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ABSTRACT

Accounts of the rise of atrocity justice often characterize the Cold War decades as a time of "hibernation." I argue that this hibernation narrative, and explanations for the rise of atrocity justice in general, overlook important developments during the Cold War period that later helped facilitate the so-called "justice cascade." Specifically, this period witnessed consequential advancements in the institutionalization, domestication, and professionalization of international criminal law. In contrast to studies that emphasize the roles of civil society activists or policymakers in the rise of atrocity justice, the developments I highlight were often driven by the work of technocratic legal experts.

I. INTRODUCTION

The 2013 conviction of Guatemalan general, Efraín Ríos Montt, was historic. Never before had a country's national court prosecuted its own former head of state for genocide.[1] But despite its historical significance, the case represented only the latest development in a three-decades-long global trend toward greater accountability for human rights violations—dubbed the "justice cascade."[2] How did the justice cascade come about?

The origins of the Ríos Montt trial reflect common explanations for the general rise of human rights accountability. In Guatemala, a convergence of political factors helped put accountability on the national agenda and bolstered efforts to overcome decades of political resistance by the stillpowerful military establishment. Perhaps the most important role was that of civil society groups, who had been working in Guatemala since the early 1990s to systematically document past atrocities and pursue accountability at home and abroad. Powerful international actors also helped: the US and Dutch governments provided financial assistance to Guatemalan activists and domestic NGOs, while the Inter-American Court for Human Rights and United Nations exerted political pressure. Finally, a motivated attorney general committed to accountability provided the political will necessary inside the government to challenge longstanding impunity and issue indictments.[3] In sum, the Ríos Montt trial, as with many post-transition human rights trials, resulted from a combination of bottom-up grassroots mobilization, international political pressure, and contingent political will.

While this explanation highlights several crucial factors, it nonetheless overlooks others. Scratch beneath the surface of the Ríos Montt trial and what's revealed is that the prosecution was also bolstered by legal groundwork that was laid decades earlier, prior to the 1990s renaissance of atrocity justice. For one, the case was aided by the prosecutor's ability to charge Ríos Montt with the specific offenses of genocide and crimes against humanity, offenses that had existed in Guatemalan criminal law since 1973—almost ten years before Ríos Montt took power. These legal provisions allowed the prosecutor to more easily circumvent an amnesty law that Guatemala adopted at the end of its thirty-six-year civil war, which had carved out exceptions for international crimes.[4] Furthermore, the effort to prosecute Ríos Montt grew out of civil society mobilization that was inspired by the example of the 1998 arrest of Augusto Pinochet in London.[5] That arrest was made possible by the United Kingdom's implementation of the 1984 Convention against Torture and the treaty's recognition of universal criminal jurisdiction for torture, an innovation which itself was facilitated by earlier developments in international criminal law.[6] In other words, while domestic and international political efforts brought Ríos Montt to trial, legal developments that unfolded long before the end of the Guatemalan civil war provided conditions to help facilitate those efforts.

Most accounts of the rise of atrocity justice typically characterize the Cold War decades as a time of "hibernation."[7] That is, shortly after the birth of the modern atrocity regime at Nuremberg, the cause of atrocity justice quickly reached an impasse under the weight of Cold War geopolitics. According to this narrative, the project of atrocity justice would not be reawakened until the late 1980s and early 1990s. That is when the end of the Cold War and the third wave of democratization paved the way for a proliferation of domestic transitional justice processes in Latin America and Eastern Europe as well as the creation of international criminal tribunals for the former Yugoslavia and Rwanda.

The purpose of this article is to focus attention on the legal origins of the justice cascade, and in doing so, revise the hibernation narrative. While prosecutions for atrocity crimes certainly remained rare during the Cold War, the project of atrocity justice did not remain dormant. I argue that the hibernation narrative, and explanations for the rise of atrocity justice in general, tend to overlook important developments during this period that helped lay the groundwork for national and international prosecutions that would propel the justice cascade. In this article, I synthesize findings from a new wave of studies to identify three categories of developments that would later prove consequential for the renaissance of atrocity justice: 1) the institutionalization of international criminal law (ICL) through the expansion of ICL treaties and the attendant recognition of new legal doctrines to enforce it, 2) the global diffusion of national legislation to domesticate ICL, and 3) the professionalization of communities of criminal law and international law specialists who acquired, developed, and disseminated expertise in this new legal field. The combination of these three sets of developments provided permissive conditions that would help facilitate the justice cascade once the necessary geopolitical shifts occurred.

This article makes three main contributions. First, it revises the hibernation narrative by highlighting developments during the Cold War decades that helped undergird the later justice cascade. While some features of this story have received attention in existing studies, I tie this work together for the first time in a narrative that gives the Cold War period its due in the historiography of modern atrocity justice. Second, my argument contributes to the explanatory literature on the justice cascade. A striking feature of the developments I identify is that technocratic legal elites played major roles in driving them, a finding that contrasts with the literature's common emphasis on either civil society activists or government leaders. Third, the narrative I present here is instructive for further efforts to consolidate the atrocity regime and other fledgling international legal regimes.

