocate their policy positions to governments and who are primarily motivated by moral beliefs, as opposed to professional norms or profit.[38] In the human rights literature, "civil society" often refers to nongovernmental organizations (NGOs). These may be purely domestic NGOs, such as the American Civil Liberties Union, or international (INGOs), such as Amnesty International. But the concept of civil society as I use it to characterize common explanations in the human rights literature also encompasses so-called transnational advocacy networks,[39] which are cooperative networks and coalitions of multiple NGOs across borders, as well as social movements,[40] which refers to a broader phenomenon of popular mobilization beyond the advocacy work of formal organizations but which typically undergirds the work of these organizations.

An extensive body of literature attributes the spread of human rights norms to the influence of domestic and international civil society actors. Specifically, this literature highlights two broad types of influence that these actors exert. First, civil society actors may use a variety of strategies to *directly* influence government behavior. In Risse, Ropp, and Sikkink's influential "spiral model," domestic and international nongovernmental actors cooperate to direct international attention to ongoing abuses and mobilize pressure from both domestic populations

[38] Keck and Sikkink 1998, 2. Moral beliefs are the same as what Goldstein and Keohane refer to as "principled" beliefs, which "consist[] of normative ideas that specify criteria for distinguishing right from wrong and just from unjust." Goldstein and Keohane 1993, 9.
[39] e.g. Keck and Sikkink 1998.
[40] e.g. Tsutsui, Whitlinger, and Lim 2012.

and foreign governmental actors to compel the target government to address human rights issues.[41] States then seek to defuse these pressures by making tactical concessions, such as ratifying human rights treaties or adopting new laws that implement human rights treaty commitments. In another highly influential study, Simmons argues that even though many governments ratify human rights treaties insincerely, ratification can have the unintended consequence of galvanizing domestic civil society actors to demand their governments live up to their treaty obligations. As with the spiral model, implementation in Simmons' account is one way that governments may seek to appease such groups.[42] The implication arising from both of these prominent theories is that implementation is something civil society actors demand, and governments carry it out largely as a concession to such pressure.[43]

Second, other research has argued that civil society actors can *indirectly* promote norm diffusion by socializing polities to identify with and embrace human rights norms. Political scientist Emilie Hafner-Burton and cultural anthropologist Sally Merry have both argued that local NGOs can play a crucial role in legitimizing what often appear to be alien or elitist ideas about human rights for local communities by reframing globalist ideas to be relevant to local needs and translating human rights discourse into local vernacular.[44] Likewise, Kim argues that, through local outreach that "help[s] local actors recognize their situations as human rights problems," INGOs can stimulate new demands among populations for governments to establish national human rights ombudsmen and other oversight institutions.[45] Sociologists in the world society tradition make a similar argument. For these scholars, INGOs are a primary conduit through which world cultural notions of how a state should look and act – as institutionalized in

[41] Risse, Ropp, and Sikkink 1999.
[42] Simmons 2009.
[43] See also Smith-Cannoy 2012; Hafner-Burton and Tsutsui 2005.
[44] Hafner-Burton 2013, 151–159; Merry 2005.
[45] Kim 2013, 514.

international law and international governmental organizations – are inculcated into domestic political consciousness. From this perspective, greater INGO penetration in a given country increases the likelihood that the government will perceive the adoption of human rights norms – including implementation – as something it *should* do. The implication of these socialization arguments is that implementation should be more likely in places that have greater domestic and international civil society activity.

Scholars have thus identified a range of means by which civil society actors facilitate the diffusion of human rights norms. Based on these theories, both quantitative and qualitative studies have found that the strength of domestic or international civil society in a given country positively correlates with a variety of different outcomes related to human rights norms, including transitional justice prosecutions,[46] national human rights oversight institution foundings,[47] human rights treaty ratifications,[48] gender equality policies,[49] children's rights policies,[50] and general levels of state repression.[51] In short, scholars have well established that civil society actors are central instigators of human rights norm diffusion.

On its face, it would seem likely that civil society actors have likewise been responsible for the spread of domestic anti-atrocity laws. That is because, like other human rights norms, domestic anti-atrocity laws would, at least, seem to offer governments little material benefit, and at most, potentially impose great costs on them. Therefore, the actors most likely to push for these laws would be human rights NGOs. On the one hand, countries with the strongest human rights records would be unlikely to experience atrocities, so domestic legislation would

[46] Kim 2012; Backer 2003; Sikkink 2011.
[47] Kim 2013; Koo and Ramirez 2009.
[48] Cole 2005; Landman 2005.
[49] True and Mintrom 2001; Htun and Weldon 2012.
[50] Grugel and Peruzzotti 2012.
[51] Hafner-Burton and Tsutsui 2005; Neumayer 2005.

seemingly be unneeded. To the extent that these governments may seek to affirm their principled commitment to the anti-atrocity regime, ratifying relevant treaties – which is a higher-profile act than adopting new domestic legislation – would likely be sufficient to fulfill this symbolic function. Therefore, these governments would be unlikely to perceive the implementation of atrocity law as a high priority, and thus would only be likely to undertake implementation if domestic actors, like civil society groups, pressured them to do so. On the other hand, governments with weaker human rights records would be cautious about adopting domestic legislation that could subject their own current or future officials to criminal liability. Again, to the extent that these governments may seek reap the symbolic benefits that come with ratifying a treaty, they would be less likely to undertake the lower-profile act of implementation absent concerted pressure from civil society actors.

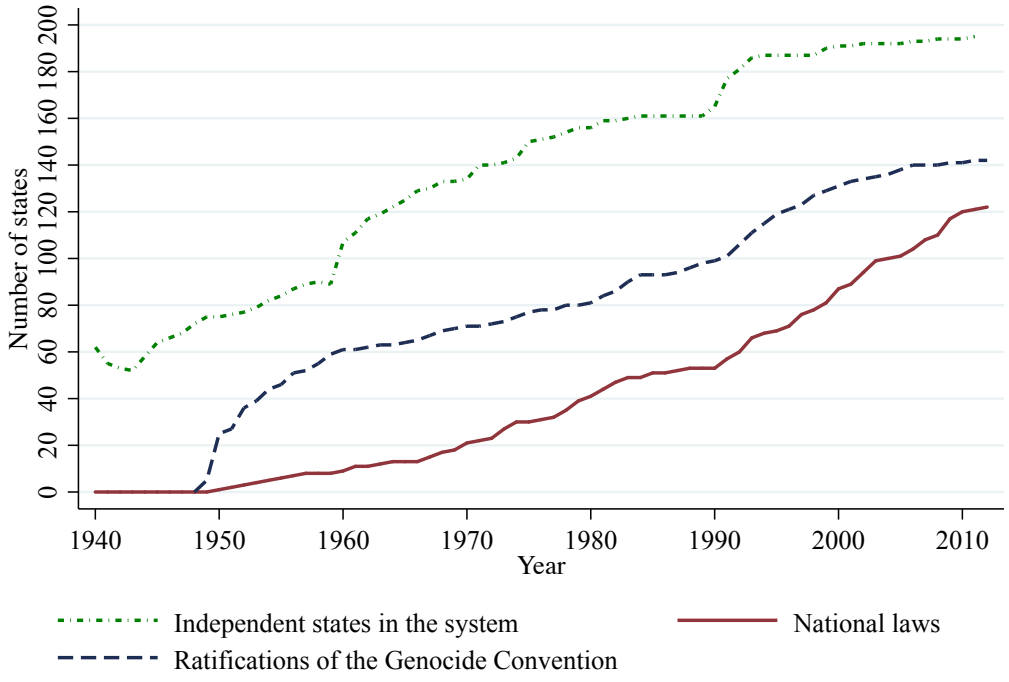
Yet closer scrutiny of the patterns by which domestic anti-atrocity laws have spread reveals at least three reasons to doubt that civil society groups have been the leading force behind this phenomenon. First, many countries adopted these laws in a period before the international human rights movement emerged as an influential force in global politics. Figures 1.1, 1.2, and 1.3 display the number of countries over time that have adopted national criminal laws for each of the three crimes under examination here. (These data are discussed in more detail in Chapter Four.) As the data show, dozens of states adopted domestic criminal laws against genocide and war crimes in the first three decades following World War II. However, as historians of the international human rights movement have documented, human rights organizations did not begin to engage in public pressure and grassroots outreach – to which scholars of norm diffusion now attribute these groups successes – until the mid to late 1970s.[52] For example, by the time that the forerunner to Human Rights Watch, Helsinki Watch, was founded in 1978, 35 countries

[52] See, for example, Neier 2012; Moyn 2010; Eckel 2013.

already had national criminal laws against genocide, 46 against war crimes, and 7 against crimes against humanity.[53] Given that global human rights advocacy only emerged in the 1970s, it is puzzling how many countries adopted these laws as early as the first few decades following World War II.

Second, to the limited extent that domestic and international human rights groups did exist and exercise political influence during 1950s, 60s, and 70s, many of the countries that adopted these laws during this period would have been highly unlikely places for civil society activity, let alone successful advocacy campaigns. Specifically, many of the adopters during this period were highly authoritarian Latin American and Eastern European countries – such as Albania, Bolivia, El Salvador, and Romania, to name just a few – that tolerated little domestic activism.

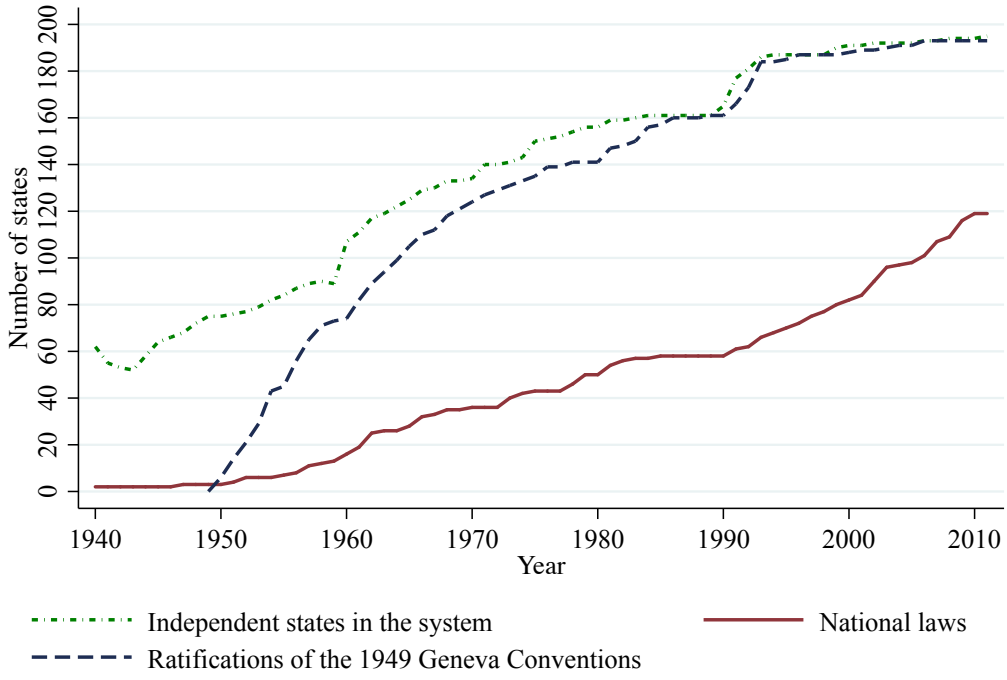
Figure 1.1: National criminal laws against genocide, 1945-2011



Note: States that adopted national laws prior to independence are counted as of their independence date

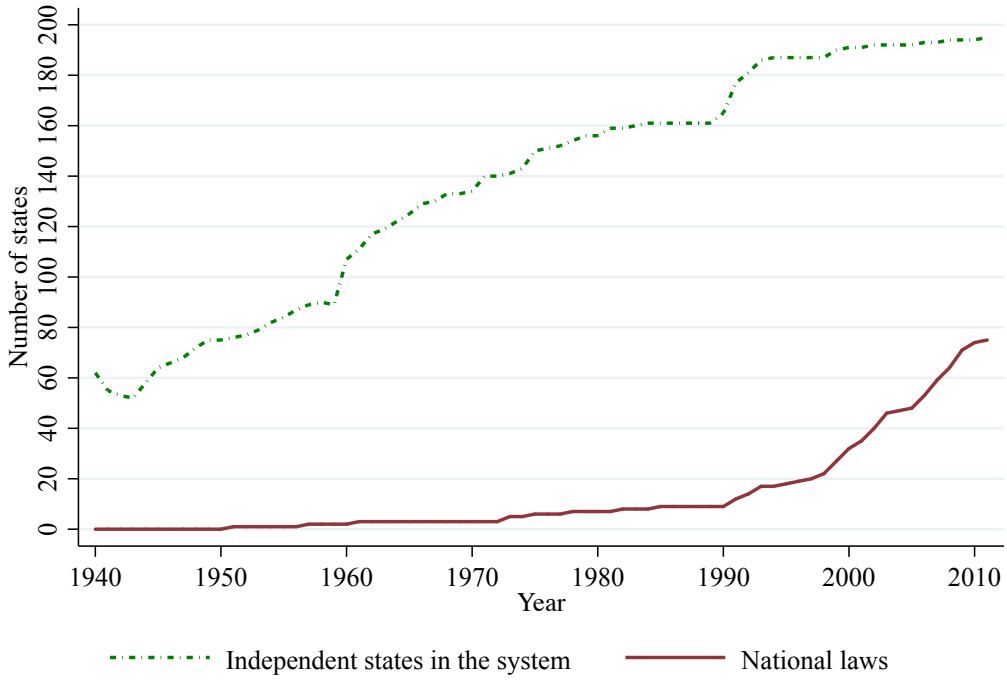
[53] These counts include states that were independent by 1978 but which had adopted laws prior to independence.

Figure 1.2: National criminal laws against war crimes, 1940-2011



Note: States that adopted national laws prior to independence are counted as of their independence date

Figure 1.3: National criminal laws against crimes against humanity, 1940-2011



Note: States that adopted national laws prior to independence are counted as of their independence date

Third, even as human rights groups did gain prominence and influence in the 1980s and 90s, the implementation of atrocity law was largely absent from their advocacy agendas – at least until the International Criminal Court was established in 1998. Traditionally, human rights NGOs have focused more on either bringing public attention to ongoing abuses or promoting the international legalization of new human rights norms, while devoting relatively little advocacy to the domestic implementation of those norms. For example, Amnesty International (AI) pioneered the now commonplace human rights NGO strategies of popular mobilization and public shaming of governments. But for the first few decades following its founding in 1961, AI mostly focused on using those tactics either to advocate for the release of political prisoners or to call attention to governments' use of torture.[54] Starting in the late-1980s and 1990s, organizations like Human Rights Watch did start advocating for applying international criminal law norms to government abuses,[55] but these groups did not make the domestic adoption of anti-atrocity legislation part of their advocacy agendas. However, things changed with the creation of the ICC in 1998. Human rights NGOs were central to the effort to create and design the ICC,[56] and given the importance of complementarity to its operation, these NGOs have since then devoted extensive advocacy efforts to promoting the domestic implementation of the Rome Statute.[57] Given this targeted advocacy, it is likely that after 1998, variation in the implementation of atrocity law across states would correlate with relative civil society strength. Yet this still leaves unexplained fifty years of the spread of these norms.

In sum, if we should expect human rights NGOs to have played a leading role in the domestic implementation of atrocity law, we should see such a relationship only after 1998 –

[54] Clark 2001. For example, Sikkink notes that even though Amnesty International led the initial movement to bring attention to torture in Greece in the late 1960s, it did not advocate for actual prosecutions. Sikkink 2011, 39.
[55] Sikkink 2011, 106–108.
[56] Struett 2008.
[57] Varda n.d., 12–18. See, for example, Human Rights Watch 2001; Amnesty International 2010.

fifty years after the anti-atrocity regime was born and several dozen countries had already adopted anti-atrocity laws. Despite the above reasons to doubt the civil society explanation, I test this explanation more formally in subsequent chapters alongside a variety of other alternative explanations drawn from the literatures on norm diffusion and human rights. But first, in the next chapter, I present a new theory that stands in contrast to the bottom-up approach of civil society explanations and instead focuses on top-down processes that are led by government-appointed technocratic actors and triggered by large-scale institutional reform processes.

Research design and plan of the dissertation

This dissertation uses a multi-method research design to test my institutional redesign theory of implementation on the question of why states have implemented international atrocity law into their domestic legal systems. My approach is based on a nested analysis design, which combines the distinctive strengths of large-N statistical methods with in-depth case studies to offer a more rigorous test for a theory and make generalizable causal inferences with greater confidence than would be possible with either method alone.[58] Nested analysis begins with quantitative analyses of large numbers of cases to test for statistically significant correlations between the explanatory and dependent variables of interest. If the researcher's predictions are confirmed, the next step is to conduct in-depth qualitative studies of individual cases. The purpose of the case studies is to trace the causal process linking the explanatory and dependent variables to verify whether the causal mechanisms hypothesized to be driving the statistical correlations are indeed present in particular cases.

Cases for in-depth study are selected using specific analytic criteria to maximize inferential leverage. While Lieberman, who developed the nested analysis approach, advocates

[58] Lieberman 2005.

selecting "typical" cases, I instead follow Gerring in contending that "pathway" cases offer greater inferential potential when it comes to confirming the validity of a hypothesized causal process. Pathway cases are cases in which both the explanatory variable and outcome of interest are present or high, yet other competing explanatory variables are absent or low. In other words, the case should be "most likely" for the theory of interest and "least likely" for alternative theories. This allows a researcher to isolate the causal effect of an explanatory variable of interest to the greatest degree possible and thus assess the empirical causal process in light of the predicted mechanisms while minimizing the confounding influence of alternative explanatory factors. A pathway case is thus most appropriate when the researcher is already confident that a given explanatory variable produced the outcome in a particular case but would like to verify the actual causal mechanisms connecting the two.[59]

My analysis thus proceeds through the next four chapters as follows. In addition to the previews presented here, each chapter includes additional discussion of my specific methodological choices and how they serve the overarching logic of my research design.

Chapter Two is the theoretical core of the dissertation. I draw on research on agenda setting, professional communities in policymaking, and norm diffusion to develop a general theory of why and how the large-scale reform of national institutions – or what I term "institutional redesign" – facilitates international legal implementation. I then discuss the practice of criminal code reform and briefly make a case for my institutional redesign theory is well positioned to explain the implementation of atrocity law through criminal code reform.

Chapter Three probes the plausibility of my argument in more detail by tracing the history of efforts to implement international atrocity law in national criminal law. This chapter sets the context for the more systematic tests presented in later chapters by locating the origins of

[59] Gerring 2007.

the idea of domestic anti-atrocity laws and outlining the broad patterns over time and space by which states have adopted them since 1945. This chapter also identifies the ideational antecedents to the mechanisms that have helped drive the spread of national anti-atrocity laws through episodes of institutional redesign and highlights how the relative importance of particular mechanisms has changed over time. Specifically, I focus on a professional community of influential European criminal law scholars who, prior to World War II, had promoted among their colleagues the notion that international criminal law should be incorporated into domestic criminal law. At the same time, these scholars were also at the forefront of an intellectual movement – led by the International Criminal Law Union and its successor, the Paris-based International Association of Penal Law – to promote a "science" of national criminal law reform that aimed to harmonize domestic legal systems around universal standards. These scholars were thus well poised to socialize their fellow criminal law specialists to associate the domestic adoption of international crimes with the design of modern criminal codes. This chapter goes on to trace how these professional ideas gained acceptance and helped facilitate the spread of national anti-atrocity laws.

Chapter Four is the first part of the nested analysis. In this chapter, I test my hypothesis quantitatively against a variety of alternatives on a worldwide sample of cases. Specifically, I use event history analysis to test whether a country that redesigns its criminal code is more likely to adopt anti-atrocity laws – and more likely to do so sooner – than one that does not. The analysis is based on an original and comprehensive dataset documenting the existence and timing of national criminal laws against genocide, war crimes, and crimes against humanity in every country in the world that has adopted them since World War II. Ultimately, I find weak to no support for the civil society hypothesis, as well as various other possible explanations drawn

from the literatures on human rights and norm diffusion. The analysis, however, does provide very strong support for my institutional redesign theory across all three categories of crime. I also conduct additional statistical tests to further verify some of the observable implications of the causal story entailed by my theory.

Chapter Five is the second part of the nested analysis. In this chapter, I qualitatively verify the existence of particular causal mechanisms in a single pathway case of anti-atrocity law adoption. Specifically, I examine Guatemala and its 1973 adoption of a new criminal code that included provisions against genocide, war crimes, and crimes against humanity. This case is particularly useful for my purposes because its outcome is poorly predicted by alternative explanations but well predicted by my own. It thus provides an especially revealing test for whether the causal mechanisms I hypothesize to be driving the statistical correlations established in the previous chapter are indeed present. Drawing on primary sources, secondary sources, and expert interviews conducted in the field, I trace the causal process leading up the adoption of the 1973 criminal code and find strong support for each of the theorized causal mechanisms.

Finally, Chapter Six concludes by summarizing the cumulative insights of the preceding three empirical chapters and their implications for the two agendas I outlined at the outset of this chapter. I also elaborate on the scope conditions under which I expect my theory to hold as well as discuss how it might be generalizable to the implementation of other international legal rules.

CHAPTER TWO

An institutional redesign theory of international legal implementation

In this chapter, I present a general theory of why and how the large-scale reform of national institutions – or what I term "institutional redesign" – facilitates international legal implementation. In brief, I argue that two features common to such process – particularly as they have been practiced in the post-World War II era – make them particularly likely to result in implementation. First, institutional redesign processes empower technocratic experts to shape the designs of new institutions, and these experts are more likely than everyday policymakers to be aware of and favor international legal norms. Second, institutional redesign is typically viewed by participants as a modernization project, which makes both policymakers and technocratic designers especially receptive to foreign and international norms. Together these two features of institutional redesign activate two professional-level mechanisms (professionalization and emulation) and two state-level mechanisms (monitoring and acculturation) that encourage the spread of international legal norms to domestic legal systems. Thus, all else being equal, institutional redesign makes implementation more likely than if such reforms had not occurred, because it provides the opportunities and motives for technocratic drafters and policymakers to codify norms that otherwise would have had lower chances of reaching a government's legislative agenda.

Institutional redesign as a policy window

To understand how policy ideas, like anti-atrocity laws, that lack interest among policymakers and salience among pressure groups can nevertheless come to be adopted, it is helpful to turn to

the political science literature on agenda setting. Scholars of agenda setting emphasize that policy innovation is often only possible during narrow moments of opportunity, or "policy windows."[1] Such moments offer policy entrepreneurs opportunities to advance initiatives that otherwise would have had little chance of being taken up by legislators or government leaders outside the reform context. The literature on policy windows tends to focus on those opened by either changes in the political status quo, such as an election or a shift in public opinion, or the sudden emergence of a new problem, like an economic downturn or an industrial disaster. In Simmons's account of how human rights treaties can spur improved human rights practice, the creation of a new treaty opens a policy window for domestic advocates to effect policy change (though Simmons does not use the term "policy window.") That is because a new treaty exogenously forces the issue of ratification onto a government agenda, which in turn opens political space for sympathetic policymakers and civil society actors to push for compliance.[2] (In the statistical analyses in Chapter Four, I test whether ratification of atrocity law treaties indeed makes implementation of atrocity law more likely.)

The theory I present here focuses on another type of policy window that I argue facilitates the implementation of human rights law: the large-scale reform of national institutions. Specifically, I focus on a particularly far-reaching type of reform that I call "institutional redesign," in which governments reconstruct or replace national institutions in their entirety. Examples of institutional redesign include the drafting of a new constitution, the creation of a new regulatory framework, or – as is my main focus here – the drafting of new legal codes. Institutional redesign is different from piecemeal reform, which consists of narrow, targeted reforms that largely leave underlying institutional designs in place. The difference is important

[1] Kingdon 1995.
[2] Simmons 2009, 127–129.

for my argument because, as I elaborate below, redesigning institutions wholesale necessarily requires a level of specialized expertise that most everyday policymakers lack, so governments tend to rely on technocratic experts to design new institutions. Institutional redesign thus constitutes a policy window, because it temporarily grants influence over the policymaking process to a set of technocratic actors and empowers them to advance policy ideas that, at least, may otherwise enjoy little interest or salience among policymakers, and at most, conflict with state interests.

Features of institutional redesign: technocratic experts and modernization

Institutional redesign opens a policy window for new policy ideas, like implementation, but opportunity alone is not sufficient to ensure that such processes actually lead to implementation. Thus I argue that two features inherent to institutional redesign processes make these openings particularly conducive to the implementation of international law.

The first feature is that such processes empower technocratic experts who are more likely than everyday policymakers to be aware of and favor international legal norms. The reasons begin from the fact that the far-reaching scope of institutional redesign processes tends to lead governments to grant a high degree of influence to technocratic actors. It is one thing for a policymaker to target specific provisions of an existing institution, like a particular constitutional or regulatory provision, for change or repeal; it is another to plan and build a new institution, like a constitution or environmental regulatory framework, in its entirety. Just as replacing one part on an automobile requires less specialized knowledge than assembling one from scratch, drafting piecemeal reforms is more tractable for policymakers lacking specialized expertise, because such reforms do not require reformers to consider how all the various components of an institution

may or may not cohere. These types of careful considerations require specialized, technical expertise, which policymakers typically lack. Therefore, governments typically delegate the work of crafting new designs to academics, practitioners, and other technical experts who are often not policymakers themselves, but who are trusted by governments by virtue of their perceived expertise. Given their specialized expertise, drafters are more likely than everyday policymakers to be aware of international legal norms that could potentially be implemented, such as those contained in treaties that the state in question has previously ratified. And, as previous research on professional communities in policymaking has emphasized, since the authority of these experts derives from their legitimated claims to expertise, and not, say, their political loyalties, governments are more likely to perceive experts' interpretations and policy recommendations as reflecting apolitical, objective knowledge, as opposed to partisan beliefs.[3] Therefore, given the inherent uncertainty policymakers face in evaluating the full range of potential institutional design choices, governments are willing to grant a high degree of deference to experts to select what they deem to be optimal design choices for the task at hand.[4]

Two sets of factors distinguish these technocratic experts from the civil society actors in the human rights literature I discussed above: motivation and relation. First, while civil society actors are motivated by moral beliefs, technocratic experts are motivated by their commitment to professional norms and the advancement of their craft. Even if technocratic experts' moral beliefs do shape their work, their specific prescriptions are nonetheless grounded in professionalized notions of what "works" as opposed to moral notions of what is "right." Furthermore, to the extent that civil society actors exercise political influence, it is largely due to their claims to moral authority, that is, the perception that they work on behalf of moral values,

[3] Haas 2004, 575–576.
[4] Haas 1992, 12–16.

like peace or human dignity.[5] In contrast, the influence of technocratic experts rests on their claims to specialized expertise.[6] Second, civil society actors seek to influence policy from outside the government by galvanizing publics and mobilizing pressure on governments. Thus these actors can be seen as exercising "bottom-up" influence. Technocratic experts, on the other hand, are more likely to exploit the elite networks in which they are embedded and which connect them to policymakers. In my account here, they do not pressure governments directly but are delegated authority by governments. Also, as Langer points out, unlike civil society actors, these types of technocratic legal experts are often not associated with any broader social movement.[7] Thus, these experts can be seen as exercising "top-down" influence through their elite, government-appointed positions.

What experts deem to be optimal design choices are shaped by a variety of factors, but a second feature of institutional design processes that typically guides the content of such reforms is "modernization," that is, the aim to adapt existing institutions to contemporary conditions, knowledge, and standards. Because the concept of "modernization" can be used in different ways, it is important to clarify what I mean by it. "Modernization" is often used as what can be described as an "external" concept, that is, it is used by analysts and academics from the outside looking in to objectively characterize types of social, economic, political, or technological change that are deemed to reflect a particular set of "modern" principles and norms. This is the usage invoked in discussions of modernization theory, which posits that particular social and economic changes (that is, modernization) lead to democratization.[8] But "modernization" can also be used as what can be described an "internal" concept, that is, it also refers to a set of self-

[5] Avant, Finnemore, and Sell 2010, 13.
[6] Ibid., 12.
[7] Langer 2007, 620.
[8] Przeworski and Limongi 1997.

conscious motivations and intersubjective rationales for individual and collective action.[9] In other words, modernization in this sense refers to actors' own self-conscious aims to adapt existing institutions to contemporary conditions, knowledge, and standards. It is this second usage that I invoke when I claim that modernization is an inherent feature of institutional redesign.[10]

Though governments may be motivated to redesign institutions for a variety of reasons, in one way or another modernization aims will inevitably permeate considerations of how new institutions should be designed. To understand why, consider a spectrum that encompasses the possible range of true motivations for institutional redesign. At one end is an ideal-typical scenario in which governments or nongovernmental reform advocates are motivated to pursue institutional redesign because they deem existing institutions to be performing suboptimally given current conditions, knowledge, or standards. In this "sincere" redesign scenario, reformers are genuinely motivated by what they perceive to be in the best interests of the broader polity. At the other end of the spectrum is an "insincere" ideal-typical scenario in which governments or nongovernmental reform advocates pursue institutional redesign for purely political or self-interested reasons, such as to consolidate power or achieve personal material gain.

Regardless of whether proponents are pursuing sincere or insincere institutional redesign (or, as is more likely, something in between), reformers must usually publicly justify reforms using modernization rhetoric, such as the need to improve efficiency, meet current standards, and facilitate social and economic progress. The reason is because, as a long tradition of

[9] Historian Steven Pincus uses "modernization" in this second way (in addition to the first.) Pincus 2009, 36.
[10] Other scholars, most notably comparative legal scholar Maxmió Langer, have invoked this usage in using the term "modernization project" to refer to the way advocates discursively frame reforms in order to sell them to legislators. In his study of criminal procedure reforms across Latin America in the 1990s and 2000s, Langer argues that such framing by technocratic criminal law specialists helped persuade policymakers from across the political spectrum to embrace what were, in reality, liberalizing reforms as apolitical, technical initiatives aimed at modernizing their criminal justice systems. Langer 2007.

constructivist IR research has highlighted, governments value their legitimacy – that is, the acceptance by audiences of a government's claim to rightful rule – just as they value more material ends, like economic wealth and military power.[11] In modern societies, legitimacy is usually derived from what scholars (following Max Weber) call rational-legal authority, that is, authority that is derived from "rationally created rules," as opposed to tradition or charisma.[12] As Barnett and Finnemore explain, "rationally created rules" means those that "deploy socially recognized relevant knowledge to create rules that determine how goals will be pursued."[13] New institutions are thus more likely to possess legitimate authority in the eyes of publics if reform processes are viewed as efforts to keep institutions in line with current knowledge and understandings, as opposed to being seen as political or self-interested projects.

For example, legal historian M.C. Mirow argues that Simón Bolívar initiated the drafting of a new civil code for Gran Colombia in 1829 more as what he calls "a last-ditch effort" to prevent the dissolution of Bolívar's "crumbling" state than as an effort to incorporate new enlightenment-era ideas of rationalization and progress.[14] Nevertheless, Bolívar justified his initiative in the archetypical language of modernization. "Observe that our now overly bulky code," Bolívar told delegates at an 1828 constitutional convention in Ocaña, "instead of leading to happiness, presents obstacles to its progress. Our laws appear made by chance: they lack unity, method, classification, and legal idiom. They are self-contradictory, confused, at times unnecessary, and even contrary to their ends."[15] While this is just one example, Bolívar's justifications are representative of those usually offered by leaders in processes of large-scale reform. In other words, regardless of their genuine motivations, reformers must inevitably pay at

[11] Bukovansky 2002; Reus-Smit 1999; Jackson 2006; Finnemore and Sikkink 1998.
[12] Weber 1946, 79; Barnett and Finnemore 1999, 707.
[13] Barnett and Finnemore 1999, 707.
[14] Mirow 2000, 85.
[15] Quoted in ibid., 92.

least some concern to whether a new institution could be deemed by audiences to be sufficiently "modern."

The implication of this association between institutional redesign processes and modernization is that modernization concerns will shape institutional designers' views of the types of ideas that should be incorporated into new institutions. In other words, the institutional design process provokes expert drafters to seek out norms that they would deem to be "modern" and motivates them to include these norms in new institutions. But how do experts come to identify international legal norms in particular as "modern?" Here I discuss two professional-level mechanisms that help link international legal norms with drafters' preferences: professionalization and emulation.

Mechanisms of influence on experts: professionalization and emulation

Professionalization refers to the formation, reinforcement, and transmission of norms and shared understandings among a professional community.[16] Professional standards are articulated and transmitted through a variety of media, like formal professional education and training, trade publications and conferences, and authoritative statements of "best practices" published by intergovernmental and nongovernmental organizations. As sociological institutionalists argue, these sources promote convergence among professionals around a body of specialized knowledge that helps define individuals *as* professionals.[17] Professionalization socializes professionals around shared worldviews and cognitive "road maps" that point the way towards particular types of ideas as useful and appropriate for a given task.[18] Professionals who share common professionalization experiences often form what political scientists call an "epistemic

[16] Farrell 2001, 72; DiMaggio and Powell 1991, 70–71.
[17] DiMaggio and Powell 1991, 70–74.
[18] Goldstein and Keohane 1993.

community," that is, a network of professionals with recognized expertise who are also united by a shared professional beliefs regarding appropriate and desirable means and ends for addressing a given issue.[19] A large body of empirical studies shows that epistemic communities promote international norm diffusion through their members' ties to likeminded professionals in other countries.[20] Therefore, professionalization into and within epistemic communities is a key influence on experts' perceptions of what ideas constitute modern standards.

One medium through which such professionalization often occurs is an expert's participation in professional networks.[21] Political scientists have long established that both domestic[22] and international[23] networks of policy advocates facilitate the diffusion of new policy ideas. Recently, a wave of research has focused in particular on transnational networks of *legal* professionals and the roles that they play in the cross-border spread and consensus-building around new legal ideas.[24] Brake and Katzenstein, for example, argue that American dominance over transnational networks of legal professionals has helped socialize Continental European legal elites to erode their previous opposition to American-style legal norms, such as class action lawsuits and pretrial discovery.[25] At the center of professional networks are often one or a handful of formal professional organizations that lead efforts to shape a professional consensus around doctrinal or policy issues. As Carpenter's work on agenda-setting within advocacy networks suggests, organizations that are centrally positioned within a given network will exert the greatest influence over members' views of what issues are deemed important or appropriate

[19] Haas 1992.
[20] Cross 2013.
[21] DiMaggio and Powell 1991, 71.
[22] e.g. Mintrom 1997.
[23] e.g. Keck and Sikkink 1998.
[24] Brake and Katzenstein 2013; Langer 2007; Slaughter 2003; Sikkink 2011; Dezalay and Garth 2012.
[25] Brake and Katzenstein 2013.

to pursue.[26] Thus, to the extent that the types of professional networks and organizations in which technocratic institutional designers are likely to participate favor international legal norms, drafters will be more likely to perceive such norms as embodying modern standards and thus favor them for inclusion in new institutions.