II. THE "HIBERNATION" NARRATIVE AND EXPLANATIONS FOR THE JUSTICE CASCADE

A series of legal innovations following the end of World War II marked the birth of the modern atrocity justice regime. The creation of the International Military Tribunal at Nuremberg set a new precedent that government and military officials could be held criminally accountable for international crimes. The Genocide Convention and 1949 Geneva Conventions, adopted soon thereafter, formally enshrined individual criminal liability in international law.[8] Despite initial enthusiasm, political will to further develop the international atrocity regime quickly faded. Seeking to consolidate the fledgling regime, legal experts under the auspices of the UN International Law Commission worked on drafts for a permanent international criminal court. But owing to emerging Cold War geopolitical tensions, those proposals stalled.[9]

Thus began what is often referred to as international criminal justice's period of "hibernation" or "dormancy."[10] It would not be until the Cold War ended and democratization swept Latin America and Eastern Europe that political space would open for societies to pursue accountability and for the international community to cooperate on establishing international criminal tribunals. A few scattered trials occurred in places like Argentina and Greece, but the real breakthrough occurred with the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993. This

development—the first international criminal tribunal established since the end of World War II—thrust atrocity justice onto the international agenda and revived efforts to pursue accountability, both domestically and internationally. The ICTY, and its sister tribunal the International Criminal Tribunal for Rwanda (ICTR), inspired efforts that would ultimately lead to the landmark arrest of Augusto Pinochet, the creation of the International Criminal Court (ICC), and a proliferation of hybrid tribunals. Since the early 1990s, international and domestic prosecutions have grown in frequency and geographic scope.[11] In the words of Kathryn Sikkink, the world is now experiencing a justice cascade, that is, a "shift in the legitimacy of the norm of individual criminal accountability for human rights violations and an increase in prosecutions on behalf of that norm."[12]

Scholars who invoke the term "hibernation" usually have in mind the lack of atrocity prosecutions during the Cold War. But while prosecutions were certainly rare during this period, that does not mean that the project of atrocity justice as a whole remained dormant. Most historical accounts of atrocity justice tend to skip over important legal advancements that occurred during the Cold War decades and which helped lay the groundwork for the later justice cascade. Specifically, I argue that three sets of developments during the Cold War were crucial for the later justice cascade. The first was the institutionalization of a growing body of ICL and, with it, the recognition of new legal doctrines that would help facilitate its enforcement. These new legal norms helped provide prosecutors, judges, and advocates with legal resources to defeat challenges by establishing a stronger doctrinal base for prosecutions. The second development was the domestication of ICL. The spread of ICL norms to domestic legal systems has empowered courts, like those in Guatemala, to prosecute atrocity crimes at the domestic level, a key feature of the justice cascade. Notably, a surprising number of countries that possess these laws today adopted them prior to the justice cascade, not in response to it.[13] The third development was the professionalization of ICL. This refers to the emergence and growth of an academic and professional field of ICL. This development helped ensure that once human rights prosecutions returned to the international agenda, international criminal tribunals could draw on preexisting doctrinal foundations and professional knowledge to inform their work and consolidate their legitimacy. Some scholars have highlighted consequential legal developments during this period and the roles of legal experts in them. Sikkink, for example, discusses what she refers to as the building of a "firm streambed of international human rights law and international humanitarian law that fortified the legal underpinnings of the cascade."[14] My account draws on Sikkink's research and that of other scholars, but it also brings attention to elements of the story that these accounts tend to overlook. These include the importance of domestic criminalization and the establishment of the principle of imprescriptibility of international crimes.

Examining the Cold War period also brings attention to a class of actors—technocratic legal experts—that tends to receive little attention in most historical accounts. The remarkable rise of atrocity justice over the past thirty years has prompted research to explain this trend. Such explanations tend to focus on the actions of one of two types of actors. One set of scholars, exemplified by Sikkink, emphasizes the roles of activists, like domestic NGOs, transnational advocacy networks, and victims groups, in promoting new ideas about criminal accountability, mobilizing public support, and spearheading litigation.[15] A second set of scholars, like Gary Bass and Christopher Rudolph, focus on the role of government leaders. These scholars examine the particular mix of realist and idealist motivations behind leaders' decisions to support domestic and international trials.[16] But as I demonstrate, much of

the work behind the developments I discuss was driven by legal experts, not policymakers or civil society activists, who often used their privileged roles as technocratic insiders to promote the development of international criminal law.

III. THE INSTITUTIONALIZATION OF INTERNATIONAL CRIMINAL LAW

The first important shift that occurred over the four decades following World War II was the institutionalization of ICL. During this time, states increasingly came to see the idea of international regulation of criminal matters as legitimate, which opened opportunities to recognize far-reaching doctrines to help facilitate the prosecution of atrocity offenses. In this section, I discuss two such developments that would prove consequential for some domestic prosecutions that contributed to the justice cascade and in which technocratic legal experts played central roles: universal jurisdiction for torture and the non-applicability of statutes of limitations for war crimes and crimes against humanity.

The "watershed" criminal tribunals at Nuremberg (1945-1946) and Tokyo (1946-1948) transcended international law's traditional state-centric enforcement models and established new precedents for the prosecution of individual state agents.[17] But they did not create new international law that could be the basis for new prosecutions going forward. Efforts in the immediate wake of World War II to establish such an international criminal code and an accompanying international tribunal were mixed. On the one hand, the 1948 Genocide Convention and 1949 Geneva Conventions broke new ground by codifying for the first time in international law the individual criminal accountability of government and military officials. On the other hand, these treaties left open major gaps in enforcement. Neither the Genocide Convention nor the Geneva Conventions established a new international tribunal, leaving domestic courts as the only venue for atrocity prosecutions. Further efforts in the 1950s to codify a comprehensive international agreement on international crimes and establish a permanent international criminal court quickly fizzled in the absence of support from powerful states.[18]

It is at this point that the conventional narrative typically jumps ahead forty years to the establishment of the ICTY. But despite the failure of efforts in the 1950s to establish a new atrocity law edifice, states nonetheless adopted a wave of new ICL instruments over the next four decades. These would help solidify ICL's status as a distinct body of international law and establish new doctrinal resources that would prove crucial for facilitating later human rights prosecutions.

In the late 1960s, the expansion of ICL treaties "started to quicken" and "particularly accelerated" in the late 1970s.[19] Despite little interest in cooperating to prosecute state-sponsored atrocity crimes, governments increasingly came to see international regulation as useful for addressing a number of transnational law enforcement issues related to non-state actors, especially those fitting under the broad category of terrorism, such as airline hijacking, hostage taking, and attacks on diplomatic personnel. This increasing willingness to see international legal cooperation on criminal matters as feasible and appropriate opened up new possibilities to establish accountability mechanisms to enforce these new agreements.

Within this context, a new development emerged that would have ramifications for atrocity justice years later: the legalization of universal jurisdiction. Universal jurisdiction is the international legal principle that allows a state's domestic courts to prosecute particular crimes, regardless of the nationality of the perpetrator or victim, or where the crimes were committed.[20] It is thus the most

expansive form of jurisdiction possible.[21] Universal jurisdiction long existed in customary international law for crimes like piracy and slave trading, but unsurprisingly, states had traditionally been reluctant to endorse it for crimes with a more political character. Representatives thus rejected the principle during the drafting of the Genocide Convention, despite its inclusion in the original draft, because they feared it could be abused for political motives.[22]

The breakthrough for universal jurisdiction came with the the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, also known as the Hague Hijacking Convention.[23] Universal jurisdiction to prosecute hijackers had been rejected in the drafting of the Hague Convention's predecessor, the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, also known as the Tokyo Convention.[24] But a desire for a more effective treaty led drafters to accept the principle in the latter treaty.[25] Moreover, states agreed to a particularly strong form of universal jurisdiction, which not only grants third-party states where the hijacker is found the *right* to prosecute them, but in fact imposes a *duty* to either prosecute or extradite them to another state.[26] The precedent set by the 1970 Hague Convention helped legitimize universal jurisdiction as an enforcement mechanism for ICL treaties generally, opening the door for states to include it in future agreements. It would thus go on to be "the first of some twenty global and regional treaties concluded since 1970" that allowed for universal jurisdiction.[27]

Among the treaties that would be shaped by the Hague Convention's precedent on jurisdiction was the 1984 Convention against Torture (CAT).[28] Like the Genocide Convention, the original working draft of the CAT included a universal jurisdiction provision.[29] That draft was originally submitted by the Swedish government, but, as Sikkink has written, it likely was influenced by the work of a group of criminal law scholars who had convened at the Siracusa Institute in Sicily to produce a draft convention against torture.[30] The group was led by Siracusa Institute founder M. Cherif Bassiouni, who was also secretary general of the Paris-based *Association Internationale de Droit Pénal* (AIDP) or International Association of Penal Law, the largest and most prestigious transnational professional association of criminal law experts. The Siracusa group also included the Swedish Attorney General,[31] and the draft it produced allowed for universal jurisdiction,[32] which likely influenced the Swedish government draft.

That universal jurisdiction provision in the Swedish draft was modeled on almost identical provisions in previous ICL treaties, all of which were, in turn, largely based on the "extradite or prosecute" provision in the Hague Convention.[33] Unlike in the Genocide Convention, proponents of universal jurisdiction in the drafting of the CAT successfully beat back challenges to the principle's inclusion and eventually persuaded opponents to accept it.[34] Key to their arguments was that the principle did not represent a radical break with existing international law doctrines, but had merely become a standard enforcement mechanism in ICL treaties. Proponents of universal jurisdiction argued that torture was surely "no less horrifying or less important" than other crimes, like attacks on diplomats or airline hijacking, for which universal jurisdiction had been recognized. Therefore, it was difficult for opponents to deny the appropriateness of universal jurisdiction for torture.[35] Despite proponents' claims, the provision did mark a significant innovation, as it legalized universal jurisdiction for peacetime crimes committed by state actors—a first in international law. Yet changes to the normative structure of ICL over the previous decades helped legitimize such an innovation, thus lending proponents' claims greater persuasive power.[36]

The universal jurisdiction provision in the CAT would prove consequential for the justice cascade. The turning point came over a decade later in 1998, when, in an unprecedented action, British authorities arrested former Chilean dictator Augusto Pinochet on a Spanish warrant alleging torture and other human rights violations committed under his rule. The arrest triggered a long process of litigation, and ultimately the UK House of Lords ruled that Pinochet could be extradited to Spain.[37] Key to the decision was the fact that the UK had legislated its obligations under the CAT into national law, including the authorization of universal jurisdiction.[38] Though ultimately Pinochet was not extradited and was allowed to return to Chile for medical reasons, the endorsement of universal jurisdiction for government officials, "breath[ed] new life into the legitimacy and validity" of the principle.[39] The victory, if only symbolic, nonetheless produced a "Pinochet effect," that catalyzed efforts to legalize and exercise universal jurisdiction, not just for torture but also other international crimes.[40]