Institutional redesign activates professionalization, because the search for modern ideas prompts drafters to take stock of the current state of the art in their fields and trends among their own epistemic communities, and then to import these ideas into their own designs. Research suggests a few reasons why experts may be particularly motivated to select ideas favored by such communities. First, as Barnett and Finnemore argue, expert professionals typically view themselves as "repositories of socially valued knowledge," and thus believe they are duty bound to "ply their knowledge their in ways that would improve society."[27] Second, as mentioned earlier, experts' authority rests on their claims to expertise, so experts face incentives to be able to present their designs to policymakers and publics as embodying modern standards. To the extent that a drafter can point to a consensus among her expert community, she can support her claim that her proposals reflect modern standards. Finally, as legal sociologists Yves Dezalay and Bryant Garth have shown in numerous studies, legal professionals are often motivated by the intra-professional prestige that comes from being seen as advancing cutting-edge norms favored by professional communities.[28]

In sum, sources of professionalization, like professional networks, helps expert drafters identify what could be deemed to be modern norms, and a range of professional-level considerations motivate them to include these in new designs. The implication is that to the

[26] Carpenter 2011.
[27] Barnett and Finnemore 2004, 24.
[28] For example, Dezalay and Garth 2012.

extent that a given expert drafter's epistemic community favors international legal norms, the more likely the drafter will include such norms in her design.

Another related, yet distinct, professional-level mechanism that connects international legal norms to the choices of technocratic drafters is emulation. In general terms, emulation occurs when an actor copies the actions of another, because it deems those actions to reflect standards of appropriate behavior.[29] Emulation can be contrasted with copying that occurs for more materialist motivations, such as a belief that the copied model will produce the most functionally efficient outcome (often referred to by scholars of diffusion as "rational learning.") While emulation is related to professionalization in that both involve "the social construction of appropriate behavior,"[30] emulation refers more to the direct, conscious copying or adaptation of specific sources, while professionalization refers more to the transposition of broader professional norms and understandings into specific, formal institutions. Emulation is a central mechanism in the influential norm cascade model of diffusion, in which states copy the policies and institutional forms of other states not necessarily to satisfy functional demands but in order to demonstrate their adherence to perceived standards of modern statehood.[31] Emulation occurs among professionals when individual experts model their own work on that of others, not because such models have proved their functional worth, but because those models are deemed by their communities to be particularly appropriate for the task at hand.

Institutional design naturally promotes professional-level emulation among drafters for two reasons. First, the cognitive limits of designers mean they rarely construct new institutions from scratch. Even an institutional designer driven solely by purely utilitarian efficiency concerns operates under bounded rationality, given both the high transaction costs of surveying

[29] Lee and Strang 2006, 889.
[30] Ibid.
[31] Finnemore and Sikkink 1998.

the full range of possible choices as well as the uncertainty inherent in predicting the relative benefits of one choice over another.[32] Therefore, one way designers handle these limits is to seek out authoritative or well-established models as guides. Second, as discussed above, the modernization concerns that permeate institutional redesign processes prompt designers to search for and copy models that they would deem to be emblematic of modern institutions. In sum, emulating socially sanctioned models thus offers designers a shortcut for selecting models that are both likely to "work" (despite lack of a proven track record) and which carry high social approval.

One particularly influential source of emulation in institutional design is prestige.[33] Prestige is the status granted to an actor or innovation that is deemed by a community to be exemplary or worthy of esteem. Selection based on prestige assists drafters in both the bounded rationality problem and modernization concerns. When an idea carries high prestige, it faces a lower burden of proof to demonstrate its utility, so designers operating under bounded rationality are more likely to give it the benefit of the doubt. Likewise, prestigious ideas also come with high legitimacy attached, and thus lend themselves to the perception that they are appropriately modern ideas.[34]

Prestige is particularly important within professional and technocratic communities given, on the hand, the value these groups place on the accumulation of specialized common knowledge, and on the other hand, the common lack of objective indicators that would otherwise provide information about which ideas perform best.[35] Individuals or models that are deemed to

[32] Weyland 2005, 282.
[33] Brake and Katzenstein 2013, 746; Rogers 1983, 215–217.
[34] Katerina Linos makes a similar argument about the preferences of voters in democracies. She argues that voters operating under uncertainty attribute more credibility to policy proposals if they receive information that those policies have been adopted by highly regarded countries. Linos 2011.
[35] Shrum and Wuthnow 1988; Cole and Cole 1973.

demonstrate a particular mastery over a given technical area are granted high influence over a community of like-minded experts, and thus are particularly likely to be emulated as embodying modern ideas. Comparative legal scholars in particular have long put great emphasis on the role of prestige in so-called "legal borrowing."[36] According to eminent legal comparativist Alan Watson, lawmakers face a particularly acute problem in imbuing new laws with legitimate authority, so emulating prestigious examples confers additional credibility on new designs. Thus, lawyers designing new institutions exhibit what Watson calls a "transplant bias" that is an unthinking receptivity to foreign models, particularly prestigious ones.[37] For example, legal scholar Jonathan Miller argues that many Latin American countries in the mid-19th century modeled their own constitutions on what they deemed to be the prestigious U.S. model, "even though they had no previous experience with anything resembling liberal constitutional institutions."[38] Additionally, from the Bourdieuian perspective of Dezalay and Garth, designers are not only influenced by the prestige of others, but tailor their actions to maximize their own standing, thus responding to additional intra-professional incentives to emulate and advance cutting-edge models and ideas.[39] In any case, the importance of prestige implies that some legal and policy ideas – like the domestic implementation of international legal norms – may spread by virtue of their association with models that expert communities deem prestigious, even though such ideas may have been of little interest in the first place to receiving policymakers, publics, or even designers themselves.

A second source of emulation consists of an actor's peer groups. Research on the diffusion of a variety of policy ideas, including human rights norms, has shown that states are

[36] Ajani 1995; Miller 2003; Watson 1978.
[37] Watson 1978, 327.
[38] Miller 2003, 871.
[39] Bourdieu 1987; Dezalay and Garth 2010.

more likely to emulate the choices of states that are culturally proximate.[40] When it comes to the transmission of legal ideas, two forms of cultural proximity are particularly important: legal tradition and language. Legal traditions, such as common law, civil law, and Islamic law traditions, can be viewed as distinctive worldviews that deem certain ways of approaching and theorizing the law as appropriate.[41] For example, civil law systems tend to view statutes as "self-applying" – that is, judges should be called upon only to apply laws, not interpret them, as judges are expected to do in common law systems – so civil law systems place greater emphasis on precision, comprehensiveness, and systematic coherence when it comes to drafting new laws than do common law systems.[42] Drafters are thus more likely to see models originating from legally proximate jurisdictions as more appropriate to emulate.

Linguistic proximity (which tends to correlate with legal tradition) is also important for the transmission of legal ideas simply because it is easier for a drafter to draw on sources in a language he or she can understand.[43] Moreover, legal specialists are well aware that problems arise from attempting to translate a legal concept from one language to another, [44] so drawing on models among a drafter's own linguistic group minimizes these issues. In sum, when drafters and leaders face the choice of where to look for design ideas, they are more likely turn to their legal and linguistic peers first, so to the extent that peers have already a given implemented international legal norm, the receiving state will more likely to do so as well.

[40] Kim 2012; Linos 2011; Elkins and Simmons 2005, 45.
[41] Pérez-Perdomo and Merryman 2007, 2; Zartner 2014, 27–40.
[42] Pérez-Perdomo and Merryman 2007, 39–47.
[43] Watson 2001, 104–105.
[44] de Groot 2006.

Mechanisms of influence on governments: monitoring and acculturation

Apart from the professional-level mechanisms that link international legal norms to drafters' designs, the aim of modernization activates broader coercive mechanisms that shape the views of not only technocratic drafters but policymakers as well regarding the types of norms new institutions should include. By "coercion," I am not referring to the traditional IR notion of direct imposition, which is based on tangible, material threats, exercised through using military force or economic sanctions. Instead, my notion of coercion here draws on the work of sociological institutionalists, as well as IR scholars who have applied these ideas to research on global norm diffusion, in conceiving of coercive mechanisms as those more tacit, normative pressures felt through cultural expectations and which speak to the motivations of states to "fit in" among their peers.[45] This type of "soft" coercion is more likely to occur in the context of institutional redesign than more conventional "hard" coercion, because states are rarely willing to deploy military or economic force to impose specific designs on other states' institutions.[46] Instead, states or other non-state actors are more likely to rely on less tangible pressures in order to socialize states to view particular legal and policy ideas to be in their interests. Here I discuss two such coercive mechanisms: monitoring and acculturation.

As defined by Kelley and Simmons, monitoring consists of the various ways that actors external to a state participate in "observing and checking the progress or quality of a policy, practice, or condition over an extended period of time."[47] According to these authors, forms of monitoring, such as rating systems and blacklists, articulate regional or global cultural

[45] Kim and Sharman 2014, 17; DiMaggio and Powell 1991, 67–69.
[46] An exception would be colonial imposition. However, I am concerned here only with the institutional design decisions of formally independent states. Another form of pressure that could be seen as somewhere between hard and soft forms of coercion occurs when international organizations impose conditions on states in return for some benefits. For example, the International Monetary Fund might require particular institutional reforms in order for a state to receive loan disbursements, or the European Union might require institutional reforms in order for a state to be considered for membership.
[47] Kelley and Simmons 2015, 3.

expectations. And when issued by a credible actor, monitoring can trigger a variety of pressures – such as civil society mobilization or peer shaming – that can motivate governments to improve their behavior.[48]

The design of new institutions triggers monitoring, because many actors, including foreign governments, international organizations, and NGOs, see such processes as opportunities to advance and institutionalize norms that they believe states should adopt. Institutional redesign processes thus invite scrutiny from external actors – sometimes solicited for their advice and sometimes not – often claiming to express modern standards to which states are expected to adhere. When it comes to institutional redesign, two forms of monitoring are particularly common. The first occurs when foreign technical assistance actors are invited to participate directly in drafting processes. Such foreign assistance actors are enlisted precisely because they are expected to be able to articulate the current consensus over best practices and modern standards, so they are in an excellent position to influence receiving drafters' and governments' views of the types of ideas that the international community would expect from a modern institution. In the early 1990s, many newly independent Eastern European republics relied on this type of assistance from Western governments, NGOs, and international organizations to help design new legal codes and constitutions, and the resulting institutions strongly reflected the influence of these foreign actors.[49] A second form of monitoring occurs when international organizations and NGOs issue unsolicited evaluations of working drafts of new institutional designs. For example, human rights organizations often publish reports and issue press releases to criticize working drafts of constitutions or legal codes that they say fail to meet modern human

[48] Ibid., 4–5.
[49] Ajani 1995, 110–115; DeLisle 1999.

rights standards.[50] The public nature of these pronouncements helps get the attention of not only a new code's drafters, but also the policymakers overseeing reforms, so these statements help prod both sets of actors to consider adopting these standards.

In the case of acculturation, cultural expectations are made less explicit, but nonetheless exert pressure through cognitive and social psychological mechanisms for drafters and policymakers to conform. Goodman and Jinks define acculturation as "the general process of adopting the beliefs and behavioral patterns of the surrounding culture."[51] Acculturation does not require that a state necessarily accept a given norm or policy as legitimate or valid; instead states adapt to cultural expectations either to reduce the cognitive and social costs of not fitting in among a particular reference group, or to increase their own social standing.[52] Acculturation resembles the process that world culture sociologists invoke to explain why so many states converge on similar policies and institutional forms despite their widely divergent social and economic conditions. From this perspective, global culture legitimizes certain policies and institutional forms (like bureaucracy or universal suffrage) and delegitimizes others (like colonialism or torture), and the desire for legitimacy in the eyes of domestic and international audiences drives governments to at least present themselves as if they were adhering to these expectations.[53]

In contrast to expectations that are articulated through active monitoring by agents, acculturation works through cultural expectations that are expressed in formal, authoritative institutions, like treaties, international soft law, and standards set by international organizations.

[50] See, for example, Amnesty International's 2013 press release regarding the draft Fijian constitution, which the organization declared "falls far short of international standards of human rights law and is another step backwards in guaranteeing human rights protection for all." (http://www.amnesty.org/en/for-media/press-releases/fiji-new-constitution-fails-protect-fundamental-human-rights-2013-09-04-0.)
[51] Goodman and Jinks 2004, 638.
[52] Ibid., 642–645.
[53] Meyer et al. 1997.

These sources provide scripts or blueprints that articulate legitimate standards and purport to offer ready-made templates that can be applied universally to all states.[54] As world society theorists note, in the contemporary, post-Enlightenment era, perceptions of "modern" are strongly tied to notions of universalism, that is, the idea that the same solutions apply to all states regardless of particular circumstances.[55] Thus actors motivated by modernization aims are particularly susceptible to being influenced by authoritative world cultural institutions, like international law, that purport to define universal standards. In other words, designers of new institutions seeking out modern norms are likely to turn to international institutions for guidance, even in the absence of explicit pressure from specific actors. Thus, the extent to which particular international legal norms have been institutionalized in international sources or become salient in global politics, the more likely drafters and policymakers will favor them during process of institutional redesign.

Criminal code reform and the implementation of anti-atrocity laws

For at least two reasons, the implementation of international atrocity law is an excellent substantive area in which to test my institutional redesign theory of international legal implementation. First, as discussed in Chapter One, since its origins in the wake of World War II, the international anti-atrocity regime has been designed to rely on domestic implementation for its operation. Second, the domestic legislation of atrocity law is a particularly puzzling case of international legal implementation. For one, as discussed in Chapter One, other areas of international law rely on reciprocal compliance to ensure their proper operation, so implementation presents states with obvious benefits. But the implementation of atrocity law

[54] Frank, Hironaka, and Schofer 2000.
[55] Boyle and Meyer 1998; Strang and Meyer 1993, 501.

does not offer the prospect of similar reciprocal gains, so it is less clear what states would stand to gain from it. Furthermore, anti-atrocity laws seemingly present high risks to government leaders by exposing them to criminal liability for official actions. Thus, these laws impinge directly on states' interests by limiting government officials' behavior in an area, national security, that constitutes the most fundamental interests of states and for which they typically seek to minimize their accountability. Atrocity law is therefore a hard case for implementation. Nevertheless, this section illustrates why the theory outlined above is well positioned to explain atrocity law implementation before presenting a more substantial account in the following chapter of how this theory applies to the history of the spread of national anti-atrocity laws.

Wholesale criminal code reform as institutional redesign

My account begins with the phenomenon of criminal code reform, which is an emblematic example of institutional redesign. Virtually every country in the world organizes its laws into formal, written legal codes. By a legal code, I mean "a body of laws intended to cover all or most aspects of a major area of law within the legal system."[56] For example, among the most common types of legal codes are civil codes, which aim to comprehensively cover the body of national law pertaining to private law. A country's criminal code – which is also interchangeably referred to as a "penal code" – defines the range of possible criminal offenses as well as the principles, such as standards of culpability and rationales for sentencing, underlying their application.[57] Governments commonly pass targeted amendments to their criminal codes. But in the context of my argument, I am referring to a particularly sweeping form of criminal code reform that I term

[56] Head 2003, 5.

[57] The criminal code should not be confused with the code of criminal procedure. As the name implies, a code of criminal procedure is a distinct code that stipulates the procedural rules, such those pertaining to due process and trial proceedings, that govern the application of the criminal code.

"criminal code redesign," which is when a government decides to entirely replace its existing criminal code with a new one. According to data I have compiled, over 100 countries have done so at least once since World War II. (I discuss these data further in Chapter Four.)

Technocratic experts and modernization in criminal code redesign

Criminal code reform exhibits both important features of institutional redesign outlined above. The first feature is the delegation of authority to technical experts. The drafting of new legal codes is an enormous and highly technical task. It typically involves the writing of hundreds of articles and unifying them under a coherent, consistent, and comprehensive system of concepts, principles, and standards. Doing so often requires drafters to weigh and apply complex academic theories of law and social behavior. For example, to formulate principles that should guide, say, the determination of sentences, one must first identify what the aim or rationale of punishment should be (for example, deterrence or rehabilitation). Such determinations should be based on assumptions of what motivates individuals to commit – or not commit – crimes. (For example, does the law shape individuals' actions or are individuals biologically, psychologically, or socially predisposed to break the law?) [58] These are highly specialized questions and considerations, and thus require experts with specialized knowledge to properly translate them into concrete institutional designs. Thus, in civil law countries codification has traditionally been viewed as a "science" and therefore the exclusive domain of legal scientists, that is, specialized legal scholars.[59] But even though common law countries do not employ the same imagery of

[58] Harno 1937.
[59] Pérez-Perdomo and Merryman 2007, 56–67; Bergel 1988.

legal science as do civil law countries, common law countries nevertheless tend to rely heavily on specialized legal experts in the drafting of new legal codes.[60]

Criminal code redesign processes also exhibit the second important feature of institutional redesign, that is, the aim of modernization. In general, it is possible to identify two ideal-typical contexts in which states in the postwar era have initiated redesigns of their criminal codes, and both of these carry strong modernization overtones. I refer to these as *transitional* and *continuous* contexts. Transitional criminal code reform occurs in the wake of monumental events or systemic shocks, such as a liberalizing transition from a repressive regime,[61] or the end of a civil conflict.[62] In transitional contexts, criminal code reform is usually intended as part of a broader package of reforms meant to set a country on a new path and distinguish it from its repressive or violent past. In both practical and symbolic terms, breaking with the past often means embracing norms – like human rights and market liberalization – that are associated with a prevailing international consensus over what institutional features should characterize a modern state. In contrast, continuous criminal code reform occurs in relatively stable contexts. In these instances, governments have come to deem existing codes to be either inefficient or out of date with contemporary criminal law needs or standards,[63] as codes that fail to keep up with current conditions can hinder economic and social development as well as create difficulties for judges to interpret the law in light of current realities.[64] In any case, reforms in both transitional

[60] See, for example, Linden 1989.
[61] For example, Frankowski and Stephan 1995; Hammergren 1998.
[62] For example, O'Connor 2006; Oette 2011.
[63] For example, Lahti 1993; Symposium: The Politics of Criminal Law Reform 1973; Linden 1989. The remarks of the president of Canada's Law Reform Commission regarding the motivation to reform that country's 100-year old criminal code are typical of those surrounding continuous criminal code redesign contexts: "By the 1960s our society was beginning to go through the stresses and strains of the shift from an industrial age to the nuclear age. In the face of the rapid social and technological changes that were taking place, it became apparent that our ad hoc approach to reforming and amending our Criminal Code was no longer adequate. What was needed was a redefinition and reformulation of the scope and function of our criminal law." Linden 1989, 9.
[64] Pérez-Perdomo and Merryman 2007, 144–145.

and continuous contexts entail either an explicit or implicit aim to "modernize" national criminal justice systems, that is, to bring their institutions in line with current needs and standards.[65]

Professionalization and emulation in criminal code drafting

Criminal code redesign thus empowers technical experts to select policy ideas that they deem to be emblematic of a modern criminal code, but how do drafters come to perceive anti-atrocity laws in particular as such? Drafters of new criminal codes are highly susceptible to the two professional-level mechanisms that I argued encourage diffusion, and since World War II, these mechanisms have favored the diffusion of anti-atrocity laws.

First, prestige-based emulation is particularly common among drafters given that, historically, so-called "legal borrowing" has been fundamental to the practice of drafting new criminal codes. Social scientists tend to emphasize that the post-World War II era is particularly conducive to norm diffusion,[66] but as comparative legal scholars have long noted, transnational legal borrowing is not new to the post-war world, nor even the post-industrial revolution world – legal borrowing has been integral to processes of legal change around the world for centuries, if not longer.[67] Alan Watson has even gone as far as to sum up millennia of worldwide legal development with the maxim: "Most changes in most systems are the result of borrowing."[68]

Modern criminal codes are emblematic of this tendency. For example, two of the earliest promulgated models in the modern era of codifications, the 1810 Napoleonic French penal code

[65] The comments of Dmitri Kozak, who was Vladimir Putin's deputy chief of staff and who led the drafting of Russia 2002 code of criminal procedure, are representative of how governments often frame continuous criminal code reforms. According to the *New York Times*, Kozak said, "the goal was to force Russia's judicial system to become something comparable to those in Western Europe and the United States. 'We can say that as of July 1, we will have a criminal procedure that corresponds to that of world standards and of civilized countries,' [said Kozak.]" Myers 2002.
[66] Meyer et al. 1997, 148.
[67] Watson 1974; Watson 1978. Alan Watson traces instances of legal borrowing as far back as the Code of Hammurabi, promulgated in 17th century B.C.
[68] Watson 1974, 95.

and the 1813 Bavarian penal code, were regarded as particularly innovative, and thus went on to dominate the form and content of subsequent Continental European and Ottoman penal codes for the next century.[69] In the late 19th and early 20th centuries, numerous Latin American countries including Argentina, Panama, and Venezuela, largely modeled their own penal codes on the highly influential 1889 Italian penal code, famous as a masterful technical achievement (also known as the Zanardelli Code).[70] And the 1899 penal code for the Australian state of Queensland (also known as the Griffith Code), itself strongly influenced by the Zanardelli Code, would go on influence not only the codes of other Australian states, but would also serve as the model penal code for overseas British territories, shaping the codes of future states as diverse as Nigeria, Israel, and Fiji.[71] Today, first hand accounts of contemporary drafting process confirm that legal borrowing remains fundamental to criminal code redesign.[72]

As I discuss further in the following chapter, this susceptibility of criminal code drafters to prestige-based emulation has likely helped promote the spread of anti-atrocity laws given that these laws have been associated with a small group of particularly prestigious models. Some of the earliest penal codifications following World War II were directed by criminal law specialists who would chose to include provisions modeled on new international legal prohibitions against war crimes and genocide, and these models would go on to influence subsequent codifications in other countries. For example, in the late 1950s, preeminent Argentinean criminal law scholar and professor Sebastián Soler was commissioned to draft proposals for new criminal codes for Argentina and Guatemala. Both of Soler's drafts contained an article for a new category of crime

[69] Ancel 1958, 346–349.
[70] Fragoso 1979, 12–14; Cadoppi 2000.
[71] O'Regan 1991.
[72] See, for example: Rosen 2001; Graven 1964; Robinson et al. 2007; Soler 1964.

explicitly modeled on the definition of genocide contained in the Genocide Convention.[73] Even though Soler's codes were ultimately never adopted by the countries that commissioned him, experts throughout the region would go on to hold up Soler's published drafts as authoritative models. Over the next three decades, numerous new Latin American penal codes would draw heavily on Soler's drafts[74] – despite them lacking any real-world track record – which can help explain why virtually every one of these subsequent codes included an article on genocide at a time when most of these countries were led by authoritarian regimes and lacked significant civil society activity.

Professionalization has also likely played a central role in prompting criminal code drafters, particularly in Europe and Latin America, to select anti-atrocity laws. Given criminal code drafters' interest in and receptivity to foreign ideas and models, transnational professional networks would likely play an especially influential role in shaping drafters' notions of the types of that norms should be included in new codes. In the field of criminal law, the largest and most prestigious transnational professional association of criminal law specialists in the post-war era has been the Paris-based *Association Internationale de Droit Pénal* (AIDP), or the International Association of Penal Law.[75] Though formally claiming worldwide membership, the AIDP has been especially influential among Continental European (both western and eastern) and Latin America experts. In the post-World War II decades, the AIDP's twice-a-decade international congresses, where the organization's official resolutions would proclaim its official positions on standards and recommendations for criminal law policy, were known to attract the elite among

[73] Soler, Lemus Morán, and Augusto de Leon 1960, 60; Soler 1964, 74–75, 150–151.
[74] See, for example: Antillón Montealegre 1997; Antony 1987, 92; Fragoso 1979, 15.
[75] Bassiouni 1989; Jescheck 1980a; Ancel 1987, 71.

these professional communities, who themselves participated in the drafting of new codes in their own and others' countries.[76]

At the same time, the AIDP has also been the leading organizational force behind the development and codification of international criminal law. Leaders of the AIDP have played key roles in the international anti-atrocity regime's most important institutional developments, including: the operation of the Nuremberg Tribunals; the drafting of the 1948 Genocide Convention, the 1949 Geneva Conventions, and the 1984 Torture Convention; and the creation of the International Criminal Court.[77] The AIDP was also an early and leading proponent of the domestic implementation of international criminal law. For example, as early as 1953 at its quinquennial congress in Rome, the AIDP passed a resolution recommending that states adopt national legislation to implement the recently codified 1949 Geneva Conventions.[78] The AIDP's central position in the transnational network of post-WWII criminal law specialists has helped its leaders define anti-atrocity laws in the eyes of its members as fundamental to a modern criminal code and thus has likely shaped how these experts' have drafted codes themselves.

Monitoring and acculturation in criminal code drafting

Beyond these professional-level mechanisms, the associations between criminal code redesign and modernization also help trigger the coercive mechanisms of monitoring and acculturation, and these pressures are also likely to favor the incorporation of anti-atrocity laws. Monitoring occurs because criminal code redesign processes provoke the attention of a variety of actors, including UN agencies, NGOs, and foreign governments, who seize on the policy window presented by the reform process to promote their own ideas of how a modern criminal code

[76] Ancel 1987, 71.
[77] Bassiouni 1989; Lewis 2014; Sikkink 2011.
[78] AIDP 2009, 39.

should look.[79] Sometimes such efforts to promote ideas occur through direct cooperation with national governments. For example, the U.S., working through USAID and nongovernment organizations it supports, provides technical assistance and expert reviews of countries' draft criminal codes, and through this support is able to shape the design of codes to reflect its own notions of how codes should look.[80] But sometimes efforts to define standards are more adversarial. For example, human rights groups like Amnesty International, Human Rights Watch, and REDRESS regularly publish reports that criticize countries' draft criminal codes for failing to incorporate international human rights standards, and these groups seek to mobilize publics around such deficiencies.[81] Whether working in cooperation with states are not, interested external actors exploit redesign processes to help define the types of standards and policy ideas that governments will perceive the international community to expect of a modern criminal code.

Second, the acculturation pressures that likely accompany criminal code redesign are likely to favor anti-atrocity laws given these laws' origins in international law and their associations with universalist notions of human rights. Since World War II, international human rights norms have increasingly become central to the script to which modern states are expected to adhere.[82] The taken-for-granted quality of human rights norms is evidenced by the worldwide convergence of national constitutions around a core set of human rights norms that originate in international law,[83] as well as the great numbers of repressive states that ratify human rights treaties seemingly without any intention to comply with them.[84] Meanwhile, this period has also seen the formal design of criminal justice systems worldwide increasingly converge on norms

[79] Sometimes these actors are responsible for prompting reforms in the first place, but often they are not.
[80] See, for example, the work described in American Bar Association 1993.
[81] See, for example, Amnesty International 2012; Human Rights Watch 2013.
[82] Meyer et al. 1997.
[83] Elkins, Ginsburg, and Simmons 2013; Beck, Drori, and Meyer 2012.
[84] Hafner-Burton and Tsutsui 2007; Hafner-Burton, Tsutsui, and Meyer 2008.

originating in international human rights law, such as those found in the International Convention for Civil and Political Rights and the UN Standard Minimum Rules for Treatment of Offenders.[85] Thus, the global cultural environment has increasingly come to expect national institutions generally – and criminal justice systems in particular – to incorporate international human rights norms, and selecting anti-atrocity laws is likely to be seen by governments as one means to conform to these trends.

Nevertheless, unlike the professional-level mechanisms discussed above, which I argue have favored anti-atrocity laws as early as the 1950s, monitoring and acculturation triggered by criminal code redesign are likely to have contributed to the adoption of anti-atrocity laws only since the end of the Cold War. That is because despite the salience of the idea of domestic anti-atrocity laws among criminal law specialists during the Cold War period, the idea was not championed outside these elite circles to a degree that would have instilled it into the international cultural environment the way it would be later. Following the Nuremberg trials, the practice of international criminal justice underwent what scholars now characterize as a period of "hibernation."[86] Efforts at the UN in the early 1950s to create a permanent international criminal court quickly foundered in light of emerging Cold War geopolitics and deeply engrained views of traditional sovereignty, and for the next three decades, domestic prosecutions for atrocities remained extremely rare.[87] But in late 1980s and early 1990s, two developments contributed to a renaissance in the practice of criminal justice for atrocities: one, a handful of transitional countries decided to prosecute former regime officials for human rights abuses, and two, the international community, under the auspices of the UN, established the international criminal tribunals for the former Yugoslavia and Rwanda, the first new international criminal tribunals in

[85] Weigend 2006, 222; Skoler 1975.
[86] Schabas 2012, 13.
[87] Lewis 2014, 274–282; Sikkink 2011.

almost fifty years. At the same time, the end of the Cold War helped reduce some of the geopolitical overtones that hindered such prosecutions in the past.[88] Together, these developments ushered in a new era of atrocity justice – out of which the International Criminal Court was ultimately born – that helped raise the profile of idea of prosecutions for atrocities in the broader cultural environment, as well as opened political space for international organizations and nonstate actors to mobilize and push for these ideas.

In sum, my institutional redesign theory of international legal implementation appears well suited to explain the spread of domestic anti-atrocity laws since World War II. Criminal code redesign processes exhibit the two important features of institutional redesign: the empowerment of technocratic experts and the impetus for modernization. Anti-atrocity laws have been promoted by the world's leading transnational professional association of criminal law specialists, as well as included in influential codes that went on to be emulated by future drafters. Starting around the end of the Cold War, anti-atrocity laws became more salient among monitoring actors and more engrained in the broader cultural environment, leading states reforming their criminal codes to be subject to increasing cultural pressure to include these laws in new codes. The next chapter elaborates on this account by tracing the history of efforts to incorporate international atrocity law into domestic legal systems.

[88] Sikkink 2011, 246.

CHAPTER THREE

The history of efforts to adopt anti-atrocity norms in domestic criminal law

In the previous chapter, I presented a theory that explains the adoption of national anti-atrocity laws as the result of choices made by technocratic criminal law specialists who have been appointed by governments to design large-scale reforms of countries' criminal laws. In this chapter, I probe the plausibility of this argument by tracing the history of efforts to implement international atrocity law in national criminal law. This chapter thus has both descriptive and analytic aims. Descriptively, this chapter locates the origins of anti-atrocity laws, introduces the individuals and organizations that have promoted or facilitated their implementation, and outlines the patterns over space and time by which they have spread. Analytically, this chapter identifies the ideational antecedents to the mechanisms that have helped drive the spread of national anti-atrocity laws through episodes of institutional redesign. This chapter also highlights how the relative importance of different mechanisms promoting this spread has changed over time.

To preview this chapter's narrative: I locate the origins of efforts to implement international atrocity law in the decades prior to World War II in a community of influential European criminal law scholars. These scholars, most of whom were leaders of the International Association of Penal Law, were committed to two distinct but overlapping professional agendas: 1) the promotion of "scientific" reform of national criminal laws around universal standards and 2) the development of an international criminal law regime that would help states combat common problems and advance the cause of international peace. These two agendas converged in the idea that an effective international criminal law regime required the unification of national

criminal laws around a set of universally applicable international crimes that could be enforced by domestic courts. In the wake of World War II, some of these same experts would help design the first international anti-atrocity treaties, and the enforcement regimes they established codified such a system of national enforcement made possible through domestic legislation.

I then identify four phases of adoption that unfolded in the decades following the adoption of these treaties. In the first phase (1945-1957), the inclusion of anti-atrocity laws in new criminal codes was driven mostly by principled norm entrepreneurs who were actively committed to the advancement of an international criminal law regime. In the second phase (1957-1983), professionalization and emulation became central mechanisms. During this period, criminal code reform made its way onto the legislative agendas of national governments all over the world. Though the professionals who carried out the designs of these codes did not necessary share the same normative agenda as the earlier norm entrepreneurs, professional influences nonetheless conditioned them to see anti-atrocity norms as important features of a modern criminal code. In the third phase (1983-1998), the mechanisms of acculturation and monitoring emerged. The increasing salience of atrocity justice in global politics coupled with a resurgence of foreign technical legal assistance helped foster the conditions that moved anti-atrocity norms beyond the narrow interest of professional criminal specialists to that of policymakers as well. Finally, in the current phase (1998-present), international civil society groups, inspired by the creation of the ICC, have undertaken concerted public advocacy efforts to promote the domestic implementation of atrocity law.

This chapter relies mostly on secondary sources written by social scientists, legal scholars, and historians. But I also draw on variety of primary sources, including professional conference proceedings, contemporaneous legal scholarship, and UN documents. Finally, to fill in some of

the gaps stemming from the limited availability of primary and secondary sources, I also conducted a small number of interviews with experts who have first-hand knowledge of some of the organizations and events that I discuss here. (These interviewees are listed in Appendix 3.1.)

Before atrocity law: The AIDP, criminal law reform, and the domestic implementation of international criminal law

The origins of the AIDP

The laws this study examines originate in a series of international legal instruments whose creation were inspired by the atrocities of WWII. But once codified in international law, efforts to incorporate these laws into domestic criminal laws grew out of organizations and intellectual currents that had actually existed long prior to WWII. This section introduces the most of important such organization, the International Association of Penal Law, and outlines its role in cultivating two distinct, yet complementary, intellectual agendas that helped facilitate the domestic implementation of international atrocity law.