Following the case, the number of states with universal jurisdiction legislation has since increased,[41] as have universal jurisdiction trials.[42] NGOs also initiated new lobbying efforts to promote universal jurisdiction legislation,[43] while new transnational networks formed to promote universal jurisdiction prosecutions.[44] The most high-profile example of this catalyzing effect of the Pinochet case was the conviction of former Chadian dictator Hissène Habré by a special domestic court in Senegal, a case human rights organizations specifically identified to build off the Pinochet precedent.[45] Today, several European countries have dedicated investigative units devoted to universal jurisdiction cases, and such prosecutions have become the main front in efforts to pursue accountability for atrocities in Syria.[46] Though the vast majority of universal jurisdiction cases have not been against heads of states but mid- and low-level officials,[47] the mechanism has nonetheless proved effective for achieving some limited amount of justice in the absence of other feasible options.

The Pinochet case also had ripple effects beyond attempts to exercise universal jurisdiction. The message that former leaders were not off limits inspired efforts to hold them accountable back in their own countries. In Chile, Pinochet's UK arrest inspired a new wave of criminal complaints against him, and judges who had previously blocked cases began to re-interpret amnesty laws to allow for prosecutions, leading Pinochet's immunity to be stripped once he returned home.[48] This accountability wave led to charges against additional military officials in Chile, and similar developments occurred in Argentina and Guatemala.[49] Thus, while universal jurisdiction is fundamentally limited as a tool for atrocity justice, the principle has nonetheless played a major role in raising legal consciousness of the possibilities for accountability more generally.

Beyond universal jurisdiction, another site of institutionalization in ICL that would have consequences decades later was the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity ("Non-Applicability Convention").[50] Statutes of limitations are common in criminal justice systems around the world, even for the most serious crimes.[51] They can be a major impediment to prosecutions of former regime officials, since oftentimes the political conditions that enable societies to pursue accountability do not obtain until many years after crimes occurred. In Latin America, Naomi Roht-Arriaza has called statutes of limitations "the single biggest legal obstacle" to prosecutions of government leaders.[52]

In the early 1960s, Eastern European socialist governments grew concerned that statutes of limitations for Nazi-era crimes would soon run out. As Raluca Grosescu has written, this concern prompted a

coalition of leading legal experts from Eastern and Western European countries, initially aided by funding from the Polish government, to spearhead an effort exploring legal doctrines related to the statutory limitations of war crimes and crimes against humanity. Their work inspired some governments to pass national legislation barring statutory limitations for war crimes and crimes against humanity. It also sparked a wave of academic writing on the topic. The most influential of this work was written by criminal law scholars who were also members of the AIDP. The organization, led at the time by Swiss comparative criminal law scholar and judge Jean Graven, published a symposium on the topic in its journal, the *Revue internationale de droit pénal*. The AIDP submitted a report to the UN summarizing its members' views and calling for the drafting of a convention to address the issue. These efforts eventually led UN member states to negotiate the Non-Applicability Convention.[53]

Though only fifty-five states ever ratified the convention, prosecutors and judges in various states since the 1980s have devised a number of legal arguments based on it to circumvent statutes of limitations for atrocity crimes.[54] These have taken two forms. In at least a few instances, prior ratification of the convention by the state in question led judges to rule that statutes of limitations were invalid. This occurred in Bolivia during the 1993 prosecution of its former de facto leader General Luis García Meza Tejada and his interior minister for genocide, stemming from a 1981 incident in which the Army carried out premediated murders of eight left-wing activist leaders.[55] But in most other cases where the Non-Applicability Convention proved consequential, prior ratification was not necessary. Instead, judges in some non-party states have ruled that the convention reflected customary international law or general principles of national legal systems at the time and thus contained rules that were binding even on states that did not ratify. This line of reasoning is significant, because one issue that attracted extensive debate during the treaty's drafting was whether it was to establish a new rule of international law or merely declare in positive law an existing general principle.[56] Despite disagreement, the final version of the preamble sided with the so-called "declarative" view, affirming that the non-applicability of statutes of limitations to war crimes and crimes against humanity already existed as a general principle of law.[57]

The first case in Latin America that would draw on this legal foundation to enable prosecutions of former government officials was in Argentina. In the 1999 trial of former Argentine President Jorge Rafael Videla, the Federal Court of Buenos Aires cited the Non-Applicability Convention, among other international instruments, in ruling that under customary international law, statutes of limitations for crimes against humanity are invalid.[58] The *Videla* case drew on earlier jurisprudence from Argentine courts stemming from a 1989 case involving the extradition to Germany of a former SS commander, Josef Schwammberger. In that case, a federal appeals court, later upheld by the Argentine Supreme Court, ruled that the statute of limitations did not bar Schwammberger's extradition since, under customary international law, such limitations are inapplicable to international crimes.[59] In that decision, the judge also made reference to the scholarly work of the AIDP and the study it had carried out on this question.[60]

The reasoning in the *Videla* case formed the basis of similar rulings in a string of subsequent cases, culminating in the landmark 2005 *Simón* decision that found Argentina's amnesty laws to be unconstitutional.[61] It is worth noting that this sequence of decisions was undergirded by the creation of a legal instrument thirty years prior, long before the rebirth of international criminal justice, and

even before the emergence of the global human rights movement.[62] Since the *Videla* case, similar rulings invoking the imprescriptibility of crimes against humanity in customary international law or as a general principle of law have followed in Chile,[63] El Salvador,[64] Peru,[65] and Uruguay.[66]

In sum, the institutionalization of ICL and the attendant recognition of far-reaching doctrines to enforce it in the terrorism treaties of the 1960s and 70s and the Non-Applicability Convention established important new precedents for the use of universal jurisdiction and the imprescriptibility of crimes against humanity. Notably, technocratic legal experts played central roles in advocating for these innovations. The significance of these innovations for atrocity justice would not be fully apparent until decades later when they influenced the Pinochet arrest and Argentine prosecutions. These cases, in turn, helped alter understandings of what was possible regarding accountability of government officials for human rights violations.

IV. THE DOMESTICATION OF INTERNATIONAL CRIMINAL LAW

The second important development during the Cold War decades was the spread of ICL norms to domestic legal systems. As mentioned above, the 1948 Genocide Convention and the 1949 Geneva Conventions both envisioned domestic criminal courts as the primary enforcers of their prohibitions. But to prosecute such cases, states often need domestic legislation that defines these offenses in domestic law. Absent such legislation, states wishing to prosecute these offenses have other options, such as adopting retroactive legislation, directly applying international law, or prosecuting under provisions for so-called "ordinary" crimes. But each of these options presents legal and normative challenges that, in some cases, have slowed down or blocked prosecutions.[67] Therefore, drafters of these treaties included provisions that call on states to enact domestic legislation necessary to prosecute the relevant offenses in their domestic criminal courts.

New data I have collected reveals the surprising extent to which states over the next forty years followed through and adopted national atrocity laws.[68] As Figures 1 shows, as of 2018, at least 133 independent states (68 percent of all independent states) had criminal laws on the books against genocide, 131 against war crimes (67 percent), and ninety (46 percent) against crimes against humanity. This diffusion was not entirely a product of the justice cascade: by the time the ICTY was established in 1993, dozens of states had already adopted atrocity laws, including sixty-five against genocide, sixty-six against war crimes, and seventeen against crimes against humanity.[69]

How did these laws spread? The trends in Figure 1 are surprising in light of much research that attributes the diffusion of human rights norms, such as the ratification of human rights treaties, to mobilization and pressure from domestic and international human rights organizations.[70] But as recent histories of the international human rights movement make clear, the movement to which scholars today attribute much diffusion did not emerge as a global political force until the late 1970s.[71] By that point, dozens of states had already adopted laws against genocide and war crimes. Many states that adopted atrocity laws during this period, like highly repressive states in Eastern Europe and Latin America, were places where domestic human rights activism would have been either nonexistent or ineffective. Before 1993, 45 percent of states that had adopted genocide laws were autocratic, as were 55 percent of states that had adopted laws for war crimes, and 70 percent for crimes against

humanity.[72] This contrasts with another common research finding, which is that democracies, especially new ones, are more likely to commit to human rights norms.[73]\

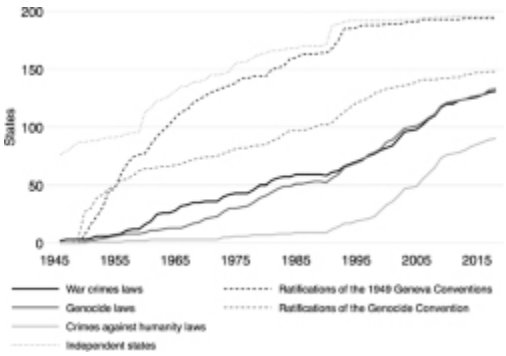

Figure 1. The Diffusion of National Atrocity Laws

In contrast to explanations for the diffusion of human rights norms that point to either civil society activists[74] or strategic policymakers,[75] the story of how atrocity laws diffused during the Cold War decades—especially to repressive states—is instead about the role of another class of actors: technocratic legal professionals. Most repressive states that adopted domestic atrocity laws during this period did so not through conventional, standalone legislation, but through large-scale processes of comprehensive criminal code reform. Just like their democratic counterparts, autocratic regimes occasionally undertake to modernize their criminal justice systems by completely overhauling their criminal codes. When they do so, governments must necessarily rely on technocratic criminal law experts to carry out the highly specialized work of drafting new codes. Such technocratic drafters are typically not policymakers themselves, but are accomplished scholars or judges to whom governments delegate authority by virtue of their claims to specialized expertise. In turn, the mandate of modernization prompts technocratic drafters to identify and select ideas that their professional communities would deem to be essential features of a modern legal code.

As I have argued elsewhere, this search for up-to-date ideas generally leads experts to borrow legal ideas from regional peers and transnational professional associations. In the post-World War II era, atrocity laws in particular have been included in a number of influential criminal codes and have been promoted by the leading transnational professional association of criminal law specialists, the AIDP. This has led technocratic drafters to perceive these laws as emblematic of a modern criminal code, despite these ideas lacking salience among policymakers, publics, or pressure groups. Meanwhile, the large-scale reform context helps reduce scrutiny of otherwise controversial provisions, like atrocity laws, by leading policymakers to view them as merely technical features of a modernization project. Thus, especially in repressive regimes, atrocity laws have come to be adopted through expert-led legal borrowing, triggered by incidental modernization initiatives.[76] The significance of this finding is that the spread of atrocity laws—particularly to the most repressive states—has been driven by the largely inconspicuous work of technocratic legal elites, not civil society activists or government leaders.