The International Association of Penal Law, more commonly known by its French name, *Association Internationale de Droit Pénal* (AIDP), was the intellectual successor to another organization, the International Union of Criminal Law, commonly known by its German name, *Internationale Kriminalistiche Vereinigung* (IKV). The IKV was formed in 1889 by three eminent European criminal law professors, Franz von Liszt of Germany, Gerard van Hamel of the Netherlands, and Adolphe Prins of Belgium with the goal to "profess a new creed in penal science."[1] The three professors were at the forefront of an intellectual movement that sought to reorient criminal along more humanistic and scientific lines. The "classical school" that had long dominated the thinking among criminal law theorists and the designs of Continental European

[1] Van Hamel 1911, 22; Radzinowicz 1991, 8.

criminal justice systems emphasized the retributive function of criminal law and assumed the equal capacities of individuals. Punishment was a means to deter autonomous, rational individuals from committing crimes, so the answer to more crime was harsher punishments. But the so-called "positivist school" that inspired the IKV's founders instead argued that the function of criminal law should not be to punish offenses, but to protect society from them.[2] That meant, for example, that punishment should be "made to fit the criminal and not the crime." In other words, the criminal's relative dangerousness should determine his sanction, not merely the objective act or moral heinousness of his crime. The criminal justice system should also aim to prevent future crime by uncovering its social and psychological causes and attempting to rehabilitate offenders.[3] As an organization, the IKV advocated for a variety of statutory and institutional reforms aimed at reducing criminal law's repressiveness and promoting rehabilitation, such as the suspended sentence (i.e. probation), the substitution of fines for imprisonment, and a criminal justice system for juveniles separate from that for adults.[4]

The founders of the IKV thus sought to create a forum where jurists, criminologists, psychologists, and legal theorists interested in the cutting edge of "criminal science" (as was the common formulation at the time) could share and disseminate ideas from their respective disciplines and influence the development of criminal policy.[5] By 1905, the IKV boasted members in thirty countries from all over Europe as well as Latin America, and 1200 participants attended its annual international meeting.[6] Many of these members represented the legal elite in their respective countries: university professors, government ministers, judges, and prosecutors. In other words, the IKV, and later the AIDP, was not comprised of activists agitating publicly for

[2] Jescheck 1980b, 45.
[3] Ancel 1987, 52–53; Canals 1960, 546.
[4] Jescheck 1980b, 46–51.
[5] Bassiouni 1989, 901.
[6] Radzinowicz 1991, 1–6.

policy change – as are so many groups to which scholars often attribute progressive policy change – nor were they particularly radical.[7] On the contrary, the members of these organizations were insiders who were embedded in the very institutions they sought to reform. Thus, members eschewed public advocacy in favor of working to change their respective national systems from within.[8] Ultimately, the IKV dissolved under the weight of the First World War, but in 1924 a group of leading European criminal law scholars formed the AIDP with the stated goal of "taking the place" of the IKV and picking up where it left off.[9]

The IKV/AIDP's intellectual agendas

Two intellectual agendas that would eventually help facilitate the domestic implementation of anti-atrocity law trace their influence among criminal law specialists back to the IKV and its successor, the AIDP. The first was the 20th century movement to promote "scientific" reform of national criminal codes. Central to the IKV's efforts to repurpose criminal law was the reform of national criminal justice systems. That is, if criminal justice was to serve a new purpose, then one would have to target the very frameworks that undergird national criminal justice systems: legal codes. This goal gave rise to what eminent British criminologist Leon Radzinowicz calls in his history of the IKV/AIDP a "distinctive and path-breaking" impulse towards detailed comparative study of the world's criminal codes to inform the task of drafting of new legislation.[10] The IKV thus published regular reports on developments in criminal law and policy in member countries along with a series of foreign criminal codes translated into German, while

[7] Ibid., 7–9.
[8] Interview with M. Cherif Bassiouni, 24 June 2014, Chicago, IL.
[9] AIDP 1925, 512. Technically, the German chapter of the IKV alone lived on following the war but ceased to have any international influence, finally disbanding in 1937. Cornil 1974, 138.
[10] Radzinowicz 1991, 22.

Von Liszt himself edited a landmark 15-volume comparative study of criminal laws from around the world.[11]

Though legal borrowing had long been a practical solution to the complexity of drafting new laws and codes, especially in the realm of criminal law, the IKV sought to promote comparative study and legal borrowing for the sake of a more ambitious agenda: unification. The leaders of the IKV and AIDP believed that it was possible to harmonize the world's criminalize justice systems around a common set of doctrines and prohibitions that would reflect a universalistic science of criminal law that transcended the circumstances of any particular country.[12] The leaders of the AIDP were so committed to this project that they founded a separate organization devoted exclusively to it, the International Bureau for the Unification of Criminal Law, which sought to promote its aims through participation in the League of Nations.[13] While the unification project in its most ambitious form lost steam by the end of the interwar period, the notion that criminal code reform should seek to advance a universalistic science of criminal law design aided by comparative study would go on to pervade the work of the AIDP and the criminal reform movement of the 20th century.[14] The enduring legacy of the criminal law unification movement on reform efforts can thus be seen in the move in the second half of the 20th century towards the development of so-called "model" criminal codes, such as the U.S. Model Penal Code (1962), the Model Criminal Code for Latin America (1971), the Unified Arab Criminal Code (1986), the Model Criminal Code for the Commonwealth of Independent States (1996), and the UN-sponsored Model Codes for Post-Conflict Criminal Justice (2007).

[11] Ibid., 22–24.
[12] Ibid., 23–24; See the resolution calling for the unification of criminal law passed by the AIDP's first Congress in 1926: AIDP 2009, 18.
[13] Lewis 2014, 115.
[14] Ibid., 116–117; Mueller 1968, 247; Riegert 1968, 248.

The second intellectual agenda that eventually helped facilitate the spread of anti-atrocity laws was the aim to realize a functioning international criminal prohibition regime through the incorporation of international criminal law into domestic legal systems. This agenda grew out of the AIDP's broader effort to promote and develop a new field of international criminal law. While the leaders of the IKV sought to use criminal law to promote safer and more just domestic orders, the leaders of the AIDP also saw the potential for criminal law to promote a more peaceful and cooperative *international* order.[15] Led by the Romanian criminal law scholar and later AIDP president Vespasian Pella, the AIDP, from its inception, sought to establish an international criminal court that would have jurisdiction to prosecute national officials for initiating aggressive wars. The AIDP also sought to codify an international criminal code that would include a variety of new crimes considered to pose a "common danger" to the international community of nation states, such as human trafficking, drug trafficking, and attacks on undersea telegraph cables.[16] Though these visionary efforts went unrealized at the time, the organization did help codify treaties that established new international criminal prohibitions against counterfeiting and terrorism.[17]

Despite the AIDP's failures, scholars credit its work during the interwar period with nothing less than inventing a whole new professional field of international criminal law,[18] and it is this project that would give rise to the idea of national implementation. In the mid-1920s, the AIDP's leaders quickly realized that the League of Nations had little interest in the

[15] Jescheck 1980b, 52–53; Lewis 2014, 100–101.
[16] Lewis 2014, 100–110; Jescheck 1980b, 52–53. The AIDP officially endorsed an international criminal court at its first meeting in 1926. AIDP 2009, 17. But the AIDP was not the only organization at the time promoting the idea of an international criminal court. The International Law Association (ILA) offered its own, if more conservative, proposal for an international war crimes court drafted by British international lawyer and professor, Hugh H. L. Bellot. See Lewis 2014, 95–100. Nevertheless, once Bellot died in 1928, the ILA's efforts to promote an international court largely faded, and the AIDP became the center of efforts to promote the idea. Segesser and Gessler 2005, 455–456.
[17] Lewis 2014, 117–120, 131–140.
[18] Ibid., 120.

organization's proposals for an international criminal court. So they turned to another strategy for realizing a worldwide criminal prohibition regime: unifying the national criminal laws of all countries around a set of universal prohibitions, so that domestic courts could carry out prosecutions for crimes of an international character.[19] This universal system of domestic criminalization would thus amount to a *de facto* international criminal code.[20]

Then in the early 1930s, international political circumstances changed, and the League of Nations became interested in establishing an international regime to prosecute acts of terrorism.[21] The League appointed a committee that included several AIDP members to draft new legal instruments, and the committee produced two treaties: one defined and criminalized terrorism, and the other established an international criminal court to prosecute violations of the first treaty. Though these treaties ultimately failed to garner enough ratifications to enter into force, they nonetheless represented an important innovation; for the first time international law sought to establish a system of cooperation among national and international courts to prosecute universal criminal prohibitions that required states to adopt relevant domestic implementing legislation.[22] This system of domestic courts enforcing international criminal prohibitions through domestic legislation (the so-called "indirect enforcement system"), which was first conceived as part of the AIDP's unification agenda, would come to characterize the dominant enforcement model for international criminal law as it would develop through the 20th century.[23] This model is institutionalized today most prominently in the ICC's complementarity regime, which relies an

[19] Ibid., 113–117.
[20] Ibid., 116. As the Greek judge and AIDP member M. A. Caloyanni recounted in 1928, "We find that many nations in the world are now drafting new national penal codes, and immediately the following idea struck our minds: would it be possible, without prejudicing in any way all that has been done and is being done by the other institutions for the creation of an International Criminal Court, to find some other way of bringing the various nations together by considering their penal laws as forming a criminal common law between themselves, and by unifying their penal laws." Caloyanni 1928, 75.
[21] Lewis 2014, 122–133.
[22] El Zeidy 2008, 56.
[23] Bassiouni 1983, 29.

international court to prosecute cases only when member states are either unable to unwilling to do so in their domestic courts. Thus, though the AIDP's goals of establishing an international criminal court and unifying the world's penal codes around international crimes proved unsuccessful during this period, the organization nonetheless planted the seeds for a paradigm that would shape the international legal innovations of the post-World War II years.

1945-1957: The birth of atrocity law and early instances of implementation by norm entrepreneurs

The birth of atrocity law and its indirect enforcement model

The specific atrocity crimes under examination here – genocide, war crimes, and crimes against humanity – originate in the post-WWII Nuremberg trials (1945-1946) and were first codified in treaties that were adopted in the trials' wake: the 1948 Genocide Convention and the 1949 Geneva Conventions. These legal instruments represented the birth of the modern international anti-atrocity regime,[24] and AIDP members played key roles in each. For example, criminal law professor and a founding member of the AIDP, Henri Donnedieu de Vabres, served as the French judge on the International Military Tribunal (IMT) at Nuremberg that prosecuted the Nazi leadership for war crimes and crimes against humanity.[25] De Vabres, along with Pella, also participated in writing the original draft of the 1948 Genocide Convention, which was mostly written by a third AIDP member, Raphael Lemkin, who had coined the term "genocide" in a book a few years earlier."[26] Finally, another AIDP member, the Swiss comparative criminal law scholar, judge, and later AIDP president, Jean Graven, participated in the drafting of the 1949

[24] Ratner, Abrams, and Bischoff 2009, 6–9, 16; Sikkink 2011, 6.
[25] AIDP 1925; Beigbeder 2006, 246. Under the charter of the IMT (art. 2), each of the four major allies – UK, US, USSR, and France – appointed a judge.
[26] Lewis 2014, 196; Lemkin 1944.

Geneva Conventions.[27]

These AIDP members thus used the opportunities presented by their appointments to push for legal ideas about the domestic implementation of international criminal law that had been circulating within the organization since its founding two decades earlier. For example, in May 1946, about midway through the Nuremberg trials, De Vabres called a special meeting of the AIDP to discuss the organization's goals and administration going forward now that the war was over. The meeting was held in the International Military Tribunal courtroom in Nuremberg and was attended by the present and future AIDP leadership, including Graven, as well as legal professionals and government officials from Denmark, France, Poland, Romania, UK, and USSR.[28] De Vabres took the opportunity to express his belief that the trials offered "a unique opportunity for criminologists to compare their traditions, customs, and doctrines" and "to extend the collaboration beyond the Nuremberg Trials, beyond the judicial field and into science and legislation."[29] The meeting ended with a speech by Pella, who was at the time an AIDP vice president and the secretary general of the Bureau for the Unification of Criminal Law and who two decades earlier had drafted a statute for an international criminal court. In his speech, Pella referenced the moribund 1937 treaties and made a plea for members to undertake a renewed initiative to unify the world's domestic laws under a universal regime of criminal sanction against crimes that posed a common danger to the international community. Criminal law, Pella agued, played a crucial role in restraining war and advancing the cause of peace, and legal professionals could further these goals by collaborating to harmonize their national legal systems.[30]

[27] Lewis 2014, 259–262.
[28] AIDP 2002.
[29] Ibid., 322.
[30] Ibid., 330–334.

Whether inspired by Pella's call or not, the drafters of the Genocide Convention and the Geneva Conventions – the first treaties that established international criminal accountability regimes for state-sponsored atrocities – subsequently helped advance Pella's goal through their respective designs. That is, both treaties created enforcement regimes that were designed to operate though domestic courts applying domestic legislation.[31] Such was the indirect enforcement model that Pella and other AIDP members had been advocating since the organization's founding. In a way, the fact that these treaties' enforcement regimes relied mostly on domestic courts and established no new international courts was a victory for powerful states who wanted to maintain the sovereign privilege of domestic criminal jurisdiction. But because the treaties obligated states to adopt domestic implementing legislation, they were also a victory for advocates of international criminal law in the AIDP, who saw such national implementation measures as key to advancing a universal criminal sanction regime that they deemed a second best solution in lieu of an actual permanent international tribunal.[32]

First instances of domestic implementation

The years following the Nuremberg trials and the postwar atrocity treaties is often characterized by scholars today as a period of "hibernation" for the cause of international criminal justice. Despite the monumental legal innovations of the immediate postwar years, efforts to continue the advancement of international criminal law in the UN foundered under Cold War geopolitical tensions.[33] For example, an initiative under the UN International Law Commission to draft a Code of Offenses against the Peace and Security of Mankind – in which AIDP members

[31] See, for example, article 5 of the Genocide Convention.
[32] Lewis 2014, 266.
[33] e.g. Schabas 2012, 13.

participated – terminally stalled by 1954 and would not be revisited until the 1980s.[34] No new international criminal tribunals would be established until the 1990s, and domestic prosecutions for atrocity crimes in the post Nuremberg decades would remain extremely rare.[35]

Nevertheless, a small number of countries did adopt national criminal laws against genocide and war crimes during the 1950s. Most of these could be considered countries for whom the idea of international criminal law would have been particularly salient. Countries like Israel, Denmark, the Netherlands, Switzerland, and Germany, were either closely connected to the atrocities of World War II or had traditionally been leaders in the promotion of international humanitarian law. In other words, the adoption of anti-atrocity laws for these governments could be understood as either political or strategic acts, aimed at either affirming their support for these nascent norms (as is likely for the Netherlands, Switzerland, and Denmark) or enabling their courts to prosecute these crimes (as in Israel or Germany).

But the other countries that adopted genocide and war crimes laws during the 1950s represent the beginning of what would develop into a tendency to perceive these laws less through the lens of politics and more through the lens of the professional norms of criminal law science. Beyond the few countries mentioned above, policymakers in most countries had little political appetite for the advancement of international criminal law. For example, resistance from inside their respective governments prevented the UK, US, and Ireland from even ratifying the Genocide Convention, let alone implementing it.[36] Nevertheless, AIDP leaders worked in professional fora to promote the idea that these new international crimes constituted important features of a modern state's criminal laws. At the forefront of this effort was Jean Graven, the Swiss comparative criminal law professor and judge who had helped draft the 1949 Geneva

[34] Struett 2008, 56–62.
[35] Sikkink 2011.
[36] Smith 2013.

Conventions and would go on to be elected president of the AIDP in 1963. Following the completion of the Conventions, Graven continued to bring attention among criminal law scholars to the need for the treaties' domestic implementation. For instance, Graven helped draft a resolution at the 1953 AIDP Congress in Rome that affirmed the importance of adopting national legislation to implement the Geneva Conventions, and he would continue to publish academic articles that emphasized this point.[37]

In 1953, Graven was commissioned by Ethiopian Emperor Haile Selassie to draft that country's new criminal code. The criminal code was part of a broader and explicit effort initiated by Selassie to modernize the entire Ethiopian legal system through the drafting of several new legal codes, including a new civil code, commercial code, maritime code, and criminal procedure code.[38] Though it is possible Selassie was motivated more by the prestige that he hoped to garner from presenting Ethiopia's new, modern legal system to the world,[39] he nonetheless publicly justified the initiative by invoking Ethiopia's need to adapt its institutions to current standards to better serve contemporary needs. Thus, in Selassie's words, "The necessity of resolutely pursuing our program of social advancement and integration in the larger world community...make[s] inevitable the closer integration of the legal system of Ethiopia with those of other countries with whom we have cultural, commercial and maritime connections."[40] To oversee the initiative, a Codification Commission was appointed comprising thirty foreign and Ethiopian legal experts. But for the main task of drawing up initial drafts of the codes, the Emperor appointed four eminent French and Swiss comparative law experts, including Graven.[41]

[37] AIDP 2009, 39–40; AIDP 1957, 45–57; Graven 1956.
[38] Singer 1970, 80–83.
[39] M. Cherif Bassiouni, who was a student of Graven at the time and assisted with the criminal code's drafting, insists this was Selassie's true motivation. Interview with M. Cherif Bassiouni, 24 Jun 2014, Chicago, IL.
[40] Quoted in Singer 1970, 80.
[41] Jembere 2000, 199–200.

The drafters were directed to incorporate principles and customs from Ethiopia's long and proud indigenous legal tradition. But as "the most distinguished jurists of the Continent," as Selassie described them, they were also expected to incorporate "contributions of the most significant systems of jurisprudence in the world today."[42] For his draft criminal code, Graven thus drew primarily on what were at the time the most esteemed European criminal codes among criminal law specialists. The greatest influence came from the Swiss criminal code of 1937, which according to leading comparativist, Marc Ancel, writing in 1958, was "considered by many criminal lawyers as the finest [criminal code] of this rich legislative period [the first half of the 20th century]."[43] Beyond the Swiss code, Graven also emulated much from other European criminal codes that were considered particularly exemplary: the 1930 Italian code (also commonly known as the "Rocco code"),[44] the 1950 Greek code, and the 1951 Yugoslav code.

Graven also included what he called an "innovative" chapter in the Ethiopian code that "incorporates the whole new field of offences against the law of nations boldly into the national law, in order to guarantee the effectiveness of its provisions."[45] The chapter, titled "Offenses against the Law of Nations," included articles on genocide, war crimes, and crimes against humanity (arts. 281-284). In a commentary published following the code's promulgation, Graven pointed out that his code followed the 1951 Yugoslav code in including crimes of a military character in the civilian criminal code, which differed from the longstanding practice of relegating them to a dedicated military criminal code, a distinction for which "there was no good reason for maintaining."[46] But he also noted that his version codified these prohibitions "more

[42] Graven 1964, 277–280. Preface to the Penal Code of the Empire of Ethiopia, Proclamation No. 158 of 1957, *Negarit Gazeta*: *Gazette Extraordinary No.1,* 23 Jul 1957.
[43] Graven 1965, 2; Ancel 1958, 363n86.
[44] Ancel calls the Rocco code a technical 'triumph.'" Ancel 1987, 97.
[45] Graven 1964, 295.
[46] Ibid., 287–288.

systematically and completely" than did other leading exemplars.[47] Graven thus boasted: "In this realm, the Ethiopian Code has really given an example which places it at the head of the laws of the World [sic]."[48]

Graven's work on the Ethiopian criminal code foreshadows how, in the minds of criminal code drafters, the ideas of national criminal laws against of genocide, war crimes, and crimes against humanity would come to be associated with the idea of scientific criminal code reform. Graven was apparently motivated by a principled commitment to advancing international criminal law. But many of the criminal law specialists drafting new codes who would follow his lead were not so much committed to the normative agenda of international criminal law as they were to the professional agenda of advancing the "science" criminal law, an aim which entailed furthering the field's cutting-edge innovations, like the implementation of international criminal law. The 1957 Ethiopian criminal code received attention from comparative criminal law scholars in English, Spanish, French, and German-language scholarship,[49] which was unsurprising given the prestige of its drafter. The influential *American Series of Foreign Penal Codes*, which translated into English and published important foreign criminal codes like those of France, Germany, and Norway, planned to publish a volume on the Ethiopian code (though for unknown reasons never did).[50] Leading German and Spanish-language scholarship specifically cited Ethiopia as an example of one the few countries that had adopted national criminal laws against genocide and war crimes.[51] Thus, the Ethiopian criminal code came to be seen as exemplifying the state of the art of codification for these new crimes that, for criminal law specialists, carried the particular types of modern and universalist connotations that they

[47] Ibid., 295.
[48] Ibid.
[49] Russell 1961; Luisi 1974, 221; Dainow 1956, 382; Jescheck 1961, 374.
[50] Mueller 1970, 47.
[51] Jescheck 1961, 374; Jiménez de Asúa 1964, 1172–1173.

prized.

1957-1983: From principled motivation to emulation and professionalization

The 1960s and 70s were particularly active times around the world for criminal law reform. This development provoked increased interest in the types of comparative study and universalistic aims that AIDP leaders had long championed. Under these conditions, anti-atrocity laws were well positioned to go beyond the concern of a small group of principled norm entrepreneurs actively promoting them. That is, because anti-atrocity laws embodied the universalistic aims that drafters during this period sought to realize in their codes, criminal law specialists who lacked the principled commitment to progressive politics nonetheless were conditioned to view these laws as part of how modern criminal code should look.

The globalization of comparative criminal law and criminal code reform

Until this time, criminal code reform was mostly an interest of Western and Central European criminal law scholars. But by the early 1960s, criminal code reform was on the legislative agendas of countries all over the world.[52] In the USSR, the adoption in 1958 of a new official statement on the *Fundamental Principles of Criminal Legislation of the USSR and Union Republics* led to a new Russian criminal code in 1960 and prompted the adoption of new codes across the individual Soviet republics. These developments in turn inspired a wave of criminal code redesigns across Communist Eastern Europe, including in Czechoslovakia (1961), Hungary (1961), Bulgaria (1968), East Germany (1968), Romania (1968), and Poland (1969).[53] The criminal law reform trend also penetrated the common law world. Between the late 1950s and

[52] Jescheck 1981.
[53] Ibid., 3.

the early 1970s, the United Kingdom undertook a series of major reforms and attempted (unsuccessfully) to initiate a formal civil law-style codification of its criminal laws.[54] In the US, a ten-year project by the American Law Institute to draft a Model Penal Code was completed in 1962 and was subsequently used by dozens of US states over the next two decades to guide the redesigns of their criminal codes.[55] Inspired by these trends in Europe and the US, Latin American governments and criminal law experts also took up the cause of criminal code reform. Beginning in the early 1960s, the Chilean criminal law professor, reform advocate, and AIDP board member Eduardo Novoa Monreal organized a series of ten conferences over 14 years of elite criminal law scholars from across Central and South America to draft a Model Penal Code for Latin America (MPCLA).[56] The idea behind the MPCLA was to provide an off-the-shelf guide to the drafting of national criminal codes that would help harmonize the region's national criminal justice systems around common norms and standards.[57] Novoa explicitly traced the intellectual lineage of his project back to the tradition of unification that originated with von Liszt and which was carried on by Pella.[58] Over the course of the 1960s and 70s, the majority of Latin American states redesigned their criminal codes, and many drew heavily from the MPCLA.[59] Meanwhile, the African continent was undergoing rapid decolonization, and many of these newly independent states adopted new criminal codes to replace their colonial codes, assert their newfound sovereignty, and modernize their legal systems.[60] Even countries in East Asia, South Asia, and the Middle East – which historically have been the least disposed towards following legal trends emanating from Europe – were swept up in the reform wave, as countries

[54] Buxton 1973; Weiss 2000, 493–495.
[55] Robinson and Dubber 2007.
[56] Dahl 1989, 19.
[57] Levene 1964.
[58] Novoa Monreal 1969, 760–761.
[59] Dahl 1989.
[60] Sedler 1968; Wekerle 1978.

as diverse as Nepal, Iraq, Tuvalu, and Mongolia all redesigned their criminal codes during these two decades.

This surge in interest in the reform criminal law inspired a renewed focus on the comparative study of criminal law to aid the drafting of new codes. In Germany in 1954, founder of the German national AIDP chapter and later AIDP president Hans Jescheck was appointed director of the newly established Max Planck Institute for Foreign and International Criminal Law. The institute became a hub of international study of comparative criminal law, attracting leading researchers from Europe, the US, and Latin America and publishing academic studies and reform proposals. The Institute also published a series of German translations of exemplary or influential foreign criminal codes.[61] The Institute's work inspired the creation of a similar institute in the US, the Comparative Criminal Law Project of New York University (CCLP). The CCLP was founded by German immigrant and law professor Gerhard Mueller, who also founded the American chapter of the AIDP and whom scholars credit with bringing the study of international criminal law to the US.[62] Until that point, the American study of criminal law had long been largely provincial, with little comparative focus on other countries.[63] Among other activities, the CCLP contributed to the professionalization of criminal law scholars worldwide by publishing over fifteen volumes of foreign criminal codes and codes of criminal procedure translated into English. First-hand accounts of criminal code drafting processes confirm that these translations continued to be relied upon for guidance by criminal code drafters decades later.[64]

This attention to comparative study helped facilitate increasing professionalization

[61] Riegert 1968.
[62] Wise 1994.
[63] Mueller 1970, 41–43.
[64] e.g. Rosen 2001, 80.

among criminal law scholars around common understandings of what constituted minimum standards for modern criminal codes. This is evidenced by the extent to which newly redesigned criminal codes in this era converged around similar features that had long been advocated by organizations like the AIDP. In general, the trend around the world in the 1960s and 70s was for criminal codes to become less repressive and more protective of the rights of offenders, which had been overarching goals of the IKV and AIDP since their beginnings.[65] For example, the recognition of the principle of legality and the abolition of punishment by analogy became commonplace in codes adopted during this period. The principle of legality dictates that only crimes that are codified in law can be punished (also known by the Latin phrase *nullem crimen nulla poena sine lege*), while, in contrast, the principle of analogy permits punishment for an act that is not explicitly criminalized. Punishment by analogy had long been common in European legal systems, but as early as its 1937 Congress, the AIDP had called for its end.[66] By the end of World War II, punishment by analogy had mostly been abolished in Western European legal systems.[67]

Nevertheless, following the lead of the Soviet Union, some socialist states retained analogy in their criminal laws, which allowed them to exercise wide latitude in punishing any acts deemed to be dangerous to the social order. However, by the late 1950s, Soviet criminal policy had become more professionalized, as criminal law scholars began to enjoy greater influence over legislation.[68] Meanwhile, Soviet criminal law experts had also begun to participate in transnational professional fora, like the AIDP. For example, one of the leading Soviet criminal law experts, Andrei Piontkovskii, began attending AIDP congresses in the 1950s

[65] Burgstaller 1989, 31–32.
[66] AIDP 2009, 33.
[67] Glaser 1942.
[68] Solomon 1978, 33–41.

and would eventually become a vice president of the organization.[69] Then in 1958, the USSR's *Fundamental Principles of Criminal Legislation*, which represented an overall liberalization of Soviet criminal law and which was mostly the work of criminal law scholars, abolished punishment by analogy.[70] Following the USSR's abolition, other socialists states began to abandon the principle in the new codes they adopted in the 60s, 70s, and 80s, as they sought to signal the modern character of their criminal laws. As noted in a commentary published by the Vietnamese Council of Ministers on that country's new 1985 criminal code that abolished punishment by analogy: "The abolition of the principle of analogy is in keeping with progressive tendencies in law throughout the world, and particularly in the fraternal socialist countries. All are unanimous in seeing in the abolition great progress in the penal legislation of Vietnam."[71]

Genocide laws in Latin America

This increasing professionalization around standards deemed to apply universally created the conditions that favored the inclusion of anti-atrocity laws in new criminal codes, and Latin America provides what is perhaps the clearest example of this. As mentioned above, the European criminal code reform movement, of which the AIDP was at the center, spread to Latin America in the form of the project to create a Model Penal Code for Latin America (MPCLA). Many of the scholars participating in the project were also leaders in the AIDP, including Heleno Claudio Fragoso of Brazil, Luis Jiménez de Asúa of Argentina, and Eduardo Novoa Monreal of Chile. These scholars were strongly influenced by German criminal law scholarship and had spent time at the Max Planck Institute in Freiburg.[72] The project would prove highly influential

[69] AIDP 1957; Wieczynski 1982.
[70] Giovannetti 1984, 396; AIDP 1957.
[71] Quoted in Quigley 1988, 157.
[72] Interview with M. Cherif Bassiouni, 24 June 2014, Chicago, IL.

and would inspire the drafting of new criminal codes across the region.[73] Between 1970 and 1990, eleven Latin American countries adopted newly redesigned criminal codes.[74]

When designers in these countries were faced with drafting new codes, they turned to sources from within the professional community who had promoted reform across the region in the first place, like those scholars who had participated in the drafting of the MPCLA. And in a number of ways, these sources favored anti-atrocity laws. For example, one of the most influential scholars involved with the MPCLA was the Argentine criminal law professor and former attorney general Sebastián Soler. In the late 1950s, Soler was commissioned to draft proposals for new criminal codes for both Argentina and Guatemala. Though these countries ultimately never adopted Soler's codes, experts throughout the region would go on to hold up Soler's published drafts as authoritative models. Over the next three decades, numerous new Latin American penal codes would cite Soler's drafts as models for their own design, including the MPCLA.[75] This was in part because Soler's codes were seen by scholars as exemplifying the most advanced technical thinking in criminal law science.[76] At the same time, Soler's drafts also promoted a universalist orientation and liberalizing aims, ideas that directly reflected those of the AIDP.[77]

Both of Soler's drafts contained an article for a new category of crime – "homicide for purposes of racial or religious hatred" – that Soler explicitly modeled on the definition of

[73] Dahl 1989.
[74] Costa Rica (1970), Bolivia (1971), El Salvador (1973), Guatemala (1973), Nicaragua (1974), Cuba (1979 and 1987), Colombia (1980), Guyana (1980), Panama (1982), Honduras (1983) and Peru (1991).
[75] For references to Soler's drafting in the design of other national criminal codes, see, for example: Antillón Montealegre 1997; Antony 1987, 92; Fragoso 1979, 15.
[76] López-Rey y Arrojo 1969, 352; Rodriguez Devesa 1960.
[77] Soler specifically points out in his draft for Guatemala that his approach was to seek out generalizable principles that can be adopted by countries as opposed to tailoring laws to specific circumstances. See Soler, Lemus Morán, and Augusto de Leon 1960, 8–9. Other scholars criticized Soler's draft for its universalist approach. See López-Rey y Arrojo 1979, 144–145.

genocide contained in the Genocide Convention.[78] Given the prestige granted to these drafts, leading Latin American scholars, like those who took part in drafting the MPCLA, took notice of this innovation in their academic writings.[79] In 1970, Costa Rica adopted a new criminal code that was the first new code in the region to include a provision against genocide (art. 373). Written by Guillermo Padilla Castro, who had participated in the MPLCA meetings, the Costa Rican code explicitly drew heavily on Soler's 1960 draft, particularly its special part.[80] In the code's accompanying commentary, the drafters note that the code's section on "Crimes against Human Rights," which included provisions against genocide and other forms of discrimination, existed only in the Costa Rican code. Thus, in its own words, "The [Drafting] Commission is proud" that "a small country like ours can stand out for its defense of human rights in a legal instrument that strongly penalizes its violation."[81]

Over the next two decades, ten Latin American countries would redesign their criminal codes, and eight of those codes would include an article on genocide. However, in contrast to the Costa Rican code, the commentaries published with these codes tended not to emphasize the genocide provision's contribution to the defense of human rights, but instead tended to note the provision's reflection of professional trends. For example, the designers of the 1973 Guatemalan criminal code noted that its provision against genocide "summarizes the doctrinal trends" that pertain to the international crime of genocide, while the designers of the 1982 Panamanian criminal code noted that its genocide provision reflected "one of the greatest concerns of scholars of international criminal law," that is, "achieving the unification" of crimes against international

[78] Soler, Lemus Morán, and Augusto de Leon 1960, 60; Soler 1964, 74–75, 150–151.
[79] e.g. Fragoso 1973; Rodriguez Devesa 1960, 378–379.
[80] Antillón Montealegre 1997; Romero Pérez 1972.
[81] Costa Rica 1970, 40.

law across national territories.[82] In other words, these drafters' justifications for their genocide provisions reflected more their concern with professional developments than the protection of human rights.

1983-1998: Monitoring and acculturation rise

Until the early 1980s, the inclusion of anti-atrocity laws in new criminal codes was mostly driven by emulation and professionalization among technocratic criminal law specialists. But during the 1980s and 90s, these laws benefited from new sources of social pressure that operated through monitoring and acculturation and influenced policymakers directly. To reiterate, monitoring refers to "the various ways that actors external to a state participate in "observing and checking the progress or quality of a policy, practice, or condition over an extended period of time."[83] In contrast, acculturation can occur in the absence of targeted policy promotion by particular actors. It refers to the process by which governments adopt policies in order to maintain legitimacy and avoid being seen as out of step with their peers. This period saw three developments that helped activate these mechanisms in ways that favored anti-atrocity laws: the rise of human rights international nongovernmental organizations (INGOs), the renaissance of atrocity justice, and a resurgence in foreign technical legal assistance.

The first two of these developments – the rise of human rights INGOs and the renaissance of atrocity justice – helped foster an international normative context in which, politically, the cause of combating atrocities became increasingly salient and legitimate. In the late 1970s, Human rights INGOs, like Amnesty International and Human Rights Watch, emerged as influential global political players by mobilizing activists and directing global attention to

[82] Guatemala 1999, 73; Royo 1970, 57.
[83] Kelley and Simmons 2015, 3.

abusive regimes around the world.[84] While these groups did not focus on the domestic implementation of anti-atrocity law during this period, they did succeed in elevating human rights norms to what Risse and Sikkink call "prescriptive status." That is, by the 1990s even repressive states publicly accepted the validity of human rights norms. Instead of denying the legitimacy of international human rights norms themselves, repressive states increasingly shifted to refuting accusations that they were violating norms, thus implicitly acknowledging those norms' legitimacy.[85] At the same time, the end of the Cold War helped depoliticize the notion of human rights and opened new political space for a Renaissance in justice for atrocities.[86] In response to the civil wars in the Balkans and the genocide in Rwanda, the UN established the first international criminal tribunals since Nuremberg, and countries in Latin America and Europe that had recently transitioned out of authoritarian rule increasingly opted to put former regime and military officials on trial.[87] This new salience of atrocity crimes in global politics thus helped foster an international normative context in which acculturation pressures led drafters of new criminal codes, and the policymakers reviewing them, to be more mindful of anti-atrocity laws and the international community's growing expectations of their legislation.