This inconspicuous work of codifying atrocity prohibitions in domestic law during the Cold War decades proved consequential in a number of prosecutions in the post-Cold War atrocity justice renaissance. As

mentioned above, states lacking pre-existing, dedicated atrocity legislation have other options for prosecuting former regime officials, but these options are more susceptible to fatal legal challenges. For example, in some post-authoritarian cases, like Uruguay, governments have tried to prosecute former regime officials using newly adopted atrocity legislation, but judges blocked the cases, citing the unconstitutionality of retroactive prosecutions.[77] In other countries, like Argentina, prosecutions have proceeded in the absence of dedicated legislation by relying on provisions for so-called ordinary crimes, like murder and kidnapping. But similar attempts to prosecute former officials under ordinary criminal provisions have encountered a different set of technical legal challenges, such as those based on statutes of limitations or standing amnesty laws.[78]

Since international law limits the applicability of amnesties and statutes of limitations to international crimes, prosecutions under dedicated atrocity laws make it easier to invoke these doctrines and overcome such obstacles. Thus, prosecutions pursued under dedicated atrocity laws adopted prior to the offenses in question, as in Guatemala, have been able to more easily avoid or overcome such challenges. In a systematic analysis, Geoff Dancy and I provide evidence that domestic atrocity laws have facilitated prosecutions; newly democratic states that had criminal provisions against genocide and crimes against humanity were more likely to prosecute past human rights abuses and to do so more frequently. Notably, we find that if atrocity provisions were adopted after the transition—creating the opportunity for retroactive application—they had no statistically significant effect on the likelihood of prosecutions.[79]

The Cold War adoption of atrocity laws has also contributed to the work of the ICTY. In 1951, Yugoslavia, ironically, became the first state to incorporate offenses against war crimes, genocide, and crimes against humanity into its domestic criminal code.[80] In its landmark *Tadic* decision, the ICTY proclaimed for the first time that war crimes can occur in a non-international armed conflict, thus affirming the validity of its jurisdiction over crimes committed in the former Yugoslavia. In its judgment, the appeals chamber referenced the relevant provisions in the criminal code of Yugoslavia to affirm the validity of individual criminal responsibility for war crimes in internal conflict.[81] In a number of other cases, judges at the ICTY and national court of Bosnia and Herzegovina have referenced pre-existing Yugoslav criminal law to affirm the legality of charges.[82] Though the viability of these cases did not appear to turn exclusively on these provisions, the ability of judges to reference them, as one commentator has noted, nonetheless "buttressed the legitimacy of the tribunals' decisions and contributed to the further development of" ICL.[83]

In sum, as Sikkink and Kim have documented, the majority of human rights prosecutions in recent decades have taken place in domestic, not international, courts.[84] One often overlooked aspect of this phenomenon is the importance of domestic criminal laws against atrocity crimes that have often helped prosecutors overcome technical legal challenges to pursuing cases. Domestic atrocity laws have also aided in landmark international prosecutions, as in the work of the ICTY. The hibernation narrative and explanations for the justice cascade downplay the significance of these laws' diffusion during the Cold War decades and the role of technocratic criminal law specialists in facilitating it.

V. THE PROFESSIONALIZATION OF INTERNATIONAL CRIMINAL LAW

The third important development during the Cold War period was the increasing professionalization of the field of ICL. By professionalization, I mean the process through which a body of common knowledge and shared understandings of a professional community are "formed, reinforced and spread, and thereby organizational fields take shape."[85] In their seminal piece on organizational dynamics in professional fields, Paul DiMaggio and Walter Powell identify two sites in which professional norms are formulated and spread: academia and professional networks.[86] As I elaborate in this section, the professionalization of ICL developed within both of these sites during the Cold War decades. A small community of scholars in the early years after World War II disseminated ideas about ICL through their scholarly work and transnational professional organizations, while using their privileged roles as consultants to governments to advance these ideas in new institutions. These developments formed important prerequisites for the advancements in institutionalization and domestication I described above. By the time the ICTY was created, ICL had formed into a distinct academic discipline. This allowed the ad hoc tribunals and the ICC to strengthen their legitimacy by drawing on a pre-established body of doctrines and specialized knowledge.

This process of professionalization began in the immediate wake of World War II. At that time, a first generation of legal academics sought to consolidate the nascent atrocity regime by strengthening its doctrinal and institutional bases. Many of these scholars were leading figures in the Paris-based International Association of Penal Law (AIDP). Throughout the twentieth century, the AIDP was the largest and most influential transnational professional association of national criminal law specialists. Since its founding in 1924, it was also an early pioneer in developing and promoting ICL and the idea of an international criminal court, a tradition it continued throughout the twentieth century.[87] This first post-WWII generation of AIDP leaders played central roles in the developments that would constitute the birth of the modern international atrocity regime. For example, French criminal law scholar and AIDP founder, Henri Donnedieu de Vabres served as a judge on the International Military Tribunal at Nuremberg, and AIDP members helped draft the Genocide Convention and 1949 Geneva Conventions.[88] (As discussed above, AIDP members also later contributed to the Non-Applicability Convention and Convention against Torture.) Through their work on these treaties, AIDP members institutionalized ideas about ICL that the AIDP had pioneered. One such idea was an enforcement paradigm, still dominant today, that designates domestic courts applying national criminal laws derived from ICL as the primary site of atrocity prosecutions.[89]

Other academics contributed to the professionalization of ICL through scholarly work that affirmed ICL's normative importance and the need for its domestication. For example, German criminal law scholar and eventual AIDP president, Hans-Heinrich Jescheck was an early, lone supporter among postwar West German legal academics for the creation of a permanent international criminal court and published an entire German-language volume on the Nuremberg principles.[90] In 1954, Jescheck was appointed director of what would later be the Max Planck Institute for Foreign and International Criminal Law. Under his leadership, the Institute became an important site of professionalization for comparative criminal law and ICL scholars from around the world.[91] One of Jescheck's students at the institute, Otto Triffterer, would go on to make influential scholarly contributions in ICL, eventually "shaping the general principles of law that have been incorporated" into the ICC's Rome

Statute.[92] Meanwhile in Latin America, longtime AIDP vicepresident and Spanish exile turned Argentine legal luminary, Luis Jiménez de Asúa, devoted extensive space in his highly influential five-volume criminal law textbook, *Tratado de Derecho Penal*, to the historical development and doctrines of ICL.[93] In doing so, he helped import the AIDP's ideas about ICL and the importance of domestication into Latin America, which would go on to influence the inclusion of international crimes in national criminal codes in the region over the 1970s and 1980s.[94] In the United States, NYU law professor Gerhard Mueller helped found the first American section of the AIDP in 1960.[95] He also used his leadership of NYU's Comparative Criminal Law Project, which he founded, to publish the first English language volume dedicated to ICL.[96] Later, scholars would credit Mueller with introducing the academic study of ICL to the Anglophone world.[97]

Notably, the abovementioned individuals were not originally trained as international lawyers, but came from academic and professional backgrounds in criminal law. Working through this professional lens, they transposed understandings of the usefulness and doctrines of domestic criminal law to international law. Their professional status as leading criminal law scholars meant that their work on international law carried influence with other criminal law experts, such as those who were tasked with drafting criminal codes. This influence helped facilitate the diffusion of ICL ideas to domestic criminal codes discussed in the previous section.[98]

A second generation of scholars linked to the first built on this doctrinal and institutional foundation by strengthening ICL's academic grounding and extending the global network of ICL scholars. Undoubtedly, the most important such scholar of this generation was M. Cherif Bassiouni. Bassiouni was an Egyptian-born criminal law scholar who spent most of his career at DePaul University in Chicago. He was also a student of AIDP President Jean Graven in France, and once in the United States, was mentored by Gerhard Mueller.[99] In 1974, Bassiouni was appointed secretary general of the AIDP. From there, he would use his platform to promote the development of ICL on a number of academic and professional fronts, ultimately leaving "his fingerprints [on] every major ICL instrument of the past 45 years."[100] This work would eventually earn him a reputation as the "'father' of modern international criminal law."[101] Bassiouni published on ICL prolifically, including a three-volume landmark reference volume,[102] and his work has been translated into at least ten languages, representing all regions of the world.[103] He was also the leading advocate during the second half of the 20th century for the creation of an international criminal court. In 1980, he presented a proposal for an international criminal code at the Congress on Crime Prevention and the Treatment of Offenders. The proposal was subsequently published in the *Revue internationale de droit pénal*, accompanied by commentaries by legal scholars. Over the next few years, it would be published in multiple languages, including Arabic, Chinese, Russian, and Spanish.[104] In 1987, Bassiouni published his proposal for a permanent international criminal court and devoted himself to "convinc[ing] scholars and world leaders" of its desirability.[105]

Beyond his touchstone publications and professional advocacy through the AIDP, Bassiouni also played a major role in extending and strengthening professional networks of scholars knowledgeable about ICL. In 1972, he helped found the International Institute of Higher Studies in Criminal Science in Siracusa, Italy ("Siracusa Institute"). Over the next couple decades, the Siracusa Institute held conferences, workshops, and training seminars that brought together criminal law scholars and practitioners from all over the world. It has also served as the site where numerous international

conventions were drafted, including early drafts of the Convention against Torture and the Rome Statute for the ICC.[106]

Bassiouni's decades of professional work would contribute to developments in the 1990s that helped usher in the justice cascade. In 1992, 99. M. Cherif Bassiouni, *A Glimpse at the Association's History and Some of the Contributions of Its Members*, 86 REVUE INTERNATIONALE DE DROIT PÉNAL 817, 818 (2015). Bassiouni was appointed to lead the UN Commission of Experts to investigate violations of international humanitarian law in the wars that occurred in the former Yugoslavia. In 1994, the Commission published its final report, which included twenty-two annexes of detailed evidence and analysis totaling over 3000 pages. Bassiouni's expertise in ICL allowed him to tailor the investigation and evidence collection to address whether the conduct in question constituted particular forms of criminal liability under ICL, such as command responsibility.[107] Bassiouni was also able to draw on his expertise to advance new cutting-edge concepts in ICL. For example, the Commission's extensive investigation and analysis into the use of sexual violence broke new ground by expanding the ICL definition of rape and conceiving of systematic sexual violence as constituting crimes against humanity and genocide. The Commission's work in this regard subsequently formed the basis of decisions in the ICTY and ICTR.[108] The Commission's investigation would go on to motivate the Security Council's decision to establish the ICTY, and the Commission's findings were used as the basis for subsequent investigations and evidence in numerous ICTY prosecutions.[109] Following his work on the Commission, Bassiouni would further shape the development of the atrocity regime though his role as chair of the committee that drafted the ICC's Rome Statute.