The third development – the resurgence in foreign technical legal assistance – provoked increased monitoring of national criminal code drafts by foreign experts. The first wave of foreign legal assistance occurred in the 1960s under the so-called "law and development" movement. Inspired by modernization theory, American policymakers and nongovernmental organizations saw law reform in developing countries as an "instrument of development."[88] By the early 1980s, faced with little tangible success from its efforts, the movement was widely

[84] Moyn 2010.
[85] Risse and Ropp 1999, 264–267; Risse and Sikkink 1999, 29–31.
[86] Sikkink 2011, 246–247.
[87] Sikkink 2011.
[88] Merryman 1977, 463.

considered dead.[89] But the end of Cold War triggered a renewed interest in foreign legal assistance, as many newly liberalizing states sought to remake their legal institutions, particularly through adopting new constitutions and legal codes. This interest inspired a new wave of efforts on behalf of American and European agencies, both governmental and nongovernmental, to shape the designs of these new institutions.[90]

This new wave of foreign legal assistance efforts included guidance on the design of new criminal codes, especially in the post-Communist states of Eastern Europe and Central Asia. One such project in particular – the Model Criminal Code for the Commonwealth of Independent States – would go on to facilitate the adoption of criminal laws against genocide, war crimes, and crimes against humanity in the majority of post-Soviet states. In the mid-1990s, the Commonwealth of Independent States (CIS), a loose intergovernmental federation comprising the former Soviet republics, undertook an initiative to draft a series of model legal codes. The model codes would reflect state-of-the-art standards and could serve as the basis for reforms in individual countries, which lacked the capacity to design their own reforms.[91] To draft the codes, the CIS Inter-Parliamentary Assembly (IPA) brought together the leading legal scholars from across the CIS countries, many of whom were working on new codes in their own countries, to work with Dutch and American legal assistance organizations, who funded much of the project.[92]

The Model Criminal Code for the CIS, completed in 1996, thus included a range of legal innovations that were progressive for the region, including the decriminalization of homosexuality and new prohibitions against intellectual property violations and obstructing the

[89] Snyder 1982.
[90] Ajani 1995, 110–115; deLisle 1999, 184–193.
[91] Sharlet 1997, 343. Interview with Peter Maggs, 3 Apr 2015, via Skype.
[92] Smits 2003, 560–561. Interview with Peter Maggs, 3 Apr 2015, via Skype.

work of journalists.[93] The innovations were not the result of public demand, as the drafting of the code took place largely without much public attention, but instead reflected choices made by legal elites.[94] The Model Code also included an extensive list of international crimes, including genocide (art. 107) and war crimes (art. 106), as well as other crimes that have traditionally been far rarer in national penal codes, including ecocide (art. 108) and the waging of an aggressive war (art. 103).[95] The Model Code went on to be highly influential among CIS member states; the vast majority drew heavily on it in drafting their own codes over the next decade, which helps account for why most contain the same international crimes as those included in the Model Code. Many of these codes even included the more obscure crimes of aggression and ecocide.[96] This can help explain why of the ten countries in the world today that have national criminal laws against ecocide, nine are CIS states.[97]

Another source of monitoring that emerged in this period was a new effort by the International Committee for the Red Cross (ICRC) to promote national implementation of international humanitarian law. Though, under international law, the ICRC had long been the official guardian of international humanitarian law, for much of the post-WWII era it did not place much emphasis on criminal accountability for war crimes. Instead the ICRC sought to promote adherence to international humanitarian law through the more pragmatic strategies of private diplomacy and attending to prisoners of war.[98] While the ICRC had always emphasized the importance of domestic implementation, it had traditionally expended little effort on

[93] Richter 1996; Noble 2013, 126; Magomedov and Tataryan 2012, 70–71. The text of Model Criminal Code is available here (in Russian): https://www.icrc.org/rus/assets/files/other/crim.pdf.
[94] Noble 2013.
[95] Ecocide is the "mass destruction of flora and fauna, poisoning of the atmosphere or water resources, as well as other actions that cause an ecological catastrophe" (art. 108). For more on the history ecocide as an international legal norm, see Higgins, Short, and South 2013.
[96] Sayapin 2014, 205.
[97] See "Ecocide crimes in Domestic Legislation," http://eradicatingecocide.com/wp-content/uploads/2012/06/Ecocide-National-Criminal-Codes1.pdf.
[98] Lewis 2014, 278.

persuading states to enact such measures. But in the mid-1980s, the organization began a new concerted effort to encourage implementation. Following a resolution at its 1986 international meeting that urged governments to fulfill their implementation obligations under the Geneva Conventions, the ICRC sent official queries to state parties and their national ICRC chapters requesting information on how they had carried out or were planning to carry out these obligations.[99] This new interest in implementation by the ICRC culminated in 1995 in the establishment of a new Advisory Service on International Humanitarian Law.[100] Among other activities, the Advisory Service has worked to promote implementation by lobbying governments, organizing seminars with national officials, supplying model implementation laws, and offering technical assistance on drafting new legislation.[101] The Advisory Service has also promoted the creation of national governmental committees for the implementation of international humanitarian law, which help recommend measures to effect implementation and offer assistance on new legislation.[102] By 2013, over 100 countries from all over the world had established such committees.[103]

1998-present: Civil society takes the lead

The most recent phase of domestic implementation of anti-atrocity laws has been the result of new civil society-led movement that was sparked by the creation of the International Criminal Court (ICC). The ICC was established in 1998 as the world's first permanent criminal tribunal tasked with prosecuting international crimes. As with the abortive proposals in the earlier part of the century, members of the AIDP leadership played central roles in promoting the idea of an

[99] ICRC 1991, 3–11.
[100] Berman 1996, 339–340.
[101] Ibid., 342–344.
[102] ICRC 2001.
[103] https://www.icrc.org/eng/assets/files/2013/national-committes-icrc-16-08-2013-eng.pdf.

international criminal court and shaping the design of its statute. This time, it was AIDP president M. Cherif Bassiouni, who is widely considered the "father" of modern international criminal law, and was one of the chief advocates for an international criminal court in the last quarter of the 20th century.[104] Bassiouni had been publishing draft statutes for an international criminal court published as early as 1980, and these drafts would go on to inspire the design of the ICC's Rome Statute, for which Bassiouni served as chairman of the drafting committee.[105]

The ICC's enforcement model is based on one proposed by the 1953 UN Committee on International Criminal Jurisdiction, which followed the model originally proposed by AIDP President Pella in the 1937 statute he drafted to prosecute cases under the proposed anti-terrorism treaty. In this model, national courts share jurisdiction with an international tribunal.[106] In the case of the ICC, this is known as its complementarity regime, and it places national courts as the primary enforcers of the Rome Statute's crimes, allowing the ICC to prosecute cases only when national authorities are either unable or unwilling to do so.[107] For national courts to prosecute cases, they typically require domestic implementing legislation that incorporates the Rome Statute's crimes – genocide, war crimes, and crimes against humanity – into domestic criminal law.

The importance of domestic implementation to this enforcement model provoked a new impetus for implementation from the actors, like human rights NGOs, who had invested so much effort in founding the Court. These groups thus turned their efforts to ensuring the Court would work properly by monitoring states' implementation of the Rome Statute. Advocates for the ICC, like Amnesty International, the International Federation for Human Rights, and the Coalition for

[104] Sadat and Scharf 2008, v–vi.
[105] Bassiouni 1980; International Law Commission 1994; El Zeidy 2008, 133.
[106] El Zeidy 2008, 93–94, 133, 137.
[107] Ibid., 157–237.

the International Criminal Court, made implementation of the Rome Statute central to their advocacy agendas.[108] Since the Court's founding, they have published surveys on the status of implementation around the world and targeted particular countries with in-depth reports on the failures of their current legislation to meet Rome Statute obligations.[109] These organizations also offer technical assistance to states that lack native expertise in helping them to draft implementing legislation and devise ways to interpret existing laws to avoid conflicts with ICC obligations.[110]

A common instrument for implementing Rome Statute crimes has become comprehensive legislative acts, which incorporate all three categories of crime into domestic law at once, along with a set of administrative complementarity provisions. The popularity of these comprehensive acts can also help explain the marked uptick in adoptions of national criminal laws against crimes against humanity. The adoption of laws criminalizing crimes against humanity had long been far rarer than those for genocide and war crimes. One likely reason for this was that unlike genocide and war crimes, crimes against humanity had long lacked a dedicated international treaty codifying the specific set of crimes in international law and obliging states to adopt implementing legislation. But with the Rome Statute, the three categories of crime were now codified in one instrument, and advocates of implementation have presented them as a single package of prohibitions that require adoption in full.

Meanwhile, these organizations have also seized on national criminal code redesign processes to point out where draft codes fail to conform to the Rome Statute and to urge states to

[108] Schroeder and Tiemessen 2014, 56–58.
[109] Varda n.d., 12–18. See, for example, Human Rights Watch 2001; Amnesty International 2010; Amnesty International 2005.
[110] Schroeder and Tiemessen 2014, 56.

modify proposed legislation.[111] Thus drafters of new codes today can anticipate that their codes will be scrutinized by INGOs for their adherence to Rome Statute obligations. As Kelley and Simmons note, "Even the anticipation of publicity and negative domestic reactions could in some cases prompt preemptive policy review by government officials."[112] In other words, the rise of monitoring of draft national criminal codes has increased the incentives for both technocratic drafters and policymakers to include anti-atrocity prohibitions so as to avoid bad publicity.

But even in countries that are not targeted for monitoring by international actors, drafters of new codes and the policymakers who review them now operate in a global normative context that has given rise to new expectations regarding what is appropriate to include in a new criminal code. The adherence of criminal codes to international law and human rights standards in general has become the object of global scrutiny, both by INGOs like Amnesty International and Human Rights Watch, and international organizations, like the Council of Europe and the UN human rights oversight committees. This normative context has encouraged further acculturation by producing new, tacit social pressure on drafters and policymakers to ensure their codes conform to prevailing understandings of how a modern code should look. This is evidenced by the fact that prior to 1998, about one third of new criminal codes contained genocide provisions and one quarter contained war crimes provisions. After 1998, over eighty percent of new criminal codes contained genocide and war crimes provisions.[113]

Conclusions

This chapter has traced the history of the spread of national criminal laws against genocide, war crimes, and crimes against humanity since their codification in international law following

[111] REDRESS and KCHRED 2008.
[112] Kelley and Simmons 2015, 58.
[113] These counts omit new criminal codes in countries that already had such laws.

World War II. I have shown that early efforts to adopt these laws grew out of two linked intellectual agendas that originated with the IKV/AIDP before World War II: the promotion of scientific criminal code reform and the pursuit of an effective international criminal law regime. The experts who advanced these agendas were also central to the creation of the post-WWII international anti-atrocity regime, which was based on the indirect enforcement model they had long favored. Through a range of professional activities, like conferences, textbooks, and the dissemination of exemplary codes, these experts successfully socialized criminal law specialists from a variety of political orientations to associate anti-atrocity norms with modern standards of criminal law. This association facilitated the adoption of anti-atrocity norms in criminal codes around the world, despite the issue of anti-atrocity justice enjoying little broader political salience during the 1960s, 70s, and 80s. Then, as the Cold War ended, transnational human rights organizations made accountability into a central issue, while actual anti-atrocity justice was meted out a large scale for the first time since World War II. These developments raised the salience of anti-atrocity norms in global politics, and coupled with a rise of foreign technical legal assistance, further encouraged the adoption of anti-atrocity norms in new criminal codes. Finally, the establishment of the ICC in 1998 sparked the first international NGO campaigns to promote the domestic implementation of anti-atrocity law, which shifted the bulk of activity around implementation from professional circles to activist ones.

Two interesting points emerge from this narrative. First, technocratic legal specialists have played at least as great – if not a greater – role than politicians or civil society activists in the spread of national criminal laws against state-sponsored atrocities. Technocratic professionals have received attention in the norm diffusion literature, but mostly in the realm of

international finance or science policy.[114] In contrast, the literature on human rights norms commonly attributes their diffusion to activist civil society actors.[115] In the case of domestic anti-atrocity laws, it was law scholars and professors who conceived of the idea that national legal systems should play a role in the enforcement of international criminal law. And through professional activities – not public advocacy – these specialists worked mostly outside the public view to socialize their colleagues to view anti-atrocity laws as emblematic modern norms.

Second, many of the drafters of these new codes were also not particularly progressive in their political views. In contrast to much research that views the carriers of human rights norms as motivated by principled commitments to these norms,[116] many of the criminal law specialists who inserted anti-atrocity laws in new codes were motivated more by commitments to the advancement of their professional craft than to progressive politics. This was especially the case in authoritarian countries, like those of Latin America and Eastern Europe, where specialists who expressed a more normative political agenda would have likely been granted little political influence. As both Hilbink and Kislowski have shown in studies of the legal profession under authoritarian rule, the adherence to apolitical, formalist legal paradigms over normative ones is necessary for legal specialists to maintain a perception as nonthreatening and thus to cultivate trust from rulers.[117] Ironically, if specialists in these countries had been committed to advancing human rights norms, they likely would not have been granted the power to design new codes. These ideas are explored further in Chapter Five, which investigates in-depth the adoption of anti-atrocity laws in one authoritarian state, Guatemala.

This chapter has shown that the adoption of anti-atrocity laws often occurs within

[114] e.g. Raustiala 2002; Haas 1992.
[115] e.g. Risse and Ropp 1999; Kim 2013.
[116] e.g. Keck and Sikkink 1998; Clark 2001.
[117] Hilbink 2007; Kisilowski forthcoming.

episodes of criminal code redesign, but on average, do countries that are likely to adopt these laws do so regardless of whether they undertake such reforms or not? In other words, does the initiative to undertake a redesign of a country's criminal code make that country more likely to adopt anti-atrocity laws than a country that does undertake large-scale reforms? This question motivates the following chapter.

CHAPTER FOUR

Statistical evidence: Criminal code redesign and atrocity criminalization

In the previous chapter, I showed that many instances of national criminal code redesign over the past sixty years have led to the adoption of national anti-atrocity laws. In this chapter, I assess the generalizability of this link between criminal code reform and atrocity criminalization. Specifically, I use event history analysis to test the hypothesis that for any given year, states that redesign their criminal codes are more likely to adopt national anti-atrocity laws than states that do not.

To summarize the argument underlying this relationship: The task of redesigning a new criminal code in its entirety requires extensive technical knowledge that policymakers typically lack, so governments usually delegate the work of writing new codes to criminal law specialists. The overtones of modernization that tend to permeate these processes prompt specialists to seek out norms that they would deem to be essential for or emblematic of a modern criminal code. When considering what norms should thus be included in a modern criminal code, two professional-level influences are particularly important: 1) ideas promoted by transnational professional networks and associations (the "professionalization" mechanism), and 2) models deemed exemplary or prestigious by specialists' particular professional communities (the "emulation" mechanism). As I detailed in the previous chapter, in the post World War II era, these two influences have strongly favored the adoption of anti-atrocity laws. Ultimately, given that these reform processes are viewed less as political processes and more as technocratic projects, governments are more willing in these contexts to defer to experts and approve anti-atrocity laws, which outside the reform context would have likely provoked greater scrutiny.

This chapter has four sections. In the first section, I detail the method and data I use to test my main hypothesis. I also present and operationalize several alternative hypotheses based on existing research on human rights and norm diffusion. In the second section, I quantitatively test my hypothesis using event history analysis against a range of alternative hypotheses and discuss my findings. In the third section, I investigate what types of countries are more likely to criminalize atrocities via criminal code redesign than conventional targeted legislation and assess these findings in light of my theory's causal story. In the final section, I summarize this chapter's findings and their significance for the larger study.

Method and data

Event history analysis

To reiterate, my main hypothesis is that *for any given year, states that redesign their criminal codes are more likely to adopt national anti-atrocity laws than states that do not.* To test this hypothesis I use event history analysis, a time-series statistical method that models the probability that a subject (in this case, states) experiences some event (adoption of a particular anti-atrocity law) in a given period (year), given that it has not already experienced that event. The probability of criminalization for any given country in any given year is thus a function of the selected covariates, which can vary over time and which are based on the hypotheses and operationalizations described below. Event history analysis assumes that the event in question is irreversible; once a subject experiences the event, it drops out of the analysis. In other words, the assumption is that once a state adopts a law in question, the law is never repealed.[1] More

[1] I uncovered only a single instance in which a state either repealed an anti-atrocity law or amended it to make it weaker: The 2006 US Military Commissions Act reduced the number of acts that could be considered "war crimes" under the earlier War Crimes Act of 1996. Nevertheless, because my coding rule only requires the existence of at least a single category of war crimes, the US law would still be coded positively after the 2006 amendment.

specifically, I use a Cox proportional hazards model, which makes no assumptions regarding the directionality or shape of the underlying baseline probability. I construct separate models for each of the three categories of crime examined here: genocide, war crimes, and crimes against humanity. The time period for each model begins the year that the international norm was established and goes to 2010, the most recent year for which most covariates are available.[2]

Dependent variables

The dependent variable for each model is the number of years from either the establishment of the international norm or since the country joined the UN (whichever is later) until the passage of the domestic criminal statute. Data for this variable comes from a new dataset I have compiled on the existence of national anti-atrocity laws and the years they were adopted in every independent country in the world that has adopted them since World War II. To collect these data, I consulted an extensive variety of print and online materials. When possible, I sought to document the existence and timing of laws using official print or online publications of countries' criminal laws and penal codes. But when such materials were either unavailable or not possible to translate, I relied on a variety of secondary source materials that contain references to the existence and timing of these laws, including: scholarly monographs and annotated compilations of laws; reports and compilations published by international governmental organizations, such as UN or EU agencies; databases compiled by nongovernmental organizations, such as Amnesty International and the International Committee for the Red Cross; and media reports. Appendix 4.1 contains a selected list of these secondary sources.

[2] The starting dates for each norm are as follows: war crimes in 1949 (when the 1949 Geneva Conventions were established); genocide in 1948 (when the Genocide Convention was established); and crimes against humanity in 1945 (when the charter for the Nuremberg tribunal was established).

Determining what counts as an instance of each of these laws is based on detailed coding rules, which are reproduced in Appendix 4.2. The general principle underlying these rules is that a statute for a given crime must invoke, whether explicitly or implicitly, that crime's origins in international law. For a crime like genocide, the very use of the term "genocide" is sufficient to imply such a link, since the legal concept's origins unmistakably lie in international law. However, for war crimes, a concept that originates in domestic legal systems prior to its codification in international law, I devised detailed coding rules to determine if the language of the statute reflects an origin in international law. I treat the passage of a given criminal statute as a onetime, dichotomous event; my coding rules do not account for variation in the scope of laws, but instead set a minimum standard by which I consider a state to have a criminal law against genocide, war crimes, or crimes against humanity.

In all, I have compiled data on 195 independent states from 1945 to 2012 (though the number of countries in each statistical model is limited by the availability of covariates.) Appendix 4.3 lists all the countries that are coded as having statutes for each of the three categories of crime and the years those laws were adopted. Appendix 4.4 lists the countries that adopted these laws prior to independence and thus are not included in the analyses.

Independent variable

The main independent variable in each model is *new criminal code*, which is a dummy variable indicating whether a country adopted a new criminal code in a given year. I define a "new" criminal code as one that comprehensively abrogates and replaces a country's previously in force criminal laws. I complied these data using the *Foreign Law Guide* (FLG), a unique online and print resource that, among other features, aims to list each country's major legal codifications

and code reforms.[3] While the FLG covers most countries in the world, it does not cover every country. Therefore, I also supplemented the FLG data with original research into the countries that are not included in the FLG. I also verified the FLG data as I combed through countries' criminal laws for the coding of the dependent variables. In all, my data include 166 instances of new criminal codes in 122 countries since 1945. Appendix 4.5 lists these new codes and the years they were adopted.

Alternative hypotheses

I also include several variables to test for plausible alternative explanations drawn from the literatures on human rights and norm diffusion. Most important is the civil society thesis, discussed in Chapter One, that states with greater domestic or international civil society strength will be more likely to adopt national anti-atrocity laws. To test this hypothesis, I use the total number of international nongovernmental organizations (INGOs) that claim at least one member in each country. While it is important to not conflate NGOs that are purely domestic and those that are transnational, it also plausible to assume – as have other scholars[4] – that the prevalence of one type of organization in a given country positively correlates with the other type. Thus, I use a single measure to account for overall civil society strength, both domestic and international. Data for this variable comes from the *Yearbook of International Organizations* published by the Union of International Associations. The *Yearbook* contains an annual count of how many INGOs operate in each country (defined as at least one citizen with membership), which I use as a proxy for overall civil society strength. Because of the skewed distribution of this measure, I log these counts. While ideally I would only include a count of INGOs that focus specifically on

[3] http://www.foreignlawguide.com
[4] Neumayer 2005.

human rights or related issues, Tsutsui and Wotipka have found that general INGO membership strongly correlates with human rights INGO membership, and thus makes a reasonable proxy.[5]

Beyond the civil society thesis, research on human rights norms has also identified a number of domestic political factors that may plausibly influence the likelihood that a state will adopt national anti-atrocity laws. First, a number of studies have found that more repressive states are less likely to ratify human rights treaties, because such governments face higher potential costs should the treaty be enforced.[6] Two widely used cross-national measures of human rights performance exist – the Political Terror Scale (PTS)[7] and the Cingranelli-Richards index (CIRI)[8] – but neither includes data earlier than 1976. My analysis seeks to analyze state behavior as far back as 1946. Thus, to operationalize repressiveness, I use regime type, as measured by the Polity IV dataset, as a proxy. Statistical studies have shown that democracies are less likely to engage in physical integrity violations,[9] so I contend that regime type makes a reasonable proxy for rights practice.

Second, leaders may strategically use the adoption of international norms to signal their sincere commitment to some course of action. Simmons and Danner, for example, argue that non-democracies with a history of civil war are highly likely to join the ICC as a way to credibly tie their own hands, thus assuring adversaries of their sincere commitments to forgo violence in the future.[10] From this perspective, states that have experienced recent civil violence will be more likely to adopt anti-atrocity laws. At the same time, the inverse proposition is also possible: states with a history of civil war may be less likely to adopt anti-atrocity laws given that they

[5] Tsutsui and Wotipka 2004.
[6] Hathaway 2007; Simmons 2009.
[7] Gibney, Wood, and Cornett 2011.
[8] Cingranelli and Richards 2010.
[9] e.g. Poe, Tate, and Keith 1999.
[10] Simmons and Danner 2010.

would be more wary of committing the types of violations that these laws criminalize. Data for the variable *recent civil violence* comes from the UCDP/PRIO Onset of Intrastate Armed Conflict Dataset, which accounts for the presence of an "intrastate" war, i.e. civil war, in every country in the world from 1945 to 2011.[11] From these data I construct a variable that indicates how many out of the previous ten years a country has experienced a civil war, defined as "an armed conflict [that] occurs between the government of a state and one or more internal opposition group(s)" and that has produced at least 1000 battle deaths in a single year.

Third, other research suggests that leaders may also adopt international human rights norms following transitions from repressive regimes in order to "lock-in" good human rights practice in the face of future uncertainty. Moravcsik originally developed the lock-in argument in order to explain why states commit to international human rights institutions, like the European Court of Human Rights.[12] Nevertheless, it is plausible that by raising the costs of future abuses, domestic legislation could serve a similar function in promoting lasting compliance with human rights norms following democratic transitions. Even if leaders do not anticipate a risk of future abuses, adopting human rights norms, such as genocide statutes, can symbolically set a new regime apart from the old one. Thus, adoption may be a signal to domestic and/or international audiences that the new regime will abide by higher human rights standards than the previous one. From this perspective, states that have undergone recent transitions to democracy will be more likely to adopt anti-atrocity laws. I operationalize *recent democratization* using the Polity IV data and construct a dummy variable that indicates whether a given country has undergone a regime transition in the previous ten years. A regime transition is defined by the Polity authors as "a three-point change in the POLITY score over a period of three years or less." Following other

[11] Themnér and Wallensteen 2012.
[12] Moravcsik 2000.

scholars,[13] I measure recent democratization by whether a country has undergone such a transition *and* has reached a score of at least 7 on the Polity score every year since the transition.

Finally, beyond domestic political factors, a large body of research on norm diffusion suggests that the decisions of one or more states to adopt new norms or policy ideas can spur further states to follow suit.[14] In other words, diffusion occurs when the adoption of a law by one state increases the likelihood of adoption by subsequent states. I construct regional and global measures of diffusion that indicate the proportion of countries out of the total possible number of countries (whether in the world or the country's region) that have adopted a domestic criminal law against the crime in question. To code regions, I use seven categories: Europe, North America, Central and South America, Middle East, Africa, South Asia, and East Asia and Oceania.

I also include two control variables. First, it is plausible that a country's decision to adopt a given anti-atrocity law is epiphenomenal to its ratification of the relevant treaty. If so, ratification should be a strong predictor of adoption. Therefore, I include a dummy variable indicating whether a country has ratified the relevant convention in the given year or any previous year.[15] In the genocide models, this is the 1948 Genocide Convention, and in the war crimes models, this is the 1949 Geneva Conventions. Crimes against humanity has never been subject to its own dedicated treaty regime, so the *treaty ratification* variable is omitted in this model. Second, countries with common law legal systems might approach the domestic implementation of international law differently from other legal systems. For one, common law countries like the US and UK are known to prefer to ratify a treaty and adopt relevant

[13] Goodliffe and Hawkins 2006.
[14] Elkins and Simmons 2005.
[15] In the case of genocide, the relevant treaty is the 1948 Genocide Convention. In the case of war crimes, the relevant treaty is the 1949 Geneva Conventions. Crimes against humanity does not have an analogous treaty, so the model for crimes against humanity does not contain such a control.

implementing legislation simultaneously in one statutory instrument. Also, recent research has identified a variety of ways that differences across legal cultures shape states' relationships towards international law.[16] Therefore, I include a dummy variable indicating that a country has a common law system. Data for this variable comes from a dataset compiled by Powell and Mitchell.[17]

Analysis

Table 4.1 displays the total number of countries that are coded as having adopted each of the three categories of crime under examination and indicates how many countries did so through either criminal code redesign or targeted legislation. (These counts exclude countries, like some former British colonies or countries that seceded from larger political entities, if they adopted these laws prior to independence. The reason is because these countries did not have the opportunity to adopt these laws on their own initiative.) In all, 101 countries are coded as having adopted national criminal laws against genocide, 90 against war crimes, and 69 against crimes against humanity. The proportion of countries that adopted these laws through criminal code redesign ranges from a low of 42% (war crimes) to a high of 48% (for genocide). Though criminal code redesign is not the modal path to criminalization, it is nevertheless remarkable that just under one half of countries that have adopted these laws have done so via a path that has so far received little attention from scholars.

[16] Powell and Mitchell 2007; Zartner 2014.
[17] Powell and Mitchell 2007.

Table 4.1: Total states that adopted anti-atrocity laws, 1945-2011

	Genocide	War crimes	Crimes against humanity
New criminal code	48 (48%)	38 (42%)	30 (43%)
Targeted legislation	53 (52%)	52 (58%)	39 (57%)
Total	101	90	69

Note: Counts exclude states that adopted laws prior to independence

But does the decision to initiate criminal code redesign make countries more likely to adopt national anti-atrocity laws than if they had not undertaken such reforms? Tables 2, 3, and 4 display the results of the event history analyses that speak to this question. For each crime, I specify three different models. The first is a "full time" model: it covers the entire range of years for each law but excludes the *civil society strength* variable, because the data for that measure are only available beginning in 1965. The second type is the "civil society" model: it adds the *civil society strength* variable but only includes observations for years 1965 and after. The third is the "post-ICC" model: it also begins at 1965 but includes an interaction term between the *civil society strength* variable and a dummy variable indicating a 1 for years 1998 and after. This interaction is meant to test for the possibility I discussed in Chapter One that the influence of civil society groups on atrocity criminalization has only taken affect after the ICC was established, since that is when human rights NGOs began to place national implementation of atrocity law on their advocacy agendas. I present each of these three types of models with and without the *new criminal code* variable in order to show how the effects of alternative variables are influenced by the inclusion of my main explanatory variable. The tables report hazard ratios: a ratio above 1 indicates a positive effect of an independent variable on the likelihood that a state will adopt a given anti-atrocity law and will do so sooner than other states, while a ratio below 1

Table 4.2: Event history analysis of genocide law adoption

	Full-time (1949-2010)		Civil society (1966-2010)		Post-ICC (1966-2010)	
	1	2	3	4	5	6
Democracy	1.01	1.05**	1.00	1.03	1.00	1.04
	(0.65)	(2.11)	(0.06)	(1.07)	(0.05)	(1.22)
Civil society			1.13	1.44	1.12	1.20
			(0.67)	(1.56)	(0.55)	(0.77)
ICC					0.84	0.03
					(-0.09)	(-1.48)
Civil society x ICC					1.09	2.09**
					(0.30)	(2.06)
Recent civil violence	0.97	0.94	0.97	0.93	0.97	0.95
	(-0.40)	(-0.67)	(-0.39)	(-0.64)	(-0.39)	(-0.51)
Recent democracy	1.08	1.03	1.00	1.01	1.02	1.20
	(0.25)	(0.07)	(0.00)	(0.03)	(0.04)	(0.40)
Global diffusion	14.32**	5.21	42.64***	92.66**	15.95	8.97
	(2.55)	(1.42)	(2.65)	(2.51)	(1.22)	(0.85)
Regional diffusion	70.06***	21.18***	91.81***	20.87***	89.38***	18.57***
	(7.58)	(4.93)	(6.20)	(3.59)	(6.15)	(3.57)
Treaty ratification	1.56*	1.84**	1.23	1.30	1.23	1.22
	(1.71)	(2.13)	(0.69)	(0.77)	(0.69)	(0.58)
Common law	1.13	1.72*	1.32	2.54**	1.30	2.48**
	(0.43)	(1.67)	(0.86)	(2.50)	(0.82)	(2.42)
New criminal code		59.77***		89.13***		113.64***
		(15.73)		(13.50)		(13.35)
Observations	5,913	5,913	4,317	4,317	4,317	4,317
Number of countries	154	154	139	139	139	139
Number of events	92	94	72	72	72	72
Log likelihood	-347.7	-245.8	-250.9	-162.8	-250.6	-159
LR chi^2	123.8	327.6	100.6	276.8	101.1	284.3
p>chi^2	0	0	0	0	0	0

z-statistics in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Table 4.3: Event history analysis of war crimes law adoption

	Full-time (1950-2010)		Civil society (1966-2010)		Post-ICC (1966-2010)	
	7	8	9	10	11	12
Democracy	1.05**	1.06**	1.05	1.04	1.04	1.04
	(2.21)	(2.53)	(1.33)	(1.25)	(1.24)	(1.22)
Civil society			1.29	1.37	1.40	1.34
			(1.28)	(1.44)	(1.50)	(1.18)
ICC					4.59	0.91
					(0.85)	(-0.04)
Civil society x ICC					0.79	1.06
					(-0.88)	(0.19)
Recent civil violence	1.00	0.98	1.09	1.06	1.09	1.07
	(-0.03)	(-0.18)	(1.12)	(0.69)	(1.14)	(0.71)
Recent democracy	1.14	1.11	0.90	0.84	0.94	0.85
	(0.36)	(0.27)	(-0.23)	(-0.33)	(-0.14)	(-0.31)
Global diffusion	8.97	0.74	356.68**	522.37**	95.52	169.80
	(1.32)	(-0.17)	(2.34)	(2.03)	(0.99)	(0.97)
Regional diffusion	130.86***	71.23***	35.30***	12.36*	41.16***	12.01*
	(5.06)	(4.11)	(3.12)	(1.93)	(3.20)	(1.87)
Treaty ratification	0.77	0.79	0.93	0.44	0.86	0.46
	(-0.63)	(-0.52)	(-0.11)	(-1.08)	(-0.21)	(-1.01)
Common law	1.99**	3.51***	1.07	2.11	1.04	2.12
	(2.26)	(3.87)	(0.15)	(1.46)	(0.09)	(1.47)
New criminal code		54.77***		73.35***		75.15***
		(13.79)		(11.16)		(10.91)
Observations	5,390	5,390	3,939	3,939	3,939	3,939
Number of countries	139	139	120	120	120	120
Number of events	79	79	54	54	54	54
Log likelihood	-304.4	-224.7	-184.3	-124.7	-183.9	-124.6
LR chi^2	85.16	244.6	57.60	176.7	58.38	176.8
p>chi^2	0	0	1.37e-09	0	7.33e-09	0

z-statistics in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Table 4.4: Event history analysis of crimes against humanity law adoption

	Full-time (1946-2010)		Civil society (1966-2010)		Post-ICC (1966-2010)	
	13	14	15	16	17	18
Democracy	1.02	1.01	1.03	1.01	1.03	1.02
	(0.81)	(0.45)	(0.83)	(0.32)	(0.83)	(0.44)
Civil society			0.97	0.98	0.86	0.66
			(-0.13)	(-0.08)	(-0.58)	(-1.54)
ICC					0.31	0.01*
					(-0.57)	(-1.72)
Civil society x ICC					1.26	2.23**
					(0.75)	(2.04)
Recent civil violence	1.04	1.03	1.06	1.02	1.06	1.03
	(0.43)	(0.30)	(0.63)	(0.21)	(0.63)	(0.32)
Recent democracy	1.21	0.81	1.16	0.65	1.16	0.68
	(0.47)	(-0.44)	(0.34)	(-0.77)	(0.34)	(-0.68)
Global diffusion	409.69***	151.32***	118.57**	167.90*	58.38	150.24
	(3.31)	(2.59)	(2.11)	(1.95)	(1.06)	(1.13)
Regional diffusion	203.69***	207.79***	281.27***	548.08***	232.15***	270.37***
	(4.78)	(4.23)	(3.96)	(3.89)	(3.80)	(3.49)
Common law	0.87	1.32	0.73	1.13	0.70	1.01
	(-0.42)	(0.72)	(-0.81)	(0.28)	(-0.89)	(0.03)
New criminal code		75.86***		87.85***		104.51***
		(12.29)		(10.82)		(10.82)
Observations	7,325	7,325	5,399	5,399	5,399	5,399
Number of countries	154	154	150	150	150	150
Number of events	62	62	52	52	52	52
Log likelihood	-236.3	-167.3	-193.5	-137.6	-193.2	-135.4
LR chi^2	75.84	213.8	55.71	167.5	56.35	172
p>chi^2	0	0	1.08e-09	0	6.74e-09	0

z-statistics in parentheses
*** p<0.01, ** p<0.05, * p<0.1

indicates a negative effect. I discuss the analyses as a whole to highlight how the results are or are not consistent across all three crimes.

Turning to the results, for all three crimes, the *new criminal code* variable consistently exhibits a very large effect with high statistical significance. In other words, for any given year, a country that adopts a new criminal code is far more likely to adopt one or more anti-atrocity laws than a country that does not adopt a new criminal code. The size of this effect ranges across the models from 55 times more likely to 105 times more likely, and these effects are consistently significant at the .01 level. This finding lends strong support to my argument that criminal code redesign is a powerful driver of implementation.

It is important to point out that the desire to pass anti-atrocity laws does not motivate governments to redesign their criminal codes. In other words, it is highly unlikely that the causal arrow is actually the reverse from what I theorize. On the contrary, criminal code redesign is usually focused primarily on the so-called "general part" of criminal codes, that is, the provisions that stipulate matters such as the nature of criminal liability, the range of possible defenses, and other general doctrinal issues that specify how the substantive criminal law is to be applied. Substantive criminal provisions, like anti-atrocity laws, are typically located in the criminal code's "special part," which gets far less attention from criminal law reformers and can be modified easily without redesigning the entire code.[18] That is, if a government wants to adopt anti-atrocity laws, there is no reason why a wholesale redesign of its national criminal code would be necessary. Nevertheless, when governments redesign their criminal code, it creates an opportunity to include changes to the code's special part that drafters deem important.

Moving on to alternative hypotheses, the civil society thesis finds very little support in the event history analyses. The *civil society strength* variable fails to reach statistical significance

[18] Green 2000.

in any model that includes it alone. This result is striking given the tendency in the human rights literature to place great emphasis on civil society groups in the spread of human rights norms and the numerous studies that find a statistically significant effect of this particular measure. In two models, the *post-ICC* and *civil society strength* interaction is associated with a statistically significant increase in the likelihood of adopting genocide and crimes against humanity law.s This suggests that civil society organizations may have begun to exert a positive effect on the adoption of these laws once they began to focus advocacy efforts on the implementation of the Rome Statute.

Of the three variables that speak to domestic political factors – *democracy*, *recent civil war*, and *recent democratization* – only *democracy* achieves statistical significance, and it does so only in full time models for genocide and war crimes. To assess whether the fact that this effect only exists in the full time model is a result of the specific time range (that is, the possibility that a large proportion of the countries that adopted before 1966 scored high on *democracy,* which in turn pushed the overall result into statistical significance) or the exclusion of *civil society strength* (that is, the possibility that once *civil society strength* is included it washes out the effect of *democracy*), I reran the full time models for only the years after 1965. In these models, the effect of democracy is still statistically significant. This suggests that the statistical significance of democracy in the original full time models is not an artifact of the particular time period under analysis, but is an artifact of an omitted variable, *civil society strength*, which once included, renders *democracy* no longer statistically significant. The other two domestic political variables, *recent civil war* and *recent democratization,* which speak to strategic theories of norm adoption that are prominent in the human rights literature, find no support in any model.

Apart from the influence of criminal code redesign, the results also point to a strong regional diffusion effect. In other words, an increase in the proportion of countries in a given region that have adopted a particular law is strongly associated with an increase in the likelihood that other countries in that region will follow suit. Based only on these results, it is difficult to infer the actual mechanism driving this diffusion, but it is possible to eliminate some possibilities. Norm diffusion research highlights four different possible mechanisms: coercion, learning, competition, and emulation.[19] Coercion "involves the (usually conscious) manipulation of incentives by powerful actors to encourage others to implement policy change."[20] While powerful states and international organizations have been known to offer benefits to states in exchange for pro-human rights policy action, such as ratifying human rights treaties,[21] adopting liberalizing policy reforms,[22] and improving human rights practices,[23] I have found no such evidence that powerful states or international organizations have pressured other states to implement international anti-atrocity law domestically. Therefore, coercion is unlikely to be driving the diffusion patterns in the event history models. "Competition," whereby the adoption of a policy by one state increases the material incentives for another state to follow suit, is also unlikely in the case of atrocity criminalization, given that states do not often compete to put war criminals on trial the way they compete, say, to make their markets more attractive to foreign investment.[24] "Learning," which occurs when governments adopt a policy because it observes that other states have had success with it,[25] is also unlikely given that for much of the period

[19] Simmons, Dobbin, and Garrett 2008.
[20] Ibid., 11.
[21] e.g. Smith-Cannoy 2012.
[22] e.g. Kelley 2004.
[23] e.g. Hafner-Burton 2005.
[24] Simmons, Dobbin, and Garrett 2008, 18.
[25] Ibid., 25.

under analysis here, prosecutions for atrocity crimes remained very rare, and thus there were very few "successes" stemming from these laws to be observed.

Therefore, that leaves "emulation" as the most plausible mechanism underlying the diffusion effects. As discussed in Chapter One, emulation occurs when an actor copies the actions of another because it deems those actions to reflect standards of appropriate behavior.[26] Professional-level emulation among legal experts is a key mechanism underlying my institutional redesign theory of international legal implementation, but the statistical analysis presented in this chapter suggests that emulation is also occurring among policymakers, not just the technocratic experts to whom governments delegate work. This regional effect is consistent with empirical studies that suggest that when it comes to policy innovation and change, states are particularly likely to emulate their regional peers. Regionally proximate models are usually more accessible, both in terms of sheer physical availability as well as language.[27] Regional peers are also more culturally similar, so their behaviors are perceived to be both more appropriate to emulate and more important to keep up with.[28] Finally, regional peers are more similar socio-economically, so policymakers are more likely perceive their neighbors' choices as transplanting well to their own country.[29] Therefore, to the extent that states adopt anti-atrocity laws outside the reform context, the event history analyses suggest that they often do so because they are emulating the behavior of other states in their region.

The models suggest that region-level diffusion has played a much larger role than global-level diffusion. As mentioned above, *regional diffusion* consistently displays an effect at a high level of statistical significance. In contrast, the effect of *global diffusion* only reaches statistical

[26] Lee and Strang 2006, 889.
[27] Watson 2001, 104–105.
[28] Kim 2012; Ramirez, Soysal, and Shanahan 1997.
[29] Weyland 2006.

significance in the models that do not include the *post-ICC* dummy variable. In other words, it appears that to the extent that full-time and civil society models do display statistically significant effects of *global diffusion*, those effects are absorbed once the models account for the existence of the ICC. This suggests that the statistical significance of the *global diffusion* measure is largely being driven by the existence of the ICC. To further verify this inference, I reran the civil society models while also including the *post-ICC* dummy variable in order to check whether the statistical significance of *global diffusion* washes out once the model controls for the post-ICC time period. As I predicted, *global diffusion* is no longer significant once these models control for the post-ICC era. What this suggests is that following the establishment of the ICC, the underlying baseline probability that countries adopt anti-atrocity laws, and the full-time and civil society models are attributing that increase to that sheer number of states that had already adopted by that time. But the lack of general statistical significance of *global diffusion* once the models analyze the two time periods separately suggests that the ostensible *global diffusion* effect is merely an artifact of the increase in post-1998 baseline probability.

Turning to the two control variables, *common law system* is associated with greater likelihoods of states adopting laws against genocide (in Models 2, 4, and 6) and war crimes (in only the full-time models), though not crimes against humanity. There is no obvious explanation for why countries with common law legal systems would be more likely to adopt anti-atrocity laws, but the fact that this effect is absent for crimes against humanity suggests a couple possibilities. First, most countries with a common law system were former British colonies, and many of these countries – especially those in the Caribbean – tended to imitate legislative innovations in the UK. So following the UK's adoptions of the 1957 Geneva Conventions Act and the 1969 Genocide Act, many former British colonies adopted similar implementing

legislation, and these patterns may be leading the event history models to discern an effect of *common law system*, when what this effect is actually reflecting is the imitation of UK legislation by former British colonies. Likewise, since the UK never implemented a similar "Crimes Against Humanity Act," there was no subsequent imitation effect among former British colonies, and this absence can help explain why the event history models do not indicate an effect of *common law system* for this category of crime. Second, common law countries often (though not always) adopt implementing legislation simultaneously along with ratification of a treaty, unlike civil law countries, which virtually always ratify and implement treaties in separate legislative or executive actions. Therefore, for a common law country, ratification (which is almost universal for the 1949 Geneva Conventions and Genocide Convention) itself increases the likelihood of implementation, and the lack of a treaty for crimes against humanity until the 1998 Rome Statute means that no such trigger for implementation in the form of ratification existed for common law countries during the pre-ICC period.

The other control variable, *treaty ratification*, only reaches statistical significance in the two full time models for genocide. This offers some reason to believe that states that ratify the 1948 Genocide Convention are more likely to adopt national criminal laws against genocide, but the inconsistency of this finding suggests reason to be skeptical. Also, these models consistently suggest that a state's ratification of the 1949 Geneva Conventions does not make it more likely to adopt national criminal laws against war crimes. In other words, the event history models lend support to the claim that implementation is not merely an epiphenomenon of ratification, but is subject to its own distinct behavioral logic.

Additional analyses

Pathways to adoption by regime type

The event history analyses above can establish the statistical significance of the co-occurrence between criminal code redesign and atrocity criminalization, but they cannot speak to the mechanisms underlying this relationship. Nevertheless, using additional analyses it is possible to verify some observable implications of those mechanisms. According to my theory, anti-atrocity laws face less resistance from policymakers when included in new criminal codes than they do if these laws would be considered as standalone legislation. The reason is because criminal code redesigns are typically viewed as apolitical, technocratic projects, so they provoke relatively less scrutiny from policymakers than does conventional legislation.

One way to assess the validity of this component of my theory is to compare countries that have adopted anti-atrocity laws through criminal code redesign with those that have adopted through targeted legislation. If my argument about the apolitical character of criminal code reform is correct, then we should expect that to the extent that governments who face greater potential costs from these laws – that is, repressive governments – have adopted these laws, they will be more likely than less repressive governments to have done so through criminal code reform. In other words, the most puzzling cases of adoption (more repressive countries) are most likely to have occurred through criminal code reform, not targeted legislative. If more repressive countries that do criminalize atrocities turn out to favor doing so through criminal code reform, it would suggest that such an option represents a path of less resistance through which norms that would typically be resisted by such governments can nonetheless be adopted more inconspicuously.

To test this claim I took the set of all countries that adopted anti-atrocity laws and compared the Polity2 regime scores of countries that adopted through targeted legislation with those that adopted though criminal code redesign. Table 4.5 displays these comparisons for each crime, along with the t-scores for difference of means tests. The comparisons support the expectation that of all countries that have adopted anti-atrocity laws, more repressive countries are more likely to do so through criminal code redesign than targeted legislation. The mean Polity2 score of countries that criminalized genocide through criminal code reform is 0.0 compared to 5.3 for those that criminalized through targeted legislation (p value < .001). For war crimes, the mean Polity2 scores are 1.0 for states that criminalized through code redesign, and 5.3 for countries that did so through targeted legislation (p value < .01). For crimes against humanity, the mean scores are 1.5 and 6.6 (p value < .01). These result support the claim that criminal code redesign represents an easier path to adoption for anti-atrocity laws than targeted legislation. These results imply that many of these more repressive states likely would not have adopted these laws at all had they not undertaken redesigns of their criminal codes. In the next chapter, I conduct a more in-depth case study into one such country, Guatemala.

Table 4.5: Polity2 regime scores by path to criminalization

	Mean	SD	N	P-value
Genocide				
New criminal code	0.0	7.2	45	<.001
Targeted legislation	5.3	5.9	48	
War crimes				
New criminal code	1.0	7.3	35	.007
Targeted legislation	5.3	6.1	44	
Crimes against humanity				
New criminal code	1.5	6.9	28	.002
Targeted legislation	6.6	5.1	34	

* Polity2 regime scores: -10 = least democratic; 10 = most democratic; SD: standard deviation

Not all countries are equally likely to redesign their criminal codes, so not all countries are equally susceptible to this path of less resistance. The preference for comprehensive codification or recodification is more engrained in the legal culture of civil law systems than in common law systems.[30] This difference stems in part from the different roles that codes play in the two systems. In civil law systems, comprehensive legal codes are the heart of a legal system; because civil law systems do not assign a role to judicial precedent, the law begins and ends with formal statutes. Therefore, systematic legal codes are one means civil law systems use to ensure that the formal law is as comprehensive and coherent as possible.[31] Large-scale reform of laws in civil law systems thus often necessitates entire recodification ("redesign" in the language of my theory) in order to maintain coherence within the system established by a code. Common law systems, in contrast, rely on judicial interpretation to fill in the gaps in the written law, so these systems place a lower premium on the ideals of comprehensiveness and coherence than do civil law systems. Therefore, common law systems are less likely to view extensive amendments to current laws as a threat to the overall coherence of a legal system, and thus are less likely to perceive the need to initiate a full redesign of a given legal code in order to reform it. Nevertheless, while these generalizations of these two systems are broadly accurate, they should not be overstated. There is a long tradition of codification efforts in common law countries (though often ultimately unsuccessful efforts),[32] and over the years several common law countries, including Australia, Canada, New Zealand, and Fiji have undertaken comprehensive redesigns of their criminal codes.

In any case, civil law countries are still more likely to initiate redesigns of their legal codes, so this finding that criminal code redesign helps facilitate the implementation of anti-

[30] Pérez-Perdomo and Merryman 2007, 27–33.
[31] Ibid., 28–33.
[32] Weiss 2000.

atrocity law is important in light of recent research that shows how legal tradition shapes states' relationships to international law.[33] For example, Powell and Mitchell have argued that several features inherent to civil law systems make those countries more willing to accept the compulsory jurisdiction of the International Court of Justice.[34] My findings point to another, so far unexplored feature built in to civil law legal cultures that helps facilitate the implementation of international law, that is, the predilection for the wholesale redesign of legal codes.

Conclusion and implications

Using event history analyses, I have found strong support for my institutional redesign theory of international legal implementation as it applies to the adoption of national anti-atrocity laws. Across all three categories of crimes and all model specifications, for any given year, states that redesign their criminal codes are far more likely to adopt national criminal laws against atrocity crimes than states that do not redesign their criminal codes. This effect is robust even while controlling for regime type, recent democratization, recent civil war, regional and global diffusion, legal tradition, and treaty ratification. I have also found very little support for the argument that states with greater domestic and international civil society activity are more likely to adopt these laws, though there is support for the argument that such actors have exerted more influence following the establishment of the ICC in 1998. When states do adopt these laws outside the reform context, the event history analyses suggest that they often do so to emulate the legislative innovations of their regional peers.

Moreover, criminal code redesign is a particularly powerful explanation for the adoption of anti-atrocity laws in more repressive countries, where it is the modal path to adoption.

[33] Zartner 2014; Powell and Mitchell 2007.
[34] Powell and Mitchell 2007.

Adoption by these countries in general is particularly puzzling, as we can presume that anti-atrocity laws would face greater resistance getting on these governments' legislative agendas than they would in more democratic countries. But the higher rates of adoption through criminal code redesign by nondemocratic countries suggests that the reform context lends a technocratic air to these laws that helps avert some of the scrutiny that would normally be provoked by conventional legislation.

In the big picture of this study, this chapter confirms that there exists a statistically significant, cross-case relationship between the decision to initiate criminal code redesign in the post-World War II period and the adoption of national anti-atrocity laws. This chapter also helps support my claim that criminal code redesign processes give rise to a lawmaking environment that is more depoliticized than conventional legislative processes and which stems from the perception of these processes as technocratic projects. Nevertheless, there are components of my theory that these analyses cannot speak to. For example, it is possible that the idea to include anti-atrocity laws in new criminal codes does not come from technocratic designers, but from policymakers who see the inclusion of such laws as an opportunity to signal their commitment – whether sincere or not – to human rights norms. Or it is possible that the idea originates with civil society groups, who seize on the opportunity presented by criminal code redesign to push for ideas that they favor. These rival causal stories are difficult to assess quantitatively using available data. Nevertheless, in-depth case studies provide an opportunity to do so. Therefore, the next chapter investigates a particularly puzzling case of atrocity criminalization in order to verify the causal story I theorize to be driving the statistical results.

CHAPTER FIVE

Verifying the mechanisms: The adoption of anti-atrocity laws in Guatemala

In the previous chapter, I showed that a state's decision to redesign its criminal code greatly increases the likelihood that it will also adopt national anti-atrocity laws. This chapter investigates a single case of atrocity criminalization in order to verify the causal mechanisms that I claim underlie those statistical findings. In 1973, thirteen years into its civil war, the Guatemalan government of President General Carlos Arana Osorio approved a new national criminal code, which included new provisions against genocide (art. 376), war crimes (art. 378), and crimes against humanity (art. 378).[1] If my theory is correct, then we should expect to uncover two main findings. First, the idea to include the anti-atrocity provisions will have originated with the technocratic criminal law experts who were appointed to draft the new code, not from the government, civil society groups, or international actors, as alternative explanations would predict. Second, the Congress and President Arana will have ultimately approved these provisions because they took them for granted as apolitical, technocratic features of a modernization project, not because the Congress or President either 1) intended to signal its commitment to deescalating the civil war or 2) yielded to pressure from domestic or international actors to adopt these laws, as alternative explanations would predict.

This chapter has four sections. The first section provides some brief background on Guatemala's 1973 adoption of anti-atrocity laws, highlighting the puzzle of this outcome, the inability of alternative explanations to account for it, and the argument offered by my own theory. The second section details my research design and outlines a set empirical predictions meant to test for each of the distinct causal mechanisms contained in my theory. The third section is the

[1] Decreto No. 17-73, 5 July 1973.

empirical core of the chapter and presents evidence for each of the tests outlined in section two. The final section summarizes the chapter's findings and discusses their significance in the context of the broader study.

Background: 1970s Guatemala and criminal code reform

Since 1954, when the social democratic government of Jacabo Arbenz was overthrown in a CIA-instigated coup d'état, Guatemala had been ruled by a succession of pro-military, anti-communist regimes that deployed increasing levels of repression, violence, and terror to prevent the resurgence of left wing political movements. Nevertheless, by the mid-1960s, a left wing guerilla insurgency was spreading across the countryside, which provoked increasingly brutal responses from the US-sponsored Guatemalan military and pro-government, paramilitary death squads.

The largest counterinsurgency operation of the period was led in 1966 by the later President, Colonel Carlos Arana Osorio, who earned the nickname "the Butcher of Zacapa" for his scorched-earth tactics in that region, including forced disappearances, razing of villages, and aerial bombing raids. Arana's strategy also included encouraging the formation of pro-government vigilante groups, which helped spark the rise of pro-government death squads that would become a defining feature of the country's thirty year civil war. By the end of 1960s, the government's so-called "counter terror" had successfully decimated the rural insurgency, leaving as many as 8,000 dead.[2] In response, the guerilla movement turned to urban warfare, employing kidnappings and high-profile assassinations.[3] In the 1970 presidential campaign, Arana was nominated as the consensus candidate for a coalition comprising the two largest pro-military parties, the National Liberation Movement (*Movimiento de Liberación Nacional* or MLN) and

[2] Norman Gall, "Slaughter in Guatemala," *New York Review of Books*, 20 May 1971; McClintock 1985, 84–85; Johnson 1971, 36.
[3] Black 1984, 74–83; Brockett 2005, 118.

the Institutional Democratic Party (*Partido Institucional Democrática* or PID). Arana won the election with a plurality of 43% on a pledge to quell the insurgency using the same tactics that brought him to fame in Zacapa, promising "If it is necessary to turn the country into a cemetery in order to pacify it, I will not hesitate to do so."[4]

Shortly after coming to power in June 1970, the Guatemalan Congress under Arana initiated a variety of legislative and institutional modernization initiatives. To prepare a draft of a new criminal code, the Congress appointed preeminent Guatemalan criminal law scholar and university professor, Gonzalo Menéndez de la Riva. By spring 1971, Menéndez de la Riva had completed his draft and presented it to Congress, where a special commission was formed to review and edit it. Like Menéndez de la Riva, the members of the special commission each possessed at least some expertise in criminal law, but unlike Menéndez de la Riva, each held a government post of some sort. The three members were: Supreme Court judge Hernán Hurtado Aguilar, Attorney General and Director of Public Prosecution Luis Alfonso López, and Congressman and lawyer Ernesto Arturto Zamora Centeno, who chaired the commission. (I refer to Menéndez de la Riva and the three members of the special commission collectively as the code's "designers.") The special commission completed its work and presented its final draft to Congress on November 10, 1972. Congress then debated and approved the draft piecemeal in several sessions over the next few months, issuing a final draft in March 1973, which was ratified by President Arana in July. (The text of the code's anti-atrocity laws is reproduced in Appendix 5.1.)

[4] Handy 1984, 167. The actual vote was widely reported to be free and fair, but the election as a whole was certainly not free. Among other restrictions, only four parties were legally authorized to run candidates. "Ley y Progreso Social con Arana," *El Imparcial*, 1 Jul 1970. For more on the conditions under which the election took place, see Jamail 1972, 161–167.

Explanations

Following from my institutional redesign theory of atrocity criminalization, I expect that the idea to include atrocity crimes in the 1973 criminal code came from Menéndez de la Riva, who deemed these laws to be emblematic of the types of modern norms that reflected doctrinal trends among criminal law professionals and which were included in prestigious codes around the region. I also argue that Guatemalan government ultimately approved these laws, because it did not perceive them to carry political connotations but took them for granted as technical features of the type of modern criminal code to which they aspired to adopt.[5]

Even though it is clear that the criminal code redesign process produced these laws, it is possible to posit alternative causal narratives to account for why the new criminal code included them. Here I offer preliminary assessments of these alternative theories, but I also revisit them in light of additional evidence I discuss in this chapter's empirical section. First, the code's designers might have included anti-atrocity laws, and the government might have approved them, as an insincere "tactical concession" to *pressure from domestic or international civil society groups,* who were either promoting these laws in particular or pressuring the government to improve its human rights practices generally.[6] However this explanation is unlikely. Domestic human rights groups in Guatemala were largely nonexistent in early 1970s. To the extent that human rights activists did attempt to mobilize, they were reliably and brutally repressed by either the government or pro-government paramilitary groups.[7] In other words, domestic human rights activists would have had miniscule influence on domestic policymaking. International human rights groups, particularly Amnesty International, had begun to take notice of the situation in Guatemala in the early 1970s, but the little public attention they brought to Guatemala at the time

[5] In this chapter, by "Guatemalan government" I mean President Arana and the Guatemalan Congress collectively.
[6] Risse and Sikkink 1999.
[7] Ropp and Sikkink 1999, 183; Americas Watch 1989, 43–44.

was focused on shedding light on actual government abuses, such as the widespread use of forced disappearances, extrajudicial killing, and torture – not promoting new criminal legislation.[8] In any case, the Arana government maintained a firm stance of denial when it came to the legitimacy of international human rights standards, and Guatemala did not begin to make the types of tactical concessions to outside human rights pressure that would have included these laws until the early 1980s.[9]

Second, it is also possible that pressure to include and approve anti-atrocity laws in the new code came not from civil society groups, but *powerful states or international organizations*. Nevertheless, I found no evidence this was the case. The US was deeply involved in providing military and developmental assistance to Guatemala, and as part of those programs, did advocate for particular institutional reforms. Nevertheless, to the extent that this pressure related to criminal justice, US agencies focused primarily on promoting reform of the police to make it more professionalized and efficient.[10] I found no evidence that US agencies promoted or sought to influence the design of the new criminal code.

Third, signaling approaches to norm adoption would suggest that the idea to include and approve atrocity crimes in the new code would have been initiated by the government itself as a way to *credibly signal its willingness to deescalate* the civil war.[11] If the anti-atrocity laws were part of such a signaling strategy, then their adoption should have been accompanied by a decrease in repression and increase in peacemaking efforts. However, the Arana government actually increased the violence and repression during the period of the drafting of the criminal

[8] Amnesty International 1976. It is telling that in Amnesty International's 1976 report on Guatemala, a section on legislative remedies for abuses committed by state actors does not even mention the criminal code's provisions on atrocity crimes. Amnesty International 1976, 8.
[9] Ropp and Sikkink 1999, 187–189.
[10] Weld 2014, 110–113.
[11] Simmons and Danner 2010.

code to previously unseen levels and made no conciliatory gestures towards the insurgency.[12] In other words, it is unlikely that the Arana government intended the anti-atrocity laws to signal its willingness for reconciliation.

Research design

Case selection

The primary analytic goal of this chapter is to use an in-depth case study to verify the causal mechanisms in my theory. A particularly useful case selection strategy when a large-N correlation has been well established (as it was in Chapter Four), yet the causal mechanisms driving this association remain unverified, is to choose what Gerring calls a "pathway case."[13] Pathway cases are those in which both the explanatory variable and outcome of interest are present or high, yet other competing explanatory variables are absent or low. In other words, the case should be "most likely" for the theory of interest and "least likely" for alternative theories. This allows a researcher to isolate the causal effect of an explanatory variable of interest to the greatest degree possible and thus assess the empirical causal process in light of the predicted mechanisms while minimizing the confounding influence of alternative explanatory factors. The researcher thus selects a pathway case when he or she is already confident that a particular explanatory variable produced the outcome in a given case but would like to verify the actual causal mechanisms connecting the two. Guatemala's 1973 adoption of anti-atrocity laws makes an excellent pathway case because all leading alternative explanations for atrocity criminalization are unable to explain it (as I discussed above), yet my institutional redesign theory appears poised to explain it well.

[12] Handy 1984, 168; McClintock 1985, 98–102.
[13] Gerring 2007.

Method

To investigate the causal process between criminal code redesign and atrocity criminalization in Guatemala, I use process tracing. Process tracing involves the use of theory to guide the task of empirically reconstructing the causal process between a cause and an outcome.[14] I follow what Beach and Pedersen call "theory-testing" process tracing, which involves using a pre-formulated theory (either the researcher's own or one derived from the literature) to predict a series of discrete mechanisms that would constitute the causal process in question and collecting empirical evidence to test these predictions.[15]

Mechanisms

Since my goal is to test the validity of my own institutional redesign theory of atrocity criminalization, I derive a sequence of distinct mechanisms from my theory that are each an "individually insufficient but necessary part of the whole"[16] causal chain that I predict will account for the effect of criminal code redesign on atrocity criminalization. The theory I presented in Chapter One allows for the existence of multiple causal pathways connecting criminal code redesign to atrocity criminalization. Therefore for the purpose of this chapter, I formulate what I expect to be the sequence of mechanisms most likely to connect criminal code redesign to atrocity criminalization in the case of Guatemala.

This causal process of my institutional redesign theory is divided into an initial cause (initiation of criminal code redesign), an outcome (adoption of anti-atrocity laws), and five causal mechanisms in between. (This causal process is illustrated in Figure 5.1.) Starting from the beginning, the first mechanism following the government's decision to redesign the criminal

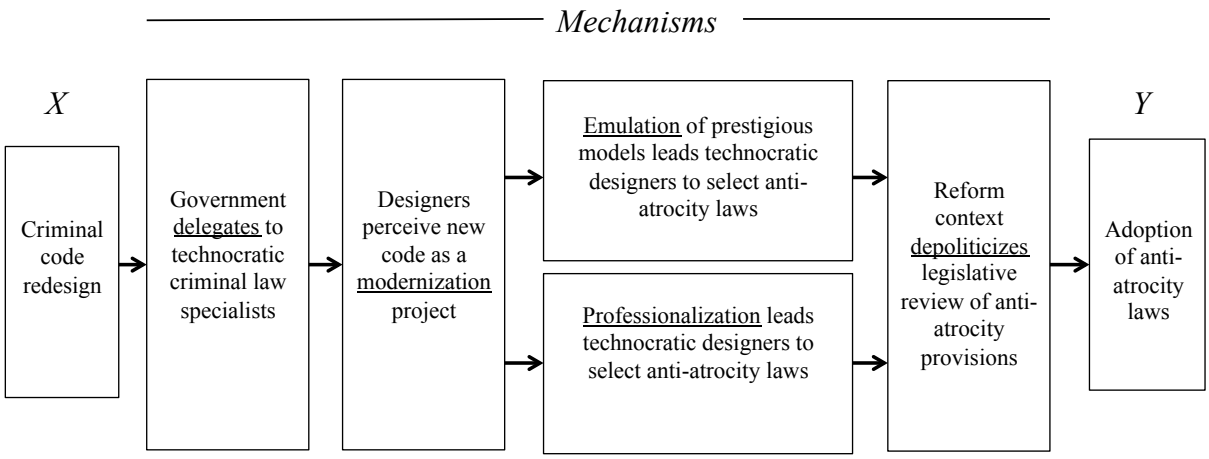
[14] Beach and Pedersen 2013; Bennett and Checkel 2014.
[15] Beach and Pedersen 2013.
[16] Ibid., 50.

code is the *government delegates the design of the new code to technocratic criminal law specialists who are trusted by virtue of their authoritative claims to expertise* (the "technocratic delegation" mechanism). The second mechanism following delegation is *designers perceive the new code as a modernization project* (the "modernization" mechanism). Next, the causal process can work through one or both of two mechanisms that follow from technocratic designers' modernization orientation and which lead them to select anti-atrocity laws for inclusion in the draft code. One possibility is *emulation of prestigious models leads technocratic designers to select anti-atrocity laws* (the "emulation" mechanism). The other possibility is *professionalization leads technocratic designers to select anti-atrocity laws* (the "professionalization" mechanism). Finally, once they are written into the draft code, the *reform context depoliticizes legislative review of the anti-atrocity provisions*, which facilitates their ultimate approval.

Causal mechanisms are usually (though not always) unobservable directly, so testing them requires the researcher to consider what he or she would expect to observe (or not observe) should the mechanisms indeed be present. Therefore, to test for their existence, I formulate a set of case-specific observable predictions that would constitute empirical evidence for each mechanism in my theory.[17] (The explanatory variable (decision to redesign criminal code) and outcome (adoption of anti-atrocity laws) do not require tests, because they are directly observable.)

[17] Ibid., 95.

Figure 5.1: Causal mechanisms in atrocity criminalization in Guatemala



Empirical tests vary in strength, that is, the degree to which they can either increase or decrease our confidence in an explanation or alternatives. The literature on process tracing identifies two main dimensions for evaluating the relative strength of a given test: certainty and distinctiveness. A test has high *certainty* when passing it is necessary to maintain confidence in a given part of an argument. Thus failing such a "hoop test" will falsify or lower confidence in a given part of an argument. (In other words, an argument must jump through this hoop in order for us to maintain confidence in it.) Nevertheless, passing a hoop test is not decisive, as it does not help disconfirm alternative theories. For example, the test "was the accused in the state on the day of murder" must be passed in order to make a case against a defendant, but passing it is not definitive of guilt.[18] In contrast, a test has high *distinctiveness* when no alternative theory is able to account for its evidence. Passing such a "smoking gun" test greatly increases our confidence in a given part of a theory, but failing to pass it does not lower our confidence. For

[18] Van Evera 1997, 31.

example, finding the accused's fingerprints on the murder weapon greatly increases our confidence that she is guilty, but failure to find her fingerprints is not evidence that she is innocent.[19] Empirical tests rarely achieve both high certainty and distinctiveness (so-called "doubly-decisive" tests), so maximizing confidence in a given explanation requires accumulating a combination of hoop and smoking gun tests. Based on this framework, I classify each of my empirical tests by their levels of certainty and distinctiveness. (See Table 5.1.)[20]

Technocratic delegation. This set of observable predictions relates to why the Guatemalan government selected Menéndez de la Riva to draft the new criminal code.

T1: If the Guatemalan government selected Menéndez de la Riva for his specialized technical expertise and not his political loyalty, then Menéndez de la Riva should have already been well known as a leading expert in criminal law.

This test is highly certain. If the government trusted Menéndez de la Riva by virtue of his technical expertise, then he would have to have already been widely perceived to possess such expertise. Nevertheless, this test is not distinctive. That is, it is possible that Menéndez de la Riva was both a highly qualified expert and selected for his political loyalty.

[19] Ibid., 32.
[20] My approach to presenting this analysis follows the model offered by Kelley (2008).

Table 5.1: Empirical tests for mechanisms connecting criminal code reform to atrocity criminalization

Mechanisms	**Certainty**	**Distinctiveness**
Technocratic delegation		
T1: Technical expertise	High	Low
Modernization project		
M1: Modernization context	Low	Low
M2: Modernization talk	High	Low
M3: Absence of pressure	Low	Moderate
Emulation		
E1: Experts generally cite other codes	High	Moderate
E2: Experts cite anti-atrocity laws in other codes	Moderate	Moderate
Professionalization		
P1: Experts' choices reflect criminal law trends	High	Moderate
P2: Experts cite professional sources on anti-atrocity laws	Moderate	High
P3: Experts do not hold progressive views	High	Low
Depoliticization		
D1: Government committing atrocities	Low	Moderate
D2: Little debate in Congress	Moderate	Moderate
D3: Little publicizing of laws	Low	High

Modernization. This set of predictions relates to evidence that the designers of the new criminal code perceived it as a modernization project – that is, a project meant to bring Guatemala's criminal justice system in line with current conditions, knowledge, or standards – as opposed to a project meant to serve the government's political or material self-interest.

M1: If the new code was part of a larger package of modernization reforms, then it is more likely that designers viewed the new criminal code as a modernization project

This test is not certain; designers may still have perceived the new criminal code as a modernization project in the absence of other similar reforms. Nor is it distinctive; the

occurrence of other similar reforms does not undermine alternative explanations. Nevertheless, establishing that the criminal code reform was part of a broader package of modernization reforms does increase the likelihood that designers of the new code would have perceived it as part of a broader modernization agenda.

M2: If designers viewed the new criminal code as a modernization project, then they would have exhibited "modernization talk," that is, rhetoric that invokes self-conscious modernization aims.

This test is highly certain, but not distinctive. Designers pursuing modernization aims would likely express those aims to justify the project and their design choices. Yet designers may employ modernization talk for other reasons, such as to serve as a cover for the government's more self-interested political aims.

M3: If designers viewed the new criminal code as a modernization project and not as a response to public or international pressure, then there would be little evidence that external actors exerted pressure on the government to reform the country's criminal code.

This prediction is not certain; evidence of external pressure for criminal code reform would not preclude designers from perceiving the code as a modernization project. But it is somewhat distinctive; failure to find evidence for external pressure would help decrease confidence in the claim that designers viewed their role as merely helping the government accede to external demands. Nevertheless, the lack of this evidence would not preclude the possibility that designers were guided by the government's own self-interested political aims.

Emulation. This set of observable predictions relates to the sources of influence that shaped designers' choices of what norms to include in the draft criminal code. The first prediction speaks to a general tendency or disposition among designers towards emulation. The second prediction speaks to evidence that emulation influenced the inclusion of anti-atrocity laws in particular.

E1: If designers were generally disposed towards emulating prestigious models, then they would have justified their design choices by reference to highly esteemed or other recently drafted codes.