ICL scholarship would go on to play a significant role in judicial decision-making at the ad hoc tribunals and ICC. Given ICL's status as "a still comparatively new and skeletal branch of international law," recent empirical studies have found that judges frequently turn to academic treatises and articles "to inform their thinking on particularly complex or new legal questions."[110] Judges have cited the writings of numerous scholars with ICL expertise, with Bassiouni himself cited in at least twelve ICTY judgments. These citation patterns illustrate the usefulness of scholarship for "legitimiz[ing] the innovative practice of the court."[111] For example, Bassiouni is referenced most frequently on issues related to the doctrines of crimes against humanity, a concept which lacks a dedicated international treaty defining it. Scholarship has thus played an especially important role in filling in existing doctrinal gaps.[112] Furthermore, several scholars who worked on ICL in their careers, including Albin Eser, Pedro David, Christine Van den Wyngaert, and Alfonso Orie—all AIDP members—would serve as judges at the ad hoc tribunals and ICC, highlighting the cross-fertilization between ICL scholarship and practice.[113]

In sum, professional expertise about ICL has undergirded the emergence and spread of the justice cascade. As Mikkel Jarle Christensen writes, "academic expertise was integral to the practical and intellectual endeavor of crafting the conceptual schemes and legal techniques on which ICL built" and "was pivotal for the modern renaissance of this field."[114] A line of professionalization can be traced through networks of legal scholars from Jean Graven in the immediate post-WWII years to judges at the ICC today. Yet the hibernation narrative and explanations for the justice cascade overlook how this expertise evolved and spread over the course of the Cold War decades, contributing to the later renaissance of atrocity justice.

VI. CONCLUSION

Most accounts of the history of atrocity justice treat the Cold War decades as a time of stagnancy and inactivity. This characterization implicitly assumes that the 1990s renaissance of atrocity justice would have unfolded no differently had those intervening decades never occurred. I have argued that this assumption is flawed. A number of advancements that occurred during the Cold War decades put ICL, and thus atrocity justice, on firmer doctrinal grounds. The institutionalization, domestication, and professionalization of ICL provided permissive conditions and lent doctrinal resources to efforts to pursue prosecutions once the necessary structural conditions—the end of bipolar geopolitical rivalry and widespread democratization—obtained. Thus, atrocity justice did not so much go into a period of hibernation during the Cold War, as much as one of foundation building—albeit a patchy and uneven one.

One major finding that emerges from this revisiting of the Cold War period is the importance of technocratic legal experts. Most explanations for the emergence of the justice cascade focus on the roles of either civil society activists or government leaders and policymakers. In contrast, most of the developments discussed here were driven or shepherded by technocratic legal experts using their privileged roles as insiders to advance new ideas about ICL. Legal experts took the lead in developing new ideas about the imprescriptibility of crimes against humanity and attaching universal jurisdiction to torture. Legal experts took the initiative to insert provisions for international crimes in new national criminal codes. And legal experts actively disseminated ideas about the normative importance of ICL and its domestication to their colleagues in academic and professional forums. Thus, legal experts helped form the doctrinal "streambed" that later allowed human rights activists and motivated policymakers to propel the justice cascade.

An important implication of these findings is that efforts to promote nascent international legal ideas and regimes would benefit from efforts to build and expand their doctrinal, institutional, and professional foundations, even while actual enforcement remains patchy or even non-existent. Once political conditions that favor enforcement do obtain, then a regime with a stronger foundation is in a better position to be exercised. Efforts to promote prohibitions related to aggression, ecocide, and autonomous weapons, to cite a few examples, would be well served by such foundation building in the forms of codifying related principles into new international legal and soft law instruments, promoting domestic legislation, and developing professional understandings and doctrines. This work will not lead to new enforcement actions on its own, but it will help these causes if political conditions shift towards an interest in enforcement, as was the case with atrocity justice in the 1990s.

Footnotes

1. Days after the conviction, the Guatemalan Constitutional Court annulled the verdict based on a procedural technicality. *See* Emi Maclean, *Guatemala's Constitutional Court Overturns Rios Montt Conviction and Sends Trial Back to April 19*, INT'L JUSTICE MONITOR (21 May 2013), https://www.ijmonitor.org/2013/05/constitutional-court-overturns-riosmontt-conviction-and-sends-trial-back-to-april-19/. Ríos Montt died in 2018 before his retrial could be completed
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3. Alicia Robinson, *Challenges to Justice at Home: The Domestic Prosecution of Efrain Rios Montt*, 16 INT'L CRIM. L. REV. 103 (2016)
4. Naomi Roht-Arriaza, *After Amnesties Are Gone: Latin American National Courts and the New Contours of the Fight Against Impunity*, 37 HUM. RTS. Q. 341, 365 (2015)
5. Amy Ross, *The Ríos Montt Case and Universal Jurisdiction*, 18 J. GENOCIDE RES. 361, 364 (2016)
6. Mark S. Berlin