This prediction is highly certain and moderately distinctive. Given that one motivation for emulation is to increase the social and political acceptability of design choices, it is unlikely that designers would miss an opportunity to legitimate their choices by emulating other codes without citing them. Also, it is fairly unlikely that designers would justify their choices by reference to other codes if designers' choices were motivated by factors other than emulation of prestigious models – except perhaps to legitimize choices that actually served personal or political interests.

E2: If designers' choices to select anti-atrocity laws were based on the emulation of prestigious models, then experts should have cited the sources of those laws in other countries' codes or prestigious models.

This prediction is moderately certain and moderately distinctive; if designers copied anti-atrocity laws from other codes, it is fairly unlikely they would fail to cite these sources given the strong norm in Latin American code drafting to reference the specific provisions in other countries' codes that inspired each provision in a draft code. Moreover, this prediction is moderately distinctive; if designers included these laws because of pressure or signaling, it is unlikely that designers would perceive the need to cite similar laws in other countries. Nevertheless, it is possible that designers motivated by factors other than emulation would cite other countries' laws as a cover for those motivations.

Professionalization. This set of observable predictions also relates to the influences that shaped designers' choices. The first prediction relates to a general tendency among designers to be influenced by professional sources and trends. The following two predictions speak to evidence that professional sources and trends influenced the selection of anti-atrocity laws.

P1: If designers' choices were generally influenced by professional sources and trends, then their choices should have accurately reflected criminal law trends of the period.

This test is highly certain; it is very unlikely that professionalization shaped designers' choices if those choices did not actually reflect the dominant ideas among criminal specialists at the time. It is also somewhat distinctive considering, on the one hand, the government's hardline politics and repressive practices, and on the other hand, the progressivism that characterized many doctrinal trends of the period. Thus, it is unlikely that designers' choices would have genuinely reflected these trends if designers were not motivated by a principled professional commitment.

P2: If designers' choices to select anti-atrocity laws were influenced by professional trends and sources, then experts should have referred to professional sources, such as textbooks or professional meetings, when discussing those laws.

This test is somewhat certain and highly distinctive. If designers selected anti-atrocity laws following the influence of professional trends and sources, they would likely cite those influences. Though it is also possible that designers were so professionalized that they took the idea of anti-atrocity laws for granted, and thus did not deem it necessary to justify these particular choices. Nevertheless it is unlikely that designers would have cited relevant professional influences if those influences did not matter.

P3: If designers' choices to select anti-atrocity laws were influenced by professional sources and trends, then experts would have selected anti-atrocity laws even if they did not hold politically progressive views.

This prediction is highly certain, though not distinctive. For professionalization to work as theorized, its effect must outweigh that of designers' own political views. Nevertheless, designers may also have selected these laws for reasons other than professionalization.

Depoliticization. This final set of observable predictions relates to the willingness of the Guatemalan government to approve laws that criminalize conduct that at the time it was either committing or otherwise supporting.

D1: If the reform context depoliticized the anti-atrocity laws, then the government would have adopted them even if it was at the same time committing or otherwise supporting atrocity crimes.

This prediction is not certain; anti-atrocity laws might have been politicized even if the government had not been committing atrocities. But it is somewhat distinctive. Signaling explanations could not account for this evidence, because a signaling strategy would have needed to be accompanied by rule-consistent behavior. Nevertheless, this evidence would not rule out the possibility that these laws were adopted as an insincere concession to outside pressure.

D2: If the reform context depoliticized the anti-atrocity laws, then the Guatemalan Congress would have debated these laws very little.

This prediction is both moderately certain and distinctive. If these laws were not perceived as controversial, then it is unlikely that members of Congress have spent much time debating them. Yet it is also possible that the reform of these laws still would have provoked some debate, even if the depoliticization effect of the reform context ultimately helped their approval. Nevertheless, alternative explanations that assume these laws carry political connotations would have difficulty accounting for a lack of debate, unless the debates over these laws took place entirely out of public view.

D3: If the reform context depoliticized the anti-atrocity laws, then the Guatemalan government would have done little to publicly highlight the inclusion of these laws in the new code.

This prediction is not certain, but it is highly distinctive. Even if these laws were perceived as largely technical provisions, the government might still have publicized these laws to demonstrate the code's modern qualities. Yet all alternative explanations for the inclusion and approval of these laws – whether based on pressure or signaling – presume that the inclusion of these laws is directed at some audience outside the government. Therefore, to reach these audiences, the government likely would have publicized its decision to include these laws.

Data

To test these mechanisms I rely on evidence from a variety of primary sources, secondary sources, and elite interviews. Primary sources consist of US and Guatemalan newspapers, US government documents, Guatemalan academic law journals, and the daily records of the sessions of the Guatemalan Congress (*Diario de las Sesiones del Congreso de la República de Guatemala)* that I acquired from the Congressional legislative archive in Guatemala City. Another important primary source is the 1973 criminal code's *Exposición de Motivos*, or "Statement of Reasons" (hereafter *Motivos*). It is common in Latin America countries to publish such statements to accompany the drafting or ratification of a new legal code. While varying in their detail and comprehensiveness, *motivos* are typically written by the code's author(s) to provide an overview of the general principles and motivations that guided the drafting of the code as well as commentaries on some or all individual articles, often citing specific sources that inspired or influenced them. In addition to these primary sources, I also rely on a range of secondary sources, including articles and monographs by legal scholars, historians, and social scientists with knowledge of either the Guatemalan legal system or the politics of the period.

Finally, I also conducted 15 semi-structured elite interviews in Guatemala City with lawyers, legal scholars, social scientists, politicians, and members of Guatemalan civil society. (See Appendix 5.2 for a complete list.) By "elite interviews," I simply mean interviews with individuals who possess particular expertise or knowledge about relevant topics or events.[21] With the exception of one former member of the Guatemalan Congress, none of my interviewees actually witnessed the events I examine first-hand. Instead, the goal in talking with these individuals was to probe their expert knowledge for information about contexts, issues, and events that are not well documented in written sources.[22] Therefore, because my goal was not to construct a sample of interviewees that is representative of some population of interest, but to identify particular individuals with knowledge over particular matters, I used forms of "non-probability" sampling to identify them. Specifically, I combined "purposive sampling" – selecting individuals to fit a study's data collection aims – with "snowball sampling" – asking interviewees to identify additional potential interviewees who would possess relevant knowledge.[23]

It is also worth highlighting some key sources of evidence that would have been especially helpful but were unfortunately unavailable. First, I was unable to interview the author of the 1973 Guatemalan criminal code, Gonzalo Menéndez de la Riva, who is deceased. Nevertheless, I was able to interview his son, Gonzalo Menéndez Park, who is a prominent corporate lawyer in Guatemala City and who provided some useful background information on his father. Second, I was unable to obtain a copy of the original draft of the criminal code that Menéndez de la Riva presented to the special commission. Therefore, it is difficult to know for certain which provisions Menéndez de la Riva wrote himself and which the special commission

[21] Leech 2002, 663.
[22] Tansey 2007, 767.
[23] Ibid., 770.

either added, deleted, or modified. Nevertheless, as I discuss below, it is possible to use other sources to infer what was contained in Menéndez de la Riva's original draft. Finally, with one exception, I was unable to track down any living former member of the Congress that approved the 1973 criminal code. I worked with a Guatemalan government office to identify every member of Congress who served during the reform of the criminal code, determine whether each was still alive, and if so, contact him or her. Ultimately, we successfully contacted only a single former Congressman, Cesar Augusto Davila Menéndez, and he had little recollection of the reform of the criminal code.

Empirical analysis: Testing the mechanisms

Delegation

My argument posits that a government's decision to initiate criminal code redesign necessitates the appointment of specialized experts who possess the knowledge necessary to draft a criminal code that reflects what are deemed to be modern standards. In other words, designers should be selected by virtue of their perceived claims to expertise, and as opposed to their political loyalty or willingness to implement the government's preferences. An observable prediction arising from this mechanism is that the designer of the new Guatemalan criminal code should have been well known as a leading expert of criminal law prior to his appointment (*T1: Technical expertise)*.

It is difficult to know exactly what was the nature of the relationship between Gonzalo Menéndez de la Riva and officials in the Arana government, and thus to what degree the government could have assumed that Menéndez de la Riva would implement its preferences. But it is clear that Menéndez de la Riva was widely considered across the political spectrum to be a

highly accomplished scholar of criminal law who was committed to his professional craft. At the time of his appointment, Menéndez de la Riva was a professor of criminal law at the University of San Carlos (USAC) in Guatemala City, the primary institution for legal education in Guatemala at the time.[24] He had also served as the head of the Department of Juridical and Social Sciences at USAC and as a member of the editorial board of its academic journal. Though Menéndez de la Riva is now deceased, I interviewed legal experts who were his contemporaries. All described him as one of the leading Guatemalan scholars of criminal law of the period.[25] Jorge Valvert, who was a student of Menéndez de la Riva in the early 1960s and went on to serve as a judge during the Arana administration, described Menéndez de la Riva as having been especially attentive to contemporary trends in criminal law doctrine around the region and the world and concerned about Guatemala's legal system keeping up with them.[26] Whatever its reason for appointing him, the government also indicated that it viewed Menéndez de la Riva as an especially reputable and qualified expert. Chair of the special commission Ernesto Zamora told Congress that "this professional" was selected "not only because he has dedicated himself to this branch of the law," but also because he shared the Congress' concern that Guatemala's laws keep up with those "other civilized countries."[27]

Yet it is still possible that Menéndez de la Riva's political leanings helped make him an attractive choice. In interviews and secondary source materials, Menéndez de la Riva's political views were consistently described as "conservative."[28] His record in the decades following the new criminal code also suggest he had little particular interest in human rights law, which would

[24] Interview with Jorge Valvert, 16 Sep 2014, Guatemala City.
[25] Interview with Jorge Valvert, 16 Sep 2014, Guatemala City; Interview with Cesar Augusto Conde Rada, 23 Sep 2014; Interview with René Arturo Villegas Lara, 23 Sep 2014, Guatemala City.
[26] Interview with Jorge Valvert, 16 Sep 2014, Guatemala City.
[27] *Diario de Sesiones*, 10 Nov 1972, Congress of the Republic of Guatemala, p. 6.
[28] Stephen Kinzer, "In Guatemala, Growing Pessimism on Human Rights Issues," *New York Times*, 21 Feb 1988, p. 23; Interview with Jorge Valvert, 16 Sep 2014, Guatemala City; Interview with Marco Antonio Sagastume Gemmell, 17 Sep 2014, Guatemala City.

have been expected form a progressively minded criminal law scholar.[29] In 1987, following the adoption of the country's new constitution, Menéndez de la Riva was appointed to the new position of human rights ombudsman, a position for which he reportedly acknowledged he was unqualified (though this may explain why he was appointed in the first place).[30] Menéndez de la Riva was widely criticized as weak and ineffective in the role and resigned a year later.[31]

Nevertheless, Menéndez de la Riva's apparent conservative leanings did not diminish his reputation as a widely respected professional and committed scholar. Even legal professionals on the political left, including those who criticized his performance as ombudsman, described him "a very serious, ethical professional," an "honest man," and respected across the political spectrum. [32] A 1992 report by a delegation of the U.S. National Academy of Sciences' Committee on Human Rights – one of the few documented sources that mention his reputation – described Menéndez de la Riva as "highly respected for his honesty and integrity."[33] According to his son, Menéndez de la Riva was never a member of a political party, and Menéndez Park claims that his father's political views did not influence his professional work, consistent with his identity as a legal scientist.[34] Therefore despite his apparent conservative allegiances, it is clear that Menéndez de la Riva enjoyed a reputation for his commitment to the advancement of legal science and not any particular political project.

[29] This lack of interest was not for lack of availability of knowledge. The leading Guatemalan law journals and the proceedings of the biannual Guatemalan Juridical Congresses contain many scholarly expositions on regional and international human rights law.
[30] Interview with Marco Antonio Sagastume Gemmell, 17 Sep 2014, Guatemala City. Interview with Mario Rene Chávez García, 29 Sep 2014, Guatemala City.
[31] Americas Watch 1988, 61–62.
[32] Interview with Jorge Valvert, 16 Sep 2014, Guatemala City. Interview with Marco Antonio Sagastume Gemmell, 17 Sep 2014, Guatemala City.
[33] National Academy of Sciences Committee on Human Rights 1992, 27.
[34] Interview with Gonzalo Menéndez Park, 29 Sep 2014, Guatemala City.

Modernization project

Once designers are appointed, my theory posits that they perceive the drafting of a new criminal code as a modernization project – that is, a project meant to bring a country's criminal justice system in line with current conditions, knowledge, or standards – as opposed to a project meant to promote a political agenda, whether the government's or that of other domestic or international interests.

The new Guatemalan criminal code was part of a broader package of modernizing reforms initiated by the Arana administration shortly after taking office *(M1: Modernization context)*. Though he campaigned on a tough "law and order" platform, once in power Arana quickly initiated a broad social and institutional reform agenda alongside a brutal counterinsurgency campaign. The reform agenda surprised observers given Arana's hawkish campaign rhetoric and broad support among the country's hard-line parties.[35] Yet this reform agenda actually reflected a longstanding, nationalist sentiment among a large portion of the military elite that the future of Guatemala – including the fight against communism – would be best served by economic development and institutional modernization to benefit the country's lower and middle classes, including policies like labor reform and trade liberalization.[36] This perspective did not favor *political* liberalization under current conditions but saw economic development as key to preparing the country for political liberalization in the future.[37] This view was at odds with that of Guatemala's civilian landowning oligarchy, who supported Arana's

[35] Juan de Onis, "Guatemalan Leader Surprises Some With Promise of Reforms," *New York Times*, 5 July 1970, p. 12.
[36] Dosal 1995, 131–132. Interview with Researcher A.
[37] Interview with Researcher A.

counterinsurgency policy yet favored the economic and institutional status quo of protectionism and underdevelopment from which they had long profited.[38]

Ultimately, it is difficult to assess how sincere Arana's reformist doctrine was, as it could easily be explained as a cover for the military's self-interested aims, which sought to increase its own share of the profits from Guatemala's economy. Indeed, this period represented the beginning of what would amount to a massive shift in economic power in Guatemalan society, as the military, under the guise of institutional reforms, rapidly injected itself into virtually every corner of the economy. Over the next decade, it absorbed dozens of semipublic institutions into its governance and established a network of highly profitable financial and industrial enterprises – all while official corruption skyrocketed.[39]

But whatever its true motivations, the Arana government had every incentive to present its reforms as part of a genuine modernization agenda. As I discussed in Chapter One, even presumably insincere reforms must be accompanied by at least the veneer of genuine modernization. That is because maintaining legitimacy means that governments cannot justify reforms in self-interested terms. In turn, a discursive context that emphasizes modernization shapes the views of technocratic institutional designers, who are more likely than everyday policymakers to take stated modernization aims seriously. In Guatemala, the Arana government would have wanted to persuade two audiences that it was sincerely committed to modernization. The first was the rural peasant population, whose hearts and minds the government was competing with the insurgency to win over. The second audience was the civilian oligarchy, who was threatened by the military's new expansion into the civilian economy. Thus on paper the Arana government at least acted *as if* it was pursuing a sincere modernization agenda in order to

[38] Dosal 1995, 131–132. Interview with Researcher A.
[39] Black 1984, 31–32; Schirmer 1998, 19.

placate these audiences. Among the reforms the Arana government initiated were the adoption of a new commercial code, health code, youth code, and transit code. It also adopted a five-year development plan meant to promote industrial development, expand exports, and increase spending on health, education, transportation, and agriculture.[40] Within this context, the new criminal code initiated by the Arana government fits the model of a "continuous" criminal code reform that I described in Chapter One. That is, the new criminal code was presented as one component of a broader and explicit agenda by a relatively stable government to make the country's national institutions more efficient and better suited to meet its current needs.

Beyond the overarching political context, the process of drafting the new criminal code in particular was also replete with modernization talk – that is, rhetoric that invoked a self-conscious need to adapt existing institutions to contemporary conditions, knowledge, or standards – which further suggests that modernization aims shaped designers' choices *(M2: Modernization talk)*. First, this rhetoric can be seen in officials' statements regarding why the redesign was undertaken in the first place. In a letter to the special commission, Mario Sandoval Alarcón, who was President of the Congress and, according to official statements, responsible for the impetus to redesign the code, wrote that the Commission of Internal Governance "had a special interest in replacing the current penal law, reforming it with the new doctrinal trends and variations that comparative law offers through institutions required by the current social situation of the country."[41] According to statements made in Congress by the chair of the special commission, "the current Code is obsolete, and it effectively needed a total reform to adjust it and frame it to the new criminal currents."[42] This view was not unique to the government, but reflected a sentiment among Guatemala's academic legal elites that the old 1936 criminal code

[40] Terri Shaw, "Guatemala: A Big Stick – and Social Reform," *Washington Post,* 23 Mar 1971, p. A17.
[41] Guatemala 1999, 1.
[42] *Diario de Sesiones*, 10 Nov 1972, Congress of the Republic of Guatemala.

needed a comprehensive overhaul in order to resolve the inconsistencies, errors, and other problems that had accumulated from various piecemeal amendments over the previous decades.[43] Likewise, according to the special commission the failure to reform the criminal code in the past "left us [Guatemala] behind other civilized countries." In the *Motivos*, the special commission appealed to Guatemala's self-conception as a leader in Central America, noting that given Guatemala's "legislative tradition," it is "unquestionable that it is not possible" that it "continues to lag behind other nations of the world."[44] It is noteworthy that I found very few statements that justify the new code by its potential to, say, aid the counterinsurgency efforts or increase human rights protections. The *Motivos* and statements in Congress also contain no references to pressure from either civil society or international interests pushing for the code *(M3: Absence of pressure)*. Instead, the overwhelming bulk of justificatory rhetoric consistently invokes modernization aims.

Second, modernization talk also consistently justified the choices of how the new code was designed. The *Motivos* and statements in Congress provide many references to the ways that choices in the new code were influenced by either doctrinal trends or the criminal codes of other Latin American or European countries. I discuss these statements further below where I test for the mechanisms relating to designers' specific design choices. But for now it is useful to note that in the special commission's own words, wherever it made changes to Menéndez de la Riva's preliminary draft, those changes were "bound by the most modern doctrinal currents and legal texts and, fundamentally, in direct proportion with the national context."[45] In other words, even though the work of revising the code shifted from non-policymakers (Menéndez de la Riva) to

[43] Francisco Fonseca Penedo, "Reformas al Código Penal," *El Imparcial*, 28 Jul 1970.
[44] Guatemala 1999, 9. For references to Sandoval initiating the reforms, see *Diario de Sesiones*, 10 Nov 1972, Congress of the Republic of Guatemala
[45] Ibid., 15.

policymakers (the special commission), the policymakers still invoked modernization aims to justify their choices.

Ultimately, it is impossible with available sources to determine for certain what the Arana government hoped to gain from the new criminal code, but what is important for my argument is how the designers themselves viewed the aims of the code's redesign. The evidence is consistent with what one would expect to find if the code's designers viewed the new code as a modernization project: an overarching modernization context, ubiquitous modernization talk, and no evidence that the code's redesign was instigated by outside interests. Nevertheless, this evidence cannot refute alternative theories. It is possible that the criminal code offered some self-serving benefit to the government, and the code's designers willingly conspired to obscure the government's true intentions by painting the project in modernization rhetoric. Yet evidence I present below for subsequent mechanisms helps cast doubt on this explanation.

Emulation

The next two mechanisms relate to why designers selected and approved the provisions they did. My theory posits that one of these mechanisms is sufficient on its own to fulfill the causal process, though often both will be present, as they are here.

It is important to note that with available sources it is difficult to determine which provisions Menéndez de la Riva included in his original draft and which the special commission provisions added, modified, or removed. Menéndez de la Riva reportedly supplied his own *Exposición de Motivos* along with his draft, but it only covered up to article 37 (out of 497).[46] Nevertheless, there is reason to be confident that the special commission's final draft (which was modified little before Congress's final approval) did not diverge greatly from Menéndez de la

[46] Ibid., 9.

Riva's. First, in the official *Motivos* issued by the special commission, the authors state that they remained faithful to Menéndez de la Riva's draft, writing "we tried, wherever possible, to respect the methodology, systematization, titles, chapters and texts of the preliminary draft."[47] Second, an academic commentary on Menéndez de la Riva's draft published before the special commission began its work cites the text and article numbers of many different provisions, and these are virtually identical to those in the special commission's final draft.[48] This suggests that to the extent that the special commission did modify Menéndez de la Riva's draft, its changes were relatively minor and mostly left the original draft in tact.

The first test speaks to a general tendency towards emulation in designers' choices *(E1: Experts generally cite other codes)*. If emulation specifically led to the inclusion and approval of the code's anti-atrocity laws, then we should first be able to establish that designers were generally disposed towards emulation. According to the special commission, Menéndez de la Riva's draft was "based almost entirely" on the 1968 draft criminal code for Honduras and the 1959 draft criminal code for El Salvador.[49] Yet neither of these codes had yet been adopted by their respective countries, nor were these countries known to be leaders in legislative innovation. So why would Menéndez de la Riva deem these codes to be worthy of emulation? The special commission's *Motivos* suggest two answers. First, these two drafts were reportedly modeled on studies produced by eminent Spanish jurists – Constancio Bernaldo de Quirós in the case of Honduras and Mariano Ruiz-Funes García in the case of El Salvador – which would have imbued them with high prestige.[50] Second, both drafts were also strongly influenced by the

[47] Ibid., 15. I was unable to locate Menéndez de la Riva's *Motivos*.
[48] Morales Baños, Rosales Martinez, and Recinos Sandoval 1971.
[49] Guatemala 1999, 10.
[50] Ibid., 12–13.

recently drafted Model Penal Code for Latin America.[51] The Model Penal Code was the product of collaboration among the leading Latin American criminal law scholars of the time and was intended to produce an off-the-shelf model that could guide the drafting of national codes and promote the harmonization of criminal law across in the region.[52] The level of esteem attributed to the Model Penal Code can be seen in the way that virtually all subsequently drafted Latin American criminal codes exhibited its influence in some way.[53] In sum, Menéndez de la Riva modeled his code on what would have been seen by Latin American penalists as the most forward-thinking models of the time.

The special commission's statements also indicate that its views of how the code should look were strongly influenced by emulation. In editing Menéndez de la Riva's draft, the special commission "reviewed all comparable legislation in Latin America," including the Model Penal Code, along with the codes of Spain, Belgium, Germany, Italy, and France "so that we could fit together in this systematization all those trends of modern legislation into our code."[54] The special commission also referred to the influence of a draft criminal code that had been commissioned for Guatemala in 1960 but was never adopted. The 1960 draft was written by Sebastián Soler, an Argentinean criminal law scholar and judge who was at the time one of the most renowned criminal law scholars in the region.[55] Furthermore, the Honduran and Salvadoran draft codes were given "special consideration...because they are the most recent" and "they contain remarkable advances in the field."[56] The special commission's statements also allude to

[51] Ibid., 13; Jescheck 1981, 19.
[52] Dahl 1989.
[53] Ibid., 237.
[54] *Diario de Sesiones*, 10 Nov 1972, Congress of the Republic of Guatemala.
[55] Ibid.
[56] Guatemala 1999, 12.

the bounded rationality inherent in designing a new code, writing that these recently drafted codes were emulated "obviously because these sources are a guarantee of good legislation."[57]

If this general tendency towards emulation also led the code's designers to include and approve anti-atrocity laws in particular, then we should expect to find references to the specific laws that inspired the code's provisions. *(E2: Experts cite anti-atrocity laws in other codes)*. According to the *Motivos* prepared by the special commission, the provision against genocide (article 376) was based on a similar provision in article 313 of the Honduran draft code, "which summarizes the doctrinal trends that were dedicated to the aforementioned crime [of genocide] in international law."[58] Beyond this statement, there is further evidence that Menéndez de la Riva copied the Guatemalan genocide provision directly from the Honduran draft code. The definition of genocide in the Honduran draft omits "racial" groups from the list of the protected groups against whom genocide could be committed and which are contained in the Genocide Convention's original definition. Instead, the definition only lists "national, ethnical, and religious" groups. The Guatemalan code's genocide definition also omits racial groups but includes the other three protected groups. Given that Menéndez de la Riva seems to have modeled the Guatemalan genocide provision on the one in the Honduran draft code, the special commission likely approved it because of its association with this prestigious draft.

In contrast, the commission does not cite a source for article 378, which prohibits war crimes and crimes against humanity. However, the 1959 draft criminal code for El Salvador, which reportedly served as a basis for Menéndez de la Riva's draft, does include a provision (art. 406) that criminalizes both war crimes and crimes against humanity and looks almost identical to article 378. Both provisions carry the same title – "*Delitos contra los Deberes de Humanidad"* or

[57] Ibid., 13. For a discussion of bounded rationality in code design, see Chapter One.
[58] Ibid., 73.

"Crimes against the Duties of Humanity" – and only minor differences in wording.[59] Though we cannot be certain, it is likely given the apparent influence of the Salvadorian codes that its war crimes and crimes against humanity provision helped inspire a similar provision in Menéndez de la Riva's draft.

If the choices of the Guatemalan code's designers were driven not by emulation, but by either pressure from outside the government or a concerted signaling strategy, would we still find this evidence? It is unlikely, but still possible. At the general level, it is possible that the designers chose these particular codes to emulate, because those codes offered particular features that benefited these strategies (either conciliation or signaling.) But the fact that the codes they selected to emulate were also ones that would have been considered especially cutting-edge either indicates a genuine disposition towards emulating prestigious models or reflects a strategy of using the prestige of these models as a cover for more political ends, such as to enact a more repressive criminal code. In terms of the actual anti-atrocity provisions, it is possible that the designers intended to obscure their true motivations for adopting these provisions by citing the influence of the Honduran draft code. Nevertheless, it is difficult to explain how this deception would benefit designers' or the government's strategies when most of the alternative explanations depend on communicating to a particular audience. Thus, based on these alternative explanations, we would expect designers and the government to be more overt about their intentions. However, one possibility is that designers and the government tried to save face by masking their capitulation to powerful outside actors. Nevertheless, I found no evidence that outside actors sought to pressure the government to include the anti-atrocity provisions.

[59] El Salvador 1960, 141-142. The 1968 draft criminal code for Honduras that apparently inspired the Guatemalan genocide provision contains no provision against war crimes or crimes against humanity. Honduras 1968.

Professionalization

Emulation may have been sufficient to prompt the designers of 1973 criminal code to include and approve anti-atrocity laws. But professionalization also likely helped reinforce designers' views that anti-atrocity provisions were the types of laws that *should* be emulated.

The first observable test for this mechanism is based on the assumption that if professionalization did contribute to the ultimate inclusion of anti-atrocity laws in particular, then we should be able to observe a general tendency for the designers to be influenced by professional sources and trends. This tendency would be evidenced in references or adherence to doctrinal trends and ideas promoted by leading professional organizations (*P1: Designers' choices generally reflect criminal law trends*). First, there is evidence that Menéndez de la Riva was generally disposed towards the influence of professionalization. According to a number of interviewees, Menéndez de la Riva took a particularly active interest in legislative and doctrinal trends in criminal law around the region and the world.[60] His internationalist orientation is also evidenced in his own academic writing, which repeatedly references the writings of European and U.S. jurists, the proceedings of international professional conferences, and what he describes as the characteristics of "modern" criminal law and criminal justice systems.[61]

Menéndez de la Riva's draft criminal code itself also embodied many professional trends. An academic commentary on Menéndez de la Riva's draft prior to its revision by the special commission notes its adherence to what at the time was the most significant large-scale shift in criminal law doctrine among civil law countries, that is, the rise of the so-called "positivist school." A core aim of criminological positivism was to reorient criminal law from its retributive function (characteristic of the previously dominant, "classical school") to one whose purpose

[60] Interview with Jorge Valvert, 16 Sep 2014, Guatemala City; Interview with Gonzalo Menéndez Park, 29 Sep 2014, Guatemala City.
[61] Menéndez de la Riva 1961.

was to protect society from the criminal. A number of doctrinal innovations followed from this reorientation, including emphasis on the prevention of crime and the rehabilitation of offenders and a de-emphasis on punishment for punishment's sake. The commentary notes a "defined affiliation to positivism" in Menéndez de la Riva's draft and concludes that it is "lined with a variety of new modalities in the legal-criminal aspect," such as its emphasis on the preventative function of criminal law.[62]

The special commission that reviewed Menéndez de la Riva's draft also found it to embody the cutting edge in criminal law doctrine. When he presented the revised code to Congress, Zamora singled out one feature of Menéndez de la Riva's draft for praise that, in Zamora's view, constituted a "radical change" (*cambio radical)*: indeterminate sentences. A system of indeterminate sentencing contrasts with one of fixed sentencing by providing a sentence range (for example, five to ten years) and allowing judges or parole officials to later determine the actual release date.[63] While Zamora does not mention it in his remarks, this move towards indeterminate sentences reflected a central tenet of positivism, that is, the individualization of punishment. For positivists, sentences should be "made to fit the criminal and not the crime," proportional to the criminal's dangerousness.[64] Many positivists held up the indeterminate sentence as a progressive innovation, because it allowed offenders to be released early if they showed that they had been rehabilitated. The indeterminate sentence was thus a primary feature of the shift towards individualization in criminological theory, and had become widely adopted in the criminal codes of continental European countries by the end of the interwar period.[65] The principle was also promoted by a number of prominent professional

[62] Morales Baños, Rosales Martinez, and Recinos Sandoval 1971, 31–32.
[63] *Diario de Sesiones*, 10 Nov 1972, Congress of the Republic of Guatemala.
[64] Ancel 1987, 52–53; Canals 1960, 546.
[65] Radzinowicz 1942, 312–314; Pifferi 2014.

sources, including the AIDP, which passed a resolution at its 1937 Congress endorsing indeterminate sentencing,[66] the UN, which published a report on indeterminate sentencing in 1954,[67] as well as the leading Latin American criminal law scholar at the time, Luis Jiménez de Asua, who published an entire monograph on the subject.[68]

The special commission's statements also suggest that its own views of what provisions it would approve were very much influenced by professional trends. Whatever its ultimate motivations, the special commission wanted its code to be seen as embodying cutting-edge professional standards. This can be seen in the *Motivos's* introductory statement, which is couched in the distinct language of positivism:

> [I]t is noteworthy to point out the restructuring of the substantive criminal law, which is *not intended to be an instrument of repression*, but a body of law that allows the State, in *legitimate defense of society*, to create rules intended to provide appropriate and legal means to *prevent crime* and, where appropriate, to *treat subjects prone to crime* as elements that *must live in harmony with the society in which they live*, *respecting rights all over the world* that are not at the mercy of the person but at the State, as the organizing body. (Italics added.)[69]

When discussing the principles that guided its revision of Menéndez de la Riva's draft, the commission also states it "was careful to bring to mind the concepts, theses and presentations of the most renowned writers in criminal law, who are representatives of the various trends and are at the forefront of criminal science."[70]

If this general disposition towards professionalization among the Guatemalan designers led them to include and approve anti-atrocity laws in particular, then there should be some indication that designers drew on professional sources that would specifically favor anti-atrocity

[66] AIDP 2009, 34.
[67] Ancel 1954.
[68] Jiménez de Asúa 1959, 134; Jiménez de Asúa 1913.
[69] Guatemala 1999, 6.
[70] Ibid., 13–14.

laws (*P2: Experts cite professional sources on anti-atrocity laws*). The clearest indication of this is the *Motivos's* commentary on the code's genocide provision, where it cites the corresponding article in the 1968 Honduran draft code. The *Motivos* note that the Honduran provision "summarizes the doctrinal trends that were dedicated to the aforementioned crime in international law," suggesting that the special commission took an interest in the degree to which the genocide provision reflected such trends.[71]

For whatever reason, there is no such commentary on the provisions against war crimes and crimes against humanity. The closest connection to that can be made between professional sources and these provisions comes from the general influence on the code of Luis Jiménez de Asúa. Jiménez de Asúa was the preeminent Latin American criminal law scholar of 20th century. Born in Spain in 1889 but exiled to Argentina in 1939, Jiménez de Asúa was one of the leaders behind the post-WWII movement to harmonize and standardize Latin American criminal law. He also wrote a five-volume *Treatise on Criminal Law* (*Tratado de Drecho Penal)* that became (and remains) a standard text in Latin American law schools. The *Motivos* indicate that Jiménez de Asúa's influence loomed large over the 1973 code, citing him specifically as the leader of the movement towards positivist doctrines "that is gaining momentum" and on which the code was modeled.[72]

Given both his European lineage and stature within Latin America, Jiménez de Asúa was well poised to import European ideas into Latin America and shape the design of criminal codes in the region along these lines. Jiménez de Asúa served as a vice-president of the AIDP from 1938 until his death in 1970, so he also would have been exposed to ideas circulating in the organization – such as those of Jean Graven, whom Jiménez de Asúa cites often – about the

[71] Ibid., 73. The original Spanish reads, "*resume las Corrientes doctrinarias que se consagraron al ser incluido el citado delito en el derecho internacional."*
[72] Ibid., 14.

importance of implementing international criminal law.[73] Most importantly, Jiménez de Asúa attended the AIDP's 1953 Congress in Rome, where the organization passed a resolution on the domestic implementation of the 1949 Geneva Conventions.[74] Since the 1930s, he also had been a participant in the meetings of the International Bureau for the Unification of Criminal Law, the AIDP offshoot organization that advocated for harmonization of the world's national criminal justice systems and which had been particularly focused on international crimes.[75] The influence of these organizations' ideas on Jiménez de Asúa can also be seen in his landmark treatise, in which he devotes 200 pages to international criminal law, offering detailed expositions on the history and jurisprudence of criminal sanctions against genocide, war crimes, and crimes against humanity.[76] Jiménez de Asúa specifically points out that the regime against these crimes is designed to depend on domestic courts and notes that "some countries – not many –" have adopted the necessary implementing legislation, as he goes on to list them.[77] Menéndez de la Riva would surely have been well-versed in Jiménez de Asúa's writings.[78] According to his son, Menéndez de la Riva greatly admired Jiménez de Asúa's work and taught his *Treatise* in his law courses.[79] Given that Menéndez de la Riva would have been influenced by Jiménez de Asúa's writings, it is plausible that Menéndez de la Riva's decision to include anti-atrocity laws was influenced by his exposure to relevant ideas in Jiménez de Asúa's work.

The final test for the influence of professionalization concerns designers' willingness to include and approve provisions that were endorsed by professional sources but would have contradicted designers' own political views (*P3: Experts do not hold progressive views)*. In other

[73] For more on Jean Graven, see Chapter Two.
[74] AIDP 1957.
[75] International Bureau for the Unification of Criminal Law, 1935. The International Bureau for the Unification of Criminal Law is introduced in Chapter Three.
[76] Jiménez de Asúa 1964, 1087–1285.
[77] Ibid., 1172–1773.
[78] Interview with René Arturo Villegas Lara, 23 Sep 2014, Guatemala City.
[79] Interview with Gonzalo Menéndez Park, 29 Sep 2014, Guatemala City.

words, if designers' choices were motivated overall by politically conservative beliefs, then it is unlikely they would have selected and adopted norms that protected human rights. Yet if designers held such beliefs but nevertheless still selected human rights norms, it would constitute evidence that their choices were motivated by professionalization. As discussed above, Menéndez de la Riva was consistently described in interviews and secondary sources as politically conservative. Biographical information on the members of the special commission is limited, but what is available suggests they too were aligned with the Guatemalan political right. Ernesto Zamora, the president of the special commission was a Congressman and founding member of the hardline, right wing MLN party.[80] Luis Alfonso López served as Attorney General under the Arana government and was a close friend of the president. (A U.S. diplomatic cable from 1974 following Alfonso's election as president of the Congress made public by Wikileaks claimed that Alfonso owed his position to intervention by Arana.)[81] Finally, Hernán Hurtado Aguilar was a judge on the Guatemalan Supreme Court and described by Guatemalan criminal law expert Luis Ramírez in an interview as "very conservative."[82] Yet the right wing allegiances of the criminal code's designers did not prevent them from adopting some relatively progressive features, such as indeterminate sentencing, conditional sentencing (i.e. probation), and the anti-atrocity provisions, that all reflected doctrinal trends across Latin American and Europe. However, this willingness does not falsify alternative theories; the designers may have been willing to include these elements as responses to pressure from outside the government. Nevertheless, this willingness does increase our confidence that professionalization was at work in the design of the criminal code.

[80] Cruz Salazar 1985, 68.
[81] Embassy Guatemala, "Lopez elected president of Congress," 17 Jun 1974. Available at: http://www.wikileaks.org/plusd/cables/1974GUATEM03274_b.html.
[82] Interview with Luis Ramírez, 16 Jun 2014, Guatemala City.

In many ways, Menéndez de la Riva's draft and the code approved by Congress were still repressive instruments. Despite the humanitarian language of positivism and some genuinely progressive features, the code still contained many other repressive components, such as a particularly harsh punishment scheme and prohibitions that could be seen as especially illiberal or outdated, including defamation, adultery and the condoning of crime (*apología de delito*).[83] Nevertheless, what at least was a need to seek legitimacy for a new code and at most a genuine, principled commitment to modern criminal law science led the special commission to approve provisions, like those relating to atrocity crimes, that demonstrated its adherence to the norms, principles, and standards deemed most modern by Latin American criminal law professionals. Ultimately, we will never know what was in the minds of the code's designers, but on one level, it does not matter. Whether they were motivated by legitimacy-seeking or principled commitments, the result was the same: that is, provisions against atrocities that reflected professional trends and that likely did not serve the government's material interests.

Depoliticization

The previous sets of tests referred to the willingness of designers to include and approve anti-atrocity laws. This final set of tests refers to the willingness of the Guatemala Congress and president Arana to approve these laws. My theory posits that the reform context depoliticized these laws such that they provoked less scrutiny than they would have had a Guatemalan lawmaker proposed them as standalone legislation.

The first test thus concerns the apparent costs for the government and military associated with adopting anti-atrocity laws. If the government was willing to adopt anti-atrocity laws even

[83] For a detailed technical critique of some of the 1973 code's more repressive features, see Morales Baños 1974, 29–36.

though it was itself committing or otherwise supporting atrocities, then it would constitute evidence that the government did not perceive these laws as politically or materially threatening (*D1: Government committing atrocities*). Five months after taking power, president Arana (1970-1974) declared a state of siege, suspending constitutional protections and giving the military a free hand to crack down on anti-government elements.[84] The military and right wing paramilitary death squads targeted left wing and moderate politicians, academics, trade unionists, and activists, along with guerillas.[85] The state of siege ended in October 1971, but the political killings continued through the remainder of Arana's presidency. Estimates put the number of killed under his tenure at a minimum of 2,000 to as high as 15,000.[86] In contrast to the genocidal violence of later governments, during which entire villages were targeted indiscriminately, the violence during this period remained fairly selective.[87] Nevertheless, the violence committed by the government and its associated paramilitary group included extra-judicial killings of rebels, political assassinations of civilian leaders, torture, and disappearances – atrocities that would have fit the definitions of war crimes and crimes against humanity in article 378. The willingness of the Arana government do adopt these provisions even while it carried out such atrocities thus suggests that it did not perceive these laws to be politically or materially threatening.

It is also clear that the inclusion of anti-atrocity laws in the new code did not coincide with the type of conciliatory shift in the counterinsurgency that would have been part of a signaling strategy. Though the levels of killing had reduced somewhat by the time the new code was ratified in July 1973, this was mostly a result of the counterinsurgency's success, not a shift in strategy. In any case, disappearances and targeted assassinations of political activists and labor

[84] "Guatemala Gains in War on Rebels," *New York Times*, 8 May 1971, p. 5.
[85] Handy 1984, 168–169. Norman Gall, "Slaughter in Guatemala," *New York Review of Books*, 20 May 1971.
[86] Ball, Kobrak, and Spirer 1999, 37; Menton et al. 1973.
[87] Ball, Kobrak, and Spirer 1999.

organizers continued through 1973 – acts that could fall under article 378's prohibition against "inhumane act against civilian populations."[88] Therefore, it is unlikely president Arana would have viewed the code's anti-atrocity laws to be part of a conciliatory signaling strategy.

The second test concerns the level of scrutiny that the code's anti-atrocity laws provoked in Congress. If the government perceived these laws politically or materially risky, then these laws likely would have provoked debate in Congress. Likewise, if the government perceived these laws as uncontroversial, then there likely would have been little such debate (*D2: Little debate in Congress*). The 498 articles of the criminal code submitted by the special commission were debated and approved by the Congress over the first two months of 1973. On February 22, Congress considered articles 360 to 407, which included the provisions relating to atrocity crimes. In the course of the over 8,000 words of transcript produced by that day's debate, not a single word was devoted to scrutiny of the articles against genocide, war crimes, and crimes against humanity. Instead, the vast majority of the debate in this session centered on article 375, which criminalized insults to the flags, emblems, or official symbols of foreign countries. Some Congressmen expressed skepticism that Guatemala should police the misuse of other countries' symbols, while others wanted to make sure that similar abuses of Guatemala's flag and symbols were also criminalized.[89]

In any case, no Congressman raised either an objection nor even a concern over the provisions relating to atrocity crimes, suggesting that the reform context helped deflect scrutiny from these laws. Nor did any Congressman express explicit support for these laws, which we might have expected if Congress viewed them as part of a conciliatory signaling strategy. It is also difficult to account for this lack of debate using explanations that appeal to outside pressure.

[88] McClintock 1985, 125–126; Ball, Kobrak, and Spirer 1999, 19.
[89] *Diario de Sesiones*, 22 Feb 1973, Congress of the Republic of Guatemala.

Had these laws been instigated by civil society groups or international actors, then the laws would necessarily have been perceived as politicized, which likely would have provoked scrutiny from a Congress that was dominated by hardline parties. Nevertheless, it is still possible that whatever debate these laws did provoke took place out of public view prior to these laws coming up for approval in Congress.

The final test for the depoliticization of these laws concerns whether the government publicly singled out the provisions relating to atrocity crimes. If these laws were either conciliation to outside pressure or part of a signaling strategy to credibly commit to reducing atrocities, then the government would have likely wanted to publicize them. However, if the government did not publicize them, it would support my argument that they were taken for granted as technical provisions (*D3: Little publicizing of laws*). I found no evidence that either the code's designers, the Congress, or the Arana government made any attempt to publicize the anti-atrocity laws. Neither the special commission nor any Congressman brought attention to these laws on the floor of Congress. When president Arana ratified the new criminal code at a special ceremony on July 27th, his reported remarks contained no reference to the provisions against atrocity crimes, or the ongoing insurgency in general.[90]

Assessing the evidence in total

Table 5.2 summarizes the empirical tests derived for each theorized mechanism and indicates whether the evidence observed was either inconsistent, partially consistent, or fully consistent with the predicted observations. Four out of the five theorized mechanisms had at least one test that carried high certainty, that is, tests that were necessary to pass to maintain confidence in the

[90] "Códigos Entregados: Los Nuevos Penales Puestos en Manos del Presidente," *El Imparcial*, 27 Jul 1973; "Presidente Sanciono los Nuevos Códigos," *Prensa Libre*, 28 Jul 1973.

theory. In the end, the evidence for each was fully consistent with the predicted observations. Four out of five mechanisms also had at least one test that carried at least moderate distinctiveness, that is, passing them would help discount alternative mechanisms, though not definitively. The evidence for each of these, too, was fully consistent with the predicted observations. In all, each mechanism was supported by evidence constituting at least either a hoop test or a smoking gun test, with four out of five mechanisms supported by both types of tests. No tests retuned evidence that was inconsistent with predicted observations.

Table 5.2: Consistency with predicted observations of mechanisms

Mechanisms	**Certainty**	**Distinctiveness**	**Consistency**
Technocratic delegation			
T1: Technical expertise	High	Low	Full
Modernization project			
M1: Modernization context	Low	Low	Full
M2: Modernization talk	High	Low	Full
M3: Absence of pressure	Low	Moderate	Full
Emulation			
E1: Experts generally cite other codes	High	Moderate	Full
E2: Experts cite anti-atrocity laws in other codes	Moderate	Moderate	Partial
Professionalization			
P1: Experts' choices reflect criminal law trends	High	Moderate	Full
P2: Experts cite professional sources on anti-atrocity laws	Moderate	High	Partial
P3: Experts do not hold progressive views	High	Low	Full
Depoliticization			
D1: Government committing atrocities	Low	Moderate	Full
D2: Little debate in Congress	Moderate	Moderate	Full
D3: Little publicizing of laws	Low	High	Full

At the same time, one of the two *strong* smoking gun tests was only partially fulfilled (*P2: Experts cite professional sources on anti-atrocity laws*). The code's drafters did refer specifically to professional sources when discussing the genocide provision (albeit very briefly),

but there was no similar reference to professional sources in the discussion of the war crimes and crimes against humanity provisions. Thus, it is more difficult to discount alternative mechanisms for why those latter provisions were included. However, there was strong evidence for professionalization in general in code's design, especially through sources, like those of Jiménez de Asúa, in which the idea of anti-atrocity laws would have been present. In the end, the evidence was fully consistent with two strong hoop tests for the professionalization mechanism. Moreover, beyond emulation, I found no corroborating evidence to support alternative mechanisms that could plausibly replace professionalization, such as influence from civil society activists or international organizations.

Conclusion

The goal of this chapter was to verify the mechanisms in my institutional redesign theory of atrocity criminalization using the pathway case of Guatemala in 1973. To do so, I conceptualized a series of discrete mechanisms and derived a variety of empirical predictions to test their observable manifestations. Using a combination of primary sources, secondary sources, and elite interviews, I found strong support for these predictions. In sum, I have shown that the idea to include anti-atrocity laws in the 1973 Guatemalan criminal code likely originated with a criminal law scholar, Gonzalo Menéndez de la Riva, who was appointed to draft the code, and not from civil society groups or government policymakers, as alternative theories would predict. Two sources of influence likely shaped Menéndez de la Riva's choices to include these laws in his draft: 1) emulation of other codes that included these laws and which were highly regarded among scholars across the region, and 2) professional ideas about the importance of adopting national legislation to implement international criminal law that spread to the region through

Latin American AIDP members. I have also shown that the Guatemalan Congress and President Arana likely approved these laws because they perceived them as inherently apolitical, and not because they intended the laws to appeal to actors outside the government, as alternative theories would predict.

Testing for this causal process in a hard case for atrocity criminalization like Guatemala helps increase our confidence in the theory's generalizability. That is, if criminal code redesign can trigger a sequence of mechanisms that are powerful enough to lead to the adoption of anti-atrocity laws in a case where the bulk of other relevant factors would work against such an outcome, then the theory would likely explain the effect of criminal code redesign in other cases as well. Yet it also likely that this causal process will differ across some cases in the precise balance and interaction of mechanisms driving the relationship between criminal code redesign and atrocity criminalization. In Guatemala, emulation and professionalization worked to reinforce each other, while monitoring and acculturation played no role. In other cases, monitoring and acculturation may play either a complementary or leading role in relation to emulation and professionalization.[91] For example, as I discussed in Chapter Two, the rise of human rights international nongovernmental organizations, the renaissance of atrocity justice, and a resurgence in foreign technical legal assistance in the 1990s led to greater overall scrutiny by outside actors of how well countries' new criminal codes conformed to international human rights standards. The increase in global attention to atrocity justice also helped make anti-atrocity law more salient in international politics. Thus, countries that redesigned their criminal codes in the post Cold War era would be more likely to face either scrutiny from human rights organizations (monitoring) or social pressure to conform to newly salient global norms (acculturation) that would encourage the inclusion of anti-atrocity laws. In the next chapter, I

[91] For more on the mechanisms of monitoring and acculturation, see Chapter One.

conclude this study by discussing how future research can both illuminate these different paths and advance our understanding of their generalizability and scope conditions.

CHAPTER SIX

Conclusion: Contributions, scope conditions, and future research

Why do states adopt international legal norms in their domestic laws? This dissertation has offered a new theory to explain the domestic legislation of international law and has tested it on the worldwide spread of national criminal laws against genocide, war crimes, and crimes against humanity. This concluding chapter proceeds in three sections. In the first section, I summarize the theory underlying my investigation and the empirical findings it has produced. In the second section, I discuss these findings' contributions to the literatures on human rights and international law. In the final section, I identify possible scope conditions for my theory as it applies to anti-atrocity laws as well as to the domestic legislation of other international legal norms. In doing so, I also identify a number of ways that future research may help shed light on both the potential limits and generalizability of my theory.

Summary of findings

In Chapter One, I presented a theory that draws on research on agenda setting, professional communities in policymaking, and norm diffusion to argue that one way international legal norms are adopted into domestic law is through large-scale, technocrat-led processes of institutional reform. Policymakers initiate these processes for a variety of reasons that are incidental to the aim of implementing international legal obligations, but modernization aims – that is, the goal to adapt existing institutions to contemporary conditions, knowledge, and standards – typically serve as the public justification. At the same time, designing new institutions requires technical expertise that policymakers lack, so they must delegate the work to

technocratic specialists, who are thus charged with crafting institutions that embody "modern" standards. These specialists possess knowledge and preferences that differ from those of policymakers and which are more likely to favor the inclusion of international legal norms. I identified two professional-level mechanisms that influence technocratic specialists' views of what norms should be included in a modern criminal code: professionalization through transnational professional organizations and emulation of prestigious models. When these sources favor international legal norms, new institutional designs will be more likely to include them. I also identified two broader mechanisms that influence the choices of both technocratic designers and policymakers: monitoring and acculturation. When international legal norms either become the focus of advocacy groups who monitor the drafting of new criminal codes or achieve salience in everyday global politics, new institutional designs will be more likely to include them. Ultimately, international legal norms in draft institutional designs benefit from the technocratic character of these processes, which helps depoliticize what otherwise could be seen as laws that conflict with governments' own interests. Thus once incorporated into proposed designs, governments are more likely to approve international legal norms than they would have had these norms been proposed as standalone legislation.

In Chapter Two, I explored the plausibility of this theory by tracing the history of efforts to incorporate international criminal law norms prohibiting state-sponsored atrocities into domestic laws. I showed that early efforts to adopt these laws grew out of two linked intellectual agendas that originated in the late 19th century with leaders of the International Criminal Law Union and its successor, the International Association of Penal Law: the promotion of "scientific" criminal code reform and the pursuit of an effective international criminal law regime. The experts who advanced these agendas were also central to the creation of the post-WWII

international anti-atrocity regime. The regime they constructed was based on an enforcement model these experts had long favored, which relied on domestic courts prosecuting international crimes using domestic legislation. Through a range of professional activities, like conferences, textbooks, and the dissemination of exemplary codes, these experts used their already prominent positions to socialize criminal law specialists from a variety of political orientations to associate domestic anti-atrocity laws with modern standards of criminal law. This association facilitated the adoption of anti-atrocity laws in new criminal codes around the world, despite the issue of anti-atrocity justice enjoying little broader political salience during the 1960s, 70s, and 80s. Then, as the Cold War ended, transnational human rights organizations made criminal accountability a central focus of their advocacy, while actual anti-atrocity justice was meted out a large scale for the first time since World War II. These developments raised the salience of anti-atrocity norms in global politics and international law, and coupled with a rise of foreign technical legal assistance, further encouraged the adoption of anti-atrocity norms in new criminal codes. Finally, the establishment of the ICC in 1998 sparked the first international NGO campaigns to promote the domestic implementation of anti-atrocity law, which shifted the bulk of activity around implementation from professional circles to activist ones.

In Chapter Three, I used an original and comprehensive dataset I constructed on the adoption of national anti-atrocity laws since World War II to test the hypothesis that, for any given year, states that redesign their criminal codes are more likely to adopt these laws than states that do not. Event history analyses provided strong support for my theory, even while controlling for several alternative explanations. Specifically, the models consistently found that criminal code redesign exerts a very large, highly statistically significant effect on the likelihood of adopting each of the three categories of crime. I also found little to no support for the

argument that civil society groups have been a leading force in the spread of these laws for the first fifty years of their existence. Nevertheless, I found some evidence that following the establishment of the International Criminal Court, greater presence of civil society groups in a country increases the likelihood that it will adopt domestic criminal laws against genocide and crimes against humanity, though not war crimes. I also found little or no support for a number of other alternative factors, including regime type, recent civil war, recent democratization, global diffusion, and treaty ratification. However, regional diffusion does exert an independent effect on the likelihood of adoption, suggesting that, in some cases, governments are emulating the policy innovations of their regional peers. Finally, I also found that of all the countries that have adopted national anti-atrocity laws, repressive regimes are more likely to adopt them as part of newly redesigned criminal codes, and democratic countries are more likely to adopt them as standalone legislation. This finding lends support to my claim that institutional redesign processes help depoliticize these laws and thus facilitate their adoption in states for whose governments these laws would presumably pose the greatest risk to state interests.

Finally in Chapter Four, I conducted an in-depth study of a single pathway case – Guatemala's 1973 adoption of anti-atrocity laws – in order to verify the causal mechanisms I theorized to be underlying the statistical results. Though these mechanisms are not directly observable, I derived a number of their observable implications that I tested using data from a range of primary and secondary source materials and expert interviews. These data offered strong support for the causal story I theorized. First, these data supported my argument that the idea to include anti-atrocity laws in the 1973 Guatemalan criminal code likely originated with a criminal law scholar, Gonzalo Menéndez de la Riva, who was appointed to draft the code, and not from civil society groups or government policymakers, as alternative theories would have

predicted. Second, these data provided evidence that Menéndez de la Riva's choices to include these laws in his draft were likely influenced by both his emulation of other prestigious codes, like the recently completed draft codes for Honduras and El Salvador, and his professionalization through the writings of AIDP vice-president and leading Latin American criminal law scholar, Luis Jiménez de Asúa. Finally, the data supported my argument that the Guatemalan Congress and President Carolos Arana likely approved these laws because they perceived them as largely apolitical, technical features of a new code, and not because they intended the laws to appeal to actors outside the government, as alternative theories would predict.

Contributions

Human Rights

This dissertation makes three primary contributions to research on human rights. First, this study sheds new light on the shift from impunity to criminal accountability for state-sponsored abuses, one of the most significant changes to the norms of global politics since World War II. Despite growing research on various components of the rise of individual criminal accountability, scholars have largely overlooked how and why states have formally institutionalized individual criminal accountability norms into their domestic legal systems. This study has produced a new dataset documenting the legislation of national criminal laws against genocide, war crimes, and crimes against humanity in every country in the world that has adopted them since World War II. The patterns revealed by these data contrast with existing research on the rise of individual criminal accountability for atrocities, which tends to emphasize the late 1980s and early 1990s as the period during which anti-atrocity justice first reemerged in any meaningful way after a long hibernation following World War II. My data suggest that the first few post-war decades

witnessed more movement towards strengthening the international anti-atrocity justice regime than the conventional narrative implies, as dozens of states during this time modified their domestic legal systems to facilitate the prosecution of international crimes (whether or not that was their governments' intentions). To be sure, prosecutions for atrocity crimes during this period remained extremely rare, but these data nonetheless shed new light on the conventional narrative by bringing more attention to the groundwork that was laid for the prosecutions that would later constitute international criminal justice's renaissance in the 1980s and 90s.

Second, the findings here challenge the focus on domestic and international civil society as driving the spread of human rights norms and illuminate an alternative set of actors with their own resources and motivations. The large literature on human rights norms commonly attributes their spread to the bottom-up public mobilization of civil society groups.[1] But civil society groups select only a small set of issues to place on their advocacy agendas, and those to which they do not devote attention and resources are unlikely to influence the legislative agendas of governments.[2] Anti-atrocity norms, despite their association with what is the most fundamental category of human rights, personal integrity rights, did not receive much attention from the leading international human rights organizations for the first four decades of their existence. Even when groups like Human Rights Watch did begin to make legal accountability for past abuses part of their advocacy agendas in the mid-1980s, it was not until the establishment of the ICC in 1998 that these groups focused specifically on domestic legislation to implement international anti-atrocity law. Instead, the findings here have supported my argument that the spread of anti-atrocity laws has often been the work technocratic criminal law specialists temporarily empowered by large-scale institutional reform processes.

[1] e.g. Risse, Ropp, and Sikkink 1999; Landman 2005; Simmons 2009; Kim 2013.
[2] Keck and Sikkink 1998; Bob 2010.

These technocratic specialists differ in at least two important ways from the civil society groups that receive so much attention in the human rights literature. First, while civil society groups work publicly, technocratic specialists work privately. The criminal law specialists discussed here did not engage in the types of public advocacy, mobilization, and naming and shaming that constitute the core tactics of civil society groups. These specialists were not activists; they did not engage in public political action. They were instead professors, scholars, lawyers, and jurists who enjoyed elite status in their respective societies. In the more repressive states where they operated, these specialists owed their status to the very fact that they did not engage in public political action. In the cases where these experts did pursue political goals – such as Vespasian Pella's promotion of an international criminal court – they nonetheless pursued these goals not through public advocacy, but through the elite networks in which they were embedded.

These specialists also differ from civil society activists in their motivations. Civil society activists are considered to be motivated by principled values.[3] Technocratic specialists, on the other hand, are often motivated by commitment to their professional craft.[4] To be sure, the criminal specialists in this study who actively promoted the development of new anti-atrocity norms, like Pella and Jean Graven, were clearly motivated by principled beliefs concerning the moral importance of restraining state violence. But many of the specialists who followed the lead of these norm entrepreneurs in codifying domestic anti-atrocity laws – like the designers of the Guatemalan criminal code – did not hold progressive political views. Instead, these specialists were responding to changing professional ideas concerning the importance of these laws in a modern criminal code. The dominant professional culture among civil law criminal specialists

[3] Keck and Sikkink 1998, 2.
[4] Barnett and Finnemore 2004, 24.

promoted the advancement of criminal law "science" – a universalistic approach to criminal law that sought to identify and harmonize national legal systems around optimal criminal law norms and policies that were not reducible to national circumstances. As a self-styled science, the field of criminal law was seen to exist apart from the political sphere. This so-called "formalist" orientation was most engrained in repressive states, like those of Eastern Europe and Latin America, where it helped the legal field maintain its apolitical image.[5] In turn, this apolitical image was unthreatening to authoritarian rulers and thus crucial to maintaining the legal field's autonomy. Thus many of these specialists did not possess any particular affinity for human rights norms, but viewed their inclusion as necessary for adhering to the norms of criminal law science.

Finally, the findings here suggest that different types of regimes are prone to adopt human rights norms through different pathways. For repressive states, institutional redesign was the modal pathway for the adoption of anti-atrocity laws, whereas in democratic states, targeted legislation was more common. Institutional redesign was thus a more reliable pathway to implementation in the types of countries that presumably would be the least likely to adopt such laws, that is, countries that are more likely to commit the types of abuses that atrocity law sanctions. The Guatemala case illustrates how even in a country where the government is implicated in ongoing atrocities, the institutional redesign context can help depoliticize anti-atrocity laws and shield them from the types of scrutiny we would expect had these laws been proposed as standalone legislation. Of course, just because these laws are adopted does not mean they will be enforced. Nevertheless, these laws at least make it possible to prosecute regime officials following later transitions. Such was the case in Guatemala, where, in 2012, former head of state Efrain Rios Montt and his chief of military intelligence, Jose Mauricio Rodriguez

[5] See, for example, Hilbink's (2007) study of Chile and Kisilowski's (Forthcoming) study of Poland.

Sanchez were prosecuted for genocide and crimes against humanity under the anti-atrocity provisions that were adopted as part of the 1973 Guatemala criminal code.[6]

International law

This dissertation also makes four contributions to the political science literature on international law. First, it contributes to an emerging research agenda on the domestication of international law. Political scientists and legal scholars have devoted much attention to examining why states establish or ratify international legal agreements, but they have only just begun to examine what happens next, that is, how these new international legal rules are or are not institutionalized into domestic law and policy. At the same time, a large body of studies evaluates states' compliance with international law, but rarely do these studies specifically consider whether states have taken necessary legislative measures to facilitate compliance in first place.

This study has identified one specific pathway to implementation, institutional redesign, that opens domestic lawmaking to the international law by empowering a class of technocratic professionals who are more likely than average policymakers to know of and favor international legal norms. Previous research has demonstrated the importance of technocratic experts in the diffusion of international legal norms. This dissertation departs with this literature in that existing studies have focused on policy areas, such as international finance and science policy, which are highly technical.[7] In contrast, technocratic actors have received relatively little attention in the literature on the diffusion of human rights norms, which has instead tended to focus on the importance of social movements and transnational advocacy networks.

[6] Malkin, Elisabeth, "Ex-Dictator Is Ordered to Trial in Guatemalan War Crimes Case," *New York Times*, 28 January 2013.
[7] e.g. Raustiala 2002; Haas 1992.

Second, this study contributes to an emerging literature that examines how legal culture shapes the ways states' legal systems interact with international law. Recent research has highlighted how the different ways that civil law, common law, and Islamic law traditions view the law and legal process influence their willingness to commit to, internalize, or comply with international legal norms.[8] This study highlights one so-far unexplored feature of civil law systems that helps facilitate the implementation of international law, that is, the instinct for comprehensive recodification. In civil law systems, formal, written legal codes are considered to be the first and final source of law (in contrast to common law systems, where judicial interpretation of statutes carry the binding status of law). Legal codes are designed to leave no gaps that could allow for judicial interpretation. Thus, codes ideally must be systematic, comprehensive, and free of conflicting provisions, like a machine whose operation depends on all parts working together as a whole. Amendments to legal codes risk upsetting this delicate internal coherence, so legal reform often leads to the wholesale rewriting of legal codes. This impulse contrasts with the culture of common law systems, which prizes systematization and legal coherence far less than that of civil law systems.[9] Common law states are thus more likely to carry out large-scale legal reforms via large packages of amendments to existing law or new, standalone legislative acts. Given civil law systems greater propensity to redesign their legal codes, these systems can be seen as possessing an ingrained institutional feature that helps facilitate the implementation of international law.

Third, this study highlights the difference that the formal codification of international norms can make on the likelihood that they are incorporated into domestic law. Of the three categories of crime I examined, the category of crimes against humanity was adopted in

[8] Powell and Mitchell 2007; Simmons 2009; Mitchell, Ring, and Spellman 2013; Zartner 2014.
[9] Pérez-Perdomo and Merryman 2007, 33.

domestic law far less frequently than genocide or war crimes. One reason likely stems from the fact that unlike genocide and war crimes, crimes against humanity lacked its own dedicated treaty regime that called upon states to enact relevant domestic legislation. When this responsibility to legislate international criminal law domestically was formally codified in the 1948 Genocide Convention and 1949 Geneva Conventions, it helped condition criminal law specialists to see the domestic implementation of genocide and war crimes as crucial for these regimes' operation. But until the 1998 Rome Statute of the ICC, no such international treaty existed to prompt criminal law specialists to consider legislating crimes against humanity. If, in contrast to my argument, most of the specialists designing new codes in the pre-ICC era were motivated by political beliefs, then we would have expected them to select crimes against humanity at comparable rates to genocide and war crimes. Nevertheless, the far lower rate of crimes against humanity adoption lends support to my claim that these specialists were motivated chiefly by their commitment to criminal law science, as reflected in their partiality towards norms that contributed to the operation of existing international legal regimes. The post-ICC developments offer further support for this claim. Once the category of crimes against humanity was included in a treaty regime that required its implementation – the ICC's Rome Statute – the rate of adoption of crimes against humanity rose dramatically.

Finally, the theory presented here sheds light on the timing of norm adoption. Research on norm diffusion rarely makes claims regarding why norms are adopted *when* they are.[10] In contrast, by theorizing the specific moments of opportunity that lead to norm adoption, this study offers one answer to the question of timing. That is, in some cases, the timing of norm adoption can be explained by the timing of large-scale institutional redesign. This insight helps us understand why, for example, a highly repressive country like Guatemala would have adopted

[10] Graham, Shipan, and Volden 2012, 24–25.

national criminal law against genocide as early as 1973 (when it opted to redesign its criminal code), whereas a liberal democratic country like France did not adopt such a law until 1992 (when it finally redesigned its nearly two-hundred-year-old criminal code). In a way, this point merely shifts the question from explaining norm adoption to explaining the decision to undertake reforms in the first place. But what is interesting in and of itself is that there exist a variety of different reasons why a given country would redesign its national institutions. Yet, as a result of the modernization overtones and professional socialization processes I have described, these varying origins for reforms can nonetheless lead countries to the same laws.

Scope conditions and avenues for future research

Which states are likely to redesign their criminal codes?

Though criminal code redesign can facilitate the adoption of domestic laws against international crimes, not all countries are equally likely to redesign their criminal codes. First, as discussed above, states with civil law legal systems are far more likely than states with common law systems to redesign their legal codes. Second, states are more likely to redesign their criminal codes as part of a major social or political transition, such as following the end of a civil war or a change from a repressive regime to a liberal one. Governments in these contexts often undertake large-scale institutional reforms in efforts to distinguish themselves from their violent or repressive pasts and affirm new standards of law and governance going forward. Criminal codes are particularly likely to be the target of reforms in these states for both practical and symbolic reasons. Criminal law is a primary instrument of repression in authoritarian societies, so its reform is a necessary part of liberalizing a political system. Criminal codes also embody the principles of rule of law that have often been decimated during periods of civil war, so their

reform helps a government express its rejection of the society's previous lawlessness and its commitment to rule of law in the future. Further research should examine whether states that redesign their criminal codes under such transitional contexts are more likely to include anti-atrocity laws than states that redesign their criminal codes under relatively stable contexts.

Third, states are more likely to redesign their criminal codes when their regional or legal peers have done so. As discussed in Chapter Two, criminal code reforms tend to occur in regional waves. Most Eastern European countries adopted new criminal codes following the reform of the Soviet criminal justice system under de-Stalinization. Most Latin American countries adopted new criminal codes following efforts by leading scholars in the region to draft a Model Penal Code for Latin America. Most post-Soviet republics adopted new criminal codes in the decade following their independence. I have argued that modernization aims tend to pervade these processes. It thus appears governments' perceptions of the need to modernize are prompted by what they observe their regional peers doing. In other words, governments are sensitive to the perception that they are lagging behind when it comes to the standards of modern criminal law, and this sensitivity can prompt them to follow their peers in redesigning their criminal codes. The question remains, however, how these waves are first triggered. Do government leaders in first-mover states take a sincere interest in criminal code reform on their own initiative? Or are they persuaded to do so by either technocratic specialists or civil society activists? There is some evidence that the initial impetus for reforms in first mover states is initiated by technocratic specialists themselves, as in the case of the Latin American specialists who promoted reform through the drafting of a Model Penal Code for Latin America. Nevertheless, future research should seek to examine further the origins of criminal code reforms through both comparative case studies and large-N analyses. In any case, it is worth noting that

in cases like the Model Penal for Latin America, where technocratic specialists helped provoke criminal code reforms, the aim to legislate international anti-atrocity law domestically did not appear to motivate these efforts in the first place but was taken up once reforms were already underway.

When are new criminal codes likely to include anti-atrocity laws?

The modernization aims that permeate criminal code redesign processes encourage designers to consider anti-atrocity norms in their drafts. But the redesign process does not guarantee that designers will include them; some new codes will be more likely to include anti-atrocity laws than others. First, given the importance of professional-level influences on their choices, technocratic drafters will be more likely to select anti-atrocity laws when the types of sources that they draw upon for guidance favor these laws. The international legal instruments from where anti-atrocity laws originate were largely Continental European projects, and the IKV and AIDP were founded and led primarily by Continental European scholars. Therefore, if specialists are partial to sources – that is, codes, scholarship, and professional organizations – associated with the Continental European criminal law tradition, then professionalization and emulation will be more likely to push them towards including anti-atrocity laws in their draft codes.

This partiality has a strong regional component. It is obvious that the specialists who are most likely partial to Continental European criminal law tradition will be themselves European. But it is perhaps less obvious that during the Cold War, Eastern and Western European specialists were similarly disposed towards the ideas associated with this tradition. Even with the political polarization of this era, the prevailing view of criminal law as a science helped the field maintain its transnational unity. This affinity for the Continental criminal law traditional has also

traditionally pervaded the thinking of Latin American criminal law scholars, whose legal culture has long been strongly influenced by that of Continental Europe and who had long imported and emulated their ideas.[11] Outside of Europe and Latin America, the influence of the Continental criminal law tradition wanes but still exerts influence. Scholars in Middle Eastern and East Asian countries have traditionally been the least disposed towards legal borrowing from European sources, so they would be less likely to draw on sources that would favor anti-atrocity laws. Nevertheless, in some countries, the legacies of socialism have conditioned their legal cultures to favor the types of sources that their European brethren drew upon. Thus, countries like Vietnam and Mongolia redesigned their criminal codes in ways that evinced strong Continental European influences. Finally, scholars in common law legal cultures have traditionally paid little attention to intellectual developments in Continental Europe, particularly regarding criminal law. Therefore, new criminal codes in common law states will also be less likely to include anti-atrocity laws.

Note that it would not be appropriate to refer to, say, Latin American and Western European criminal law scholars as representing a common epistemic community, since scholars across these regions did not necessarily share the same normative or political aims. Nevertheless, they did share an affinity for the same intellectual tradition of Continental criminal law science, which did condition them to favor the same types of intellectual influences.

Second, historical time will also influence the likelihood that new criminal codes include anti-atrocity laws. As I showed in Chapter Three, the salience of anti-atrocity laws in global politics rose following the end of the Cold War, and even more with the establishment of the ICC in 1998. Once anti-atrocity laws achieved salience outside professional circles, the pressures of monitoring and acculturation meant that policymakers were more likely to take interest in them.

[11] Fragoso 1979.

Thus, as the salience of anti-atrocity laws in global politics rises, all countries will be more likely to include anti-atrocity laws in new codes, regardless of region.

What other international criminal law norms will be implemented in domestic law through institutional redesign?

Genocide, war crimes, and crimes against humanity are considered the "core" international crimes. But there exist a number of other international crimes for which incorporation into domestic law is likely to be explained by the theory presented here. International criminal prohibitions against drug trafficking, counterfeiting, airline hijacking, and terrorism are more likely to be addressed by targeted legislation, because policymakers are more likely to perceive a tangible, pressing interest in them. But given that is empowers of a small class of technically oriented experts, institutional redesign is particularly beneficial for legal norms for which there is little demand or interest from policymakers or domestic interest groups. These would be prohibitions for which criminalization is not perceived to be an urgent issue. In these cases, the actors most likely aware of and interested in codifying these norms would be technocratic criminal law specialists. Some examples of these types of less salient prohibitions would include those against human trafficking, the use of chemical weapons, and the waging of an aggressive war.

So far, little research has been devoted to explaining the national legislation of these norms. But there is some preliminary evidence that criminal prohibitions against aggression have largely been adopted through the redesign of national criminal codes. According to the Global Institute for the Prevention of Aggression, only about three dozen states have adopted domestic criminal laws against aggression, and of those, it appears that the overwhelming majority did so

through redesigns of their criminal codes.[12] However, with the amendment of the ICC's Rome Statute in 2010 to now include aggression within the court's jurisdiction,[13] the crime will likely become part of civil society organizations' advocacy around ICC implementation. Therefore, it will likely become more common for states to adopt domestic criminal laws against aggression through either targeted legislation or comprehensive ICC implementing legislation. Nevertheless, future research should test this claim as well as whether international criminal prohibitions that lack political salience are indeed more likely to be legislated domestically though institutional redesign than through targeted legislation.

What other areas of international law would likely to be implemented domestically through institutional redesign?

Two features make international criminal law particularly conducive to domestic implementation through institutional redesign as compared to other legal domains. First, criminal prohibitions are relatively self-contained; a typical criminal code provision criminalizing a particular act is not dependent on the existence of other supporting provisions in the code. In contrast, consider the implementation of international environmental law. Domestic environmental protection regimes typically involve complex administrative and monitoring systems. These often require the allocation of new funds, the creation of new bureaucracies, and the amending of existing laws.[14] A typical domestic provision based on international environmental law thus fits into a larger regulatory apparatus that often must be modified or constructed alongside the adoption of the particular rule in question, which requires far more coordinated legislative and administrative activity than the adoption of new criminal prohibition.

[12] See http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/.
[13] Barriga and Grover 2011.
[14] Vogel and Kessler 2000, 20–30.

Second, some legal domains are more conducive to wholesale institutional redesign than others. Core legal codes are highly susceptible to redesign, but not all areas of law are covered by comprehensive codes.[15] For example, a state's environmental protection laws are typically made up of a patchwork of legislative regulatory acts and issued rules issued by bureaucratic agencies. A state will rarely initiate a wholesale redesign of its entire environmental regulatory system. When states do adopt new regulatory systems, they are usually targeted on particular issues – such as ozone regulation or biodiversity – and these are typically initiated for the specific purpose of implementing treating obligations. Thus criminal laws are located in the types of formal institutions that are likely to be redesigned, while environmental protection laws are not.

Beyond criminal law, other areas of international law will likely be implemented through institutional redesign law when they are similarly both self-contained and located in the types of institutions that get redesigned. One area of international law that meets these conditions is international human rights law, particularly those standards that relate to criminal process. International human rights law includes a range of provisions that relate to standards of due process and the rights of defendants. Many of these standards, such as the rights to habeas corpus and freedom from torture, can be formally implemented with single provisions, and thus fulfill the criterion of being self-contained. Also, in domestic law, these types of provisions are typically located in codes of criminal procedure or constitutions. Both criminal procedure codes and constitutions are the types of institutions that often undergo wholesale reform, satisfying the second criterion.

[15] By "core" legal codes, I mean those comprehensive codes that are found in almost all countries. These include a civil code, code of civil procedure, criminal code, code of criminal procedure, and commercial code. Also very common are a labor code, family code, and traffic code.

The institutional redesign theory I have presented here thus offers possible insight into a phenomenon that has received attention in recent studies: the striking convergence over time of national constitutions around a core set of international human rights standards. Scholars seeking to understand this trend have found that more recently drafted constitutions are more likely to incorporate more international human rights standards.[16] From the perspective of my institutional redesign theory, the convergence has likely not resulted from governments amending existing constitutions to include these new rights. Instead, this convergence likely reflects incidental choices to rewrite national constitutions, decisions that may be motivated by a variety of reasons.[17] But once policymakers elect to rewrite their national constitution, the process invites the influence of the four mechanisms – professionalization, emulations, monitoring, and acculturation – that I have discussed here, and which are likely to favor the inclusion of international human rights norms.

[16] Elkins, Ginsburg, and Simmons 2013; Beck, Drori, and Meyer 2012.
[17] On the determinants of constitutional redesign, see Elkins, Ginsburg, and Melton 2009.

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Appendix 3.1: Interviewees for Chapter Three

Name	Position	Relevant background	Contact source	Date
M. Cherif Bassiouni	• Honorary president of the AIDP • Emeritus professor of Law, DePaul University	• Former secretary general (1974-1989) and president (1989-2004) of the AIDP • Leader in promoting the creation of the ICC • Assisted Jean Graven in drafting 1957 Ethiopian criminal code • Widely regarded as the "father" of modern international criminal law	Research	6/24/14, 6/25/14
Peter Maggs	• Professor of law, University of Illinois at Urbana-Champaign	• Participated in US sponsored projects that led to the drafting of model codes for the CIS	Eric Vincken	4/3/15
Eric Vincken	• Deputy director, Center for International Legal Cooperation, the Hague	• Coordinated foreign assistance on the drafting of the CIS model criminal code	Jan Smits	3/26/15

Appendix 4.1. Selected secondary sources used to code dataset on anti-atrocity laws

ICRC reports

Respect of the Geneva Conventions: Measures Taken to Repress Violations. Vol. 1 (1965)
Respect of the Geneva Conventions: Measures Taken to Repress Violations. Vol. 2 (1969)

UN documents and reports

Question of the Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity: Study Submitted to the Secretary General. UN Doc. E/CN.4/906 (1966)
Responses from governments to Secretary General for information on the measures adopted to give effect to the Genocide Convention (1969)
UN Doc. E/CN.4/Sub2.2/303
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UN Doc. E/CN.4/Sub2.2/303/Add.6
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Question of the Punishment of War Criminals and of Persons who have committed Crimes Against Humanity: Report of the Secretary General. UN Doc. A/8038. (1970)

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Law Library of Congress. *Crimes Against Humanity Statutes and Criminal Code Provisions in Selected Countries*. (2010)

NGO reports

Amnesty International. *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World*. (2011)
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Online databases

ICRC National Implementation Database (https://www.icrc.org/ihl-nat)
Rule of Law in Armed Conflict Project (http://www.geneva-academy.ch/RULAC/index.php)
Prevent Genocide International. *The Crime of Genocide in Domestic Laws and Penal Codes* (http://preventgenocide.org/law/domestic/)

Appendix 4.2: Coding rules for dataset on anti-atrocity laws

This appendix details that coding rules used to construct the dataset on national criminal laws against genocide, war crimes, and crimes against humanity. The general principle underlying these rules is that a statute for a given crime must invoke, whether explicitly or implicitly, that crime's origins in international law. The idea behind this principle is to ensure that different statutes across states are instances of the same international legal norm.

Genocide

I code a given criminal statute as being an instance of a genocide statute when it meets *at least one* of the following two conditions:

1. The statute defines a crime that it refers to as "genocide."

2. The statute defines a crime in a way that closely resembles the definition of genocide from article II of the Genocide Convention.[1] At minimum, the definition must refer to the intent to destroy, in whole or in part, either a national, ethnic, racial or religious group.

Rationale: The first condition is sufficient to code a statute positively because of genocide's clear origin as an international crime. The term "genocide" was coined by Ralph Lemkin in his 1944 book, *Axis Rule in Occupied Europe*.[2] Two years later, the United Nations initiated the negotiations that would produce the 1948 Genocide Convention, largely as a result of Lemkin's own efforts. In other words, to merely refer to the concept of genocide is to unmistakably refer to

[1] Article II of the 1948 Genocide Convention defines genocide as: "…any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a. Killing members of the group;
b. Causing serious bodily or mental harm to members of the group;
c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d. Imposing measures intended to prevent births within the group;
e. Forcibly transferring children of the group to another group."

[2] Schabas 2009, 17.

a norm of international origin. The second condition is important, because some criminal statutes include more or less the definition of genocide from the Genocide Convention, yet they omit the specific label "genocide," and instead either do not include any label or use another label, such "crimes against humanity."[3]

Crimes against humanity

I code a given criminal statute as an instance of crimes against humanity in domestic law when it meets *both* of the following conditions:

1. The statute explicitly refers to "crimes against humanity," "offenses against humanity," or "crimes against the peace and security of mankind," either in the text of its section heading, title, or body.

2. The statute includes *at least one* of the enumerated acts contained in article VII of the Rome Statute of the International Criminal Court committed against a civilian population.[4]

Rationale: The concept of crimes against humanity refers to a variety of distinct acts committed against a civilian population perpetrated by state or state-like actors as part of a widespread or

[3] An example of a statute that I would code as an instance of genocide but that does not include the word "genocide" is art. 91(1) of the 1968 Penal Code of East Germany, titled "Crimes Against Humanity," (*Verbrechen gegen die Menschlichkeit*) which reads: "Whoever undertakes to persecute, force the migration of, or destroy in whole or in part, national, ethnic, racial, or religious groups, or commit other inhumane acts against such group, will be punished with no less than five years of imprisonment." (*Wer es unternimmt, nationale, ethnische, rassische oder religiöse Gruppen zu verfolgen, zu vertreiben, ganz oder teilweise zu, vernichten oder gegen solche Gruppen andere unmenschliche Handlungen zu begehen, wird mit Freiheitsstrafe nicht unter fünf Jahren bestraft*.)

[4] The acts enumerated in article VII are: "a) murder; b) extermination; c) enslavement; d) deportation or forcible transfer of population; e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; f) torture; g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; i) enforced disappearance of persons; j) the crime of apartheid; k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

systematic attack. The Nuremberg Charter (1945), which was the first of many international legal instruments to codify crimes against humanity, defines the concept as:

> Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated (article 6(c)).

However, there is currently no single agreed-upon definition of crimes against humanity. Unlike the three other categories of international crime under discussion here, the international community has never established a specialized international convention that formally defines and criminalizes crimes against humanity under international law (though it is well established in international law that crimes against humanity are indeed international crimes). Instead the concept has been defined variously across at least a dozen different international legal instruments, including statutes for international criminal tribunals and various declarations by the UN's International Law Commission.[5] In the words of one scholar, the law of crimes against humanity thus "remains riddled with doctrinal ambiguities and subject to fundamental normative disagreements."[6]

What is important for my purposes is that the legal category of crimes against humanity is and has been generally understood to refer to violent or otherwise inhumane acts committed by state or state-like actors against a civilian population. It is the endorsement of this general legal category – which has unmistakable international origins – and not a specific legal formulation, that interests me. Thus, my coding rule aims to capture the general endorsement of this legal category in domestic criminal law. The first part of the rule is based on the assumption that, given the concept's origins in the Nuremberg trials and its continuing association with

[5] Bassiouni 2011, xxxi.
[6] deGuzman 2011, 134.

international prosecutions over the following several decades, to refer to crimes against humanity, or similarly formulated concepts, is to unmistakably refer to an international norm. Also, legal systems commonly contain prohibitions against many acts, such as murder or slavery, which could constitute crimes against humanity, but only when combined with particular contextual elements recognized as part of the international legal definition. Thus an explicit reference to these acts as crimes against humanity is necessary to distinguish them from ordinary crimes.[7]

The second part of the rule is necessary because in some instances national criminal codes contain a section titled "crimes against humanity" that only includes specific offenses against either genocide or war crimes while omitting any further reference to distinct acts considered crimes against humanity under international law. These cases do not count as instances of crimes against humanity in domestic criminal law because they merely refer to other crimes that do not embody the particular meaning of "crimes against humanity." Also, I rely on the Rome Statute as the authoritative source of enumerated acts because it is the most extensive list of acts that can be considered crimes against humanity of all the international legal instruments that define the concept.[8] Finally, because the Nuremberg Charter was the first international legal instrument to code crimes against humanity, I will restrict my analysis to instances of domestic criminalization that occurred after 1945.

[7] For example, art. 320 of the 1991 Peruvian criminal code criminalizes forced disappearances (*desparicion forzada*), but the statute itself does not refer to crimes against humanity. Nevertheless, art. 320 is contained within title XIV-A, which is entitled "Crimes against Humanity" (*Delitos contra la humanidad)*, and thus I would code art. 320 as an instance of crimes against humanity.

[8] deGuzman 2011, 126.

War crimes

I code a given criminal statute as an instance of war crimes in domestic law when it meets *both* of the following conditions:

1. The statute explicitly refers to the "Geneva Conventions," "international humanitarian law," "the laws of war," or "international law," either in the text of its section heading, title, or body.

2. The statute explicitly refers *either* to conduct committed within the context of an armed conflict against some class of protected persons, such as prisoners of war, humanitarian workers, civilians, an occupied population, or wounded, sick or shipwrecked persons *or* to prohibitions on means of waging war against combatants, such as disproportionate or indiscriminate attacks.

Rationale: Like crimes against humanity, the legal category of war crimes refers to a variety of distinct acts, which in this case pertain to the conduct of belligerent parties in armed conflict. Criminal prohibitions against certain conduct in war have existed for centuries, if not millennia, in the customary and positive law and practice of various societies.[9] Nevertheless, the modern law of war crimes is based on a distinct body of international law known as international humanitarian law (IHL) or the "laws of war." IHL originates from a series of late nineteenth and early twentieth century treaties, and has continued to evolve through numerous subsequent treaties – most notably the four Geneva Conventions of 1949 and their Additional Protocols of 1977 – and other international legal sources, such as the case law of international criminal tribunals. Today IHL is an intricate body of law that regulates the means of warfare (e.g. by banning disproportionate or indiscriminate attacks or the use of prohibited weapons) and the treatment of particular protected groups (e.g. prisoners of war, humanitarian workers, civilians,

[9] McCormack 1997, 31–39.

populations under occupation, and wounded, sick or shipwrecked persons) in both international and non-international armed conflicts.

What is important for my purposes is that despite a historical legacy of war crimes in national legal systems that predates international codification, today IHL is the authoritative source for the law of war crimes.[10] Thus my coding rule aims to capture the incorporation of IHL into domestic criminal law. The first coding condition is meant to ensure that references to war crimes in domestic law are consciously based on international law.[11] Also, since I am generally concerned with criminal prohibitions regarding the treatment of individuals, the second condition is meant to exclude references to acts that are deemed war crimes but which nonetheless do not pertain to the treatment of individuals, such as the willful destruction of objects of cultural heritage or the misuse of Red Cross symbols.[12] I will also not count references to the crime of aggression or the waging of an aggressive war. Aggression is typically considered a distinct international crime apart from the category of war crimes, and instead is usually classified under "crimes against peace," though its status and characteristics under international law have been strongly disputed since its inclusion in the Nuremberg Charter.[13] An adequate doctrinal treatment of aggression would require a lengthy discussion, but it is worth noting that 1) aggression is not included in any of the Geneva Conventions, and 2) very few countries have criminalized aggression, though recent years have seen a handful of states do so.[14] Thus to avoid making apples-and-oranges comparisons between references to aggression and war crimes, I will not

[10] As of today, 195 states have ratified the 1949 Geneva Convention. See http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=AE2D398352C5B028C12563CD002D6B5C.

[11] So far I have found no examples of references to war crimes in domestic law that do not in some way also invoke international law.

[12] For example, Indonesia's Law No. 14 of 1962 on The Display of the Red Cross Sign and Words criminalizes the unauthorized use of Red Cross symbols as set out by the 1949 Geneva Conventions. Nevertheless, Indonesia has no criminal statutes in its civilian law pertaining to war crimes committed against individuals.

[13] Ratner, Abrams, and Bischoff 2009, 136–140.

[14] See http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/.

consider references to the former as instances of the latter. Finally, even though IHL treaties originating back to 19th century prohibit certain conduct by states, it was not until the 1949 Geneva Conventions that IHL explicitly established an individual criminal liability regime.[15] Therefore, I will restrict my analysis to instances of domestic criminalization that occurred after 1949.

Finally, I do not code references to war crimes that either only apply to military actors or are only adjudicated by military courts. Military criminal codes have long provided for criminal sanctions against military actors for a range of crimes. Sometimes these have included crimes, like those involving the mistreatment of prisoners of war or the targeting of civilians, that either implicitly or explicitly invoke international humanitarian law. Nevertheless, these codes typically apply only to military actors, not civilian government officials or nonmilitary combatants (though some exceptions do exists). I do not count prohibitions that apply only to military actors, because I am seeking to account for a normative development that extends criminal liability for atrocities to civilian actors. Military criminal codes also typically only grant jurisdiction to military courts. I do not count prohibitions that only entail jurisdiction by military courts because, again, I am seeking to account for a normative development that grants jurisdiction over war crimes civilian criminal justice systems.

[15] Ratner, Abrams, and Bischoff 2009, 5.

Appendix 4.3: States that adopted national anti-atrocity laws

Genocide

Country	Year
Israel	1950
Yugoslavia	1951
Albania	1952
Taiwan	1953
Germany	1954
Denmark	1955
Brazil	1956
Ethiopia	1957
Romania	1960
Czechoslovakia	1961
Hungary	1961
Sweden	1963
Netherlands	1964
Italy	1967
Mexico	1967
Bulgaria	1968
East Germany	1968
United Kingdom	1969
Costa Rica	1970
Spain	1971
Bolivia	1972
El Salvador	1973
Guatemala	1973
Ireland	1973
Austria	1974
Nicaragua	1974
Trinidad and Tobago	1977
Cuba	1979
Barbados	1980
Cyprus	1980
Ivory Coast	1981
Panama	1982
Papua New Guinea	1982
Portugal	1982
Honduras	1983
Luxembourg	1985
Vietnam	1985
Liechtenstein	1987
United States	1988
Peru	1991
France	1992
Lithuania	1992
Georgia	1993
Ghana	1993
Guinea-Bissau	1993
Latvia	1993
Estonia	1994
Uzbekistan	1994
Finland	1995
Burkina Faso	1996
Russia	1996
Kazakhstan	1997
Kyrgyzstan	1997
Paraguay	1997
Poland	1997
Turkmenistan	1997
Congo-Brazzaville	1998
Tajikistan	1998
Azerbaijan	1999
Belarus	1999
Belgium	1999
Canada	2000
Colombia	2000
Indonesia	2000
New Zealand	2000
Switzerland	2000
Zimbabwe	2000
Mali	2001
Ukraine	2001
Australia	2002
Malta	2002
Moldova	2002
Mongolia	2002
South Africa	2002
Armenia	2003
Burundi	2003
Cape Verde	2003
Niger	2003
Rwanda	2003
Turkey	2004
Andorra	2005
Argentina	2006
Uruguay	2006
Samoa	2007
Senegal	2007
Singapore	2007
South Korea	2007
Kenya	2008
Norway	2008
Bangladesh	2009
Cambodia	2009
Chile	2009
Ecuador	2009

Philippines	2009
Sudan	2009
Timor-Leste	2009
Central African Republic	2010
Lesotho	2010
Uganda	2010
Mauritius	2011
Sao Tome and Principe	2012

War crimes

Country	**Year**
Yugoslavia	1951
Albania	1952
Netherlands	1952
Thailand	1955
Bulgaria	1956
Ethiopia	1957
Australia	1957
United Kingdom	1957
New Zealand	1958
Cyprus	1959
India	1960
Romania	1960
Czechoslovakia	1961
Hungary	1961
Ireland	1962
Malaysia	1962
Sweden	1962
Canada	1965
Malawi	1967
East Germany	1968
Guatemala	1973
Singapore	1973
El Salvador	1973
Nicaragua	1974
Papua New Guinea	1975
Cuba	1979
Ivory Coast	1981
Zimbabwe	1981
Portugal	1982
Vanuatu	1982
Vietnam	1985
Seychelles	1985
Belgium	1993
Latvia	1993
Uzbekistan	1994
Estonia	1994
Finland	1995
Spain	1995
Russia	1996
United States	1996
Poland	1997
Kazakhstan	1997
Paraguay	1997
Tajikistan	1998
Congo-Brazzaville	1998
Georgia	1999
Belarus	1999
Azerbaijan	1999
Lithuania	2000
Colombia	2000
Ukraine	2001
Mali	2001
Germany	2002
Moldova	2002
South Africa	2002
Malta	2002
Costa Rica	2002
Mongolia	2002
Burundi	2003
Rwanda	2003
Niger	2003
Namibia	2003
Cape Verde	2003
Armenia	2003
Japan	2004
Andorra	2005
Uruguay	2006
Sri Lanka	2006
Samoa	2007
Sudan	2007
Panama	2007
Senegal	2007
South Korea	2007
Argentina	2007
Denmark	2008
Norway	2008
Ghana	2009
Bangladesh	2009
Chile	2009
Timor-Leste	2009
Philippines	2009
Burkina Faso	2009
Cambodia	2009

Central African Republic	2010
Switzerland	2010
France	2010
Sao Tome and Principe	2012

Crimes against humanity

Country	**Year**
Yugoslavia	1951
Ethiopia	1957
Czechoslovakia	1961
Guatemala	1973
El Salvador	1973
Bulgaria	1975
Hungary	1978
Portugal	1982
Vietnam	1985
France	1992
Guinea-Bissau	1993
Albania	1995
Burkina Faso	1996
Poland	1997
Congo-Brazzaville	1998
Peru	1998
Belarus	1999
Georgia	1999
Azerbaijan	1999
Luxembourg	1999
Belgium	1999
New Zealand	2000
Indonesia	2000
Lithuania	2000
Switzerland	2000
Canada	2000
Estonia	2001
Mali	2001
United Kingdom	2001
Germany	2002
Australia	2002
Malta	2002
South Africa	2002
Costa Rica	2002
Spain	2003
Rwanda	2003
Netherlands	2003
Niger	2003
Armenia	2003
Burundi	2003
Turkey	2004
Andorra	2005
Ireland	2006
Uruguay	2006
Cyprus	2006
Trinidad and Tobago	2006
Panama	2007
Samoa	2007
South Korea	2007
Nicaragua	2007
Senegal	2007
Argentina	2007
Kenya	2008
Denmark	2008
Sudan	2008
Norway	2008
Finland	2008
Timor-Leste	2009
Cambodia	2009
Bangladesh	2009
Chile	2009
Philippines	2009
Latvia	2009
Fiji	2009
Lesotho	2010
Uganda	2010
Central African Republic	2010
Mauritius	2011
Sao Tome and Principe	2012

Appendix 4.4: States that adopted national anti-atrocity laws prior to independence

Genocide

Country	Year
Bosnia and Herzegovina	1951
Croatia	1951
Macedonia	1951
Montenegro	1951
Slovenia	1951
Eritrea	1957
Slovakia	1961
Kiribati	1965
Tuvalu	1965
Bahamas	1969
Dominica	1969
Fiji	1969
Tonga	1969
Belize	1970
Saint Lucia	1970
Saint Vincent and the Grenadines	1970
Seychelles	1970
Grenada	1972
Solomon Islands	1972
Antigua and Barbuda	1975

War crimes

Country	Year
Montenegro	1951
Bosnia and Herzegovina	1951
Croatia	1951
Slovenia	1951
Macedonia	1951
Eritrea	1957
Kenya	1959
Nigeria	1959
Antigua and Barbuda	1959
Saint Vincent and the Grenadines	1959
Uganda	1959
Gambia	1959
Jamaica	1959
Botswana	1959
Guyana	1959
Fiji	1959
Saint Lucia	1959
Barbados	1959
Mauritius	1959
Belize	1959
Sierra Leone	1959
Lesotho	1959
Grenada	1959
Bahamas	1959
Saint Kitts and Nevis	1959
Solomon Islands	1959
Kiribati	1959
Trinidad and Tobago	1959
Dominica	1959
Tuvalu	1959
Slovakia	1961

Crimes against humanity

Country	Year
Bosnia and Herzegovina	1951
Macedonia	1951
Montenegro	1951
Slovenia	1951
Croatia	1951
Eritrea	1957
Slovakia	1961

Appendix 4.5: States that adopted redesigned criminal codes since 1945

Country	Year
Syria	1949
Czechoslovakia	1950
Greece	1950
Bulgaria	1951
Yugoslavia	1951
Albania	1952
Libya	1953
South Korea	1953
Canada	1954
Cambodia	1955
Thailand	1956
Ethiopia	1957
Bhutan	1959
Ghana	1960
Nigeria (northern)	1960
Russia	1960
Jordan	1960
Czechoslovakia	1961
Central African Republic	1961
Mongolia	1961
New Zealand	1961
Hungary	1961
Niger	1961
Mali	1961
Morocco	1962
Sweden	1962
Somalia	1962
Gabon	1963
Nepal	1964
Cameroon	1965
Senegal	1965
Guinea	1965
Marshall Islands	1966
Algeria	1966
Monaco	1967
Chad	1967
East Germany	1968
Romania	1968
Bulgaria	1968
Poland	1969
Iraq	1969
Costa Rica	1970
Qatar	1971
Spain	1971
South Vietnam	1972
Bolivia	1972
Madagascar	1972
Mauritania	1972
Guatemala	1973
El Salvador	1973
San Marino	1974
Ethiopia	1974
Austria	1974
Oman	1974
Nicaragua	1974
Yugoslavia	1976
Serbia	1976
Bahrain	1976
Liberia	1976
South Yemen	1976
Afghanistan	1976
Albania	1977
Rwanda	1977
Hungary	1978
China	1979
Cuba	1979
Colombia	1980
Guyana	1980
Togo	1980
Comoros	1981
Burundi	1981
Belize	1981
Cote D'Ivoire	1981
Vanuatu	1981
Portugal	1982
Iran	1982
Panama	1982
Mauritania	1983
Honduras	1983
Sudan	1983
Netherlands	1984
Vietnam	1985
United Arab Emirates	1987
Liechtenstein	1987
Cuba	1987
Saint Vincent	1988
Poland	1989
Laos	1989
Andorra	1990
Iran	1991
Peru	1991
Sudan	1991
Estonia	1992
France	1992
Guinea-Bissau	1993
Yemen	1994
Slovenia	1994

Uzbekistan	1994
Montenegro	1994
Albania	1995
Portugal	1995
Spain	1995
Australia	1995
Djibouti	1995
Finland	1996
Burkina Faso	1996
Macedonia	1996
Russia	1996
Turkmenistan	1997
El Salvador	1997
Poland	1997
Kazakhstan	1997
Paraguay	1997
Kyrgyzstan	1997
Croatia	1997
Guinea	1998
Tajikistan	1998
Latvia	1998
Vietnam	1999
Mexico	1999
Azerbaijan	1999
Belarus	1999
Georgia	1999
Lithuania	2000
Colombia	2000
Nigeria (north)	2000
Mali	2001
Estonia	2001
Ukraine	2001
Mexico	2002
Moldova	2002
Mongolia	2002
Cape Verde	2003
Bosnia	2003
Armenia	2003
Montenegro	2003
Bhutan	2004
Turkey	2004
Qatar	2004
Zimbabwe	2004
Saint Lucia	2004
Ethiopia	2004
Andorra	2005
Serbia	2005
Slovakia	2005
Yugoslavia	2005
Panama	2007
Nicaragua	2007
Slovenia	2008
Kosovo	2008
Timor-Leste	2009
Fiji	2009
Czechoslovakia	2009
Cambodia	2009
Burundi	2009
Romania	2009
Lesotho	2010
Central African Republic	2010
Belgium	2010
Croatia	2011
Marshall Islands	2011
Hungary	2012
Sao Tome and Principe	2012
Rwanda	2012

Appendix 5.1: Text of atrocity crimes in 1973 Guatemalan criminal code

Capitulo IV

De los Delitos de Trascendencia Internacional

Genocidio

Artículo 376. Comete delito de genocidio quien, con el propósito de destruir total o parcialmente un grupo nacional, étnico o religioso, efectuare cualquiera de los siguientes hechos:

1. *Muerte de miembros del grupo.*
2. *Lesión que afecte gravemente la integridad física o mental de miembros del grupo.*
3. *Sometimiento del grupo o de miembros del mismo, a condiciones de existencia que pueda producir su destrucción física, total o parcial.*
4. *Desplazamiento compulsivo de niños o adultos del grupo, a otro grupo.*
5. *Medidas destinadas a esterilizar a miembros del grupo o de cualquiera otra manera impedir su reproducción.*

El responsable de genocidio será sancionado con prisión de veinte a treinta años.

Instigación al Genocidio

Artículo 377. Quien instigare públicamente a cometer el delito de genocidio, será sancionado con prisión de cinco a quince años.

La proposición y la conspiración para realizar actos de genocidio serán sancionados con igual pena.

Delitos contra los Deberes de Humanidad

Artículo 378. Quien violare o infringiere deberes humanitarios, leyes o convenios con respecto a prisioneros o rehenes de guerra, heridos durante acciones bélicas, o que cometiere cualquier acto inhumano contra población civil, o contra hospitales o lugares destinados a heridos, será sancionado con prisión de veinte a treinta años.

Chapter IV

Of the Crimes of International Significance

Genocide

Article 376. Commits the crime of genocide he who, with the intent to destroy in whole or in part a national, ethnic, or religious group, carries out any of the following acts:

1. Death of members of the group.
2. Injury that affects the physical or mental integrity of members of the group.
3. Subjection of the group or members of the same group to life conditions that can cause their total or partial physical destruction.
4. Compulsory displacement of children or adults of the group to another group.
5. Measures designed to sterilize members of the group or in any other way prevent their reproduction.

The person responsible for genocide shall be punished by imprisonment of twenty to thirty years.

Incitement to genocide

Article 377. Whoever publicly incites to commit the crime of genocide shall be punished by imprisonment of five to fifteen years.

The proposition and conspiracy to commit acts of genocide shall be punished by the same penalty.

Crimes against the duties of humanity

Article 378. Whoever violates or infringes humanitarian duties, laws or treaties with respect to prisoners or hostages of war, those wounded during armed actions, or who commits any inhumane act against civilian populations or against hospitals or places for the wounded, shall be punished by imprisonment of twenty to thirty years.

Appendix 5.2: Interviewees for Chapter Five

Name	Position	Relevant background	Contact source	Date
Otto Argueta	• Coordinator for peacebuilding NGO Interpeace	• Historian of Guatemalan politics	Referral from Source C	9/26/14
Jose Guillermo Alfredo Cabrera Martinez	• Guatemalan criminal lawyer • Dean of the Faculty of Juridical and Social Sciences and International Relations, Universidad Da Vinci	• Criminal law expert • Former president of the College of Lawyers of Guatemala (*Colegio de Abogados de Guatemala*) • Former public prosecutor	Referral from Henry Dahl, Secretary General of the Inter-American Bar Association	9/25/14; 9/29/14
Ramón Cadena	• Guatemalan human rights lawyer • Regional Director of the International Commission of Jurists for Central America	• Leading expert on human rights accountability in Guatemala	Research	9/17/14
Mario Rene Chávez García	• Guatemalan labor lawyer	• Former president of the College of Lawyers of Guatemala (*Colegio de Abogados de Guatemala*) • Former director of the journal *Revista de Colegio de Abogados* • Contemporary of Menéndez de la Riva	Referral from Edelberto Torres Rivas	9/29/14
Cesar Augusto Davila Menéndez	• Retired Guatemalan colonel	• Member of Guatemalan Congress 1970-1974, first from PID, then MLN	Research	10/4/14
Judge A	• Guatemalan judge	• Specialist in criminal law	Referral from Source A	9/18/14
Frank La Rue	• Guatemalan labor and human rights lawyer • Founder of Center for Legal Action for Human Rights (*Centro para la Acción Legal para los Derechos humanos*)	• Leading expert on human rights accountability in Guatemala	Referral from Source A	9/19/14
Gonzalo Menéndez Park	• Guatemalan corporate lawyer, chairman of LEXINCORP	• Son and former student of Gonzalo Menéndez de la Riva	Research	9/29/14

Professor A	• Professor of law in the Faculty of Juridical and Social Sciences, USAC	• Law professor at Menéndez de la Riva's university since early 1980s	Met walking around USAC campus	9/23/14
Luis Ramirez	• Director of the Guatemalan Institute of Comparative Studies in Criminal Sciences (*Instituto de Estudios Comparados en Ciencias Penales de Guatemala*)	• Leading expert on Guatemalan criminal justice system	Research	9/16/14
Researcher A	• Researcher and social scientist	• Former Guatemalan diplomat through 1980s and 90s	Referral from Source B	9/26/14
Marco Antonio Sagastume Gemmell	• Guatemalan human rights lawyer	• Student of Gonzalo Menéndez de la Riva	Referral from Ramón Cadena	9/17/14
Edelberto Torres Rivas	• Preeminent Guatemalan sociologist	• Leading scholar of Guatemalan political development	Referral from Ramón Cadena	9/25/14
Jorge Valvert	• Former director of the Institute for Public Criminal Defense (*Instituto de la Defensa Pública Penal*)	• Judge during Arana administration • Student of Gonzalo Menéndez de la Riva	Referral from Source A	9/16/14
René Arturo Villegas Lara	• Professor of law in the Faculty of Juridical and Social Sciences, USAC	• Contemporary of Menéndez de la Riva.	Referral from Professor A	9/23/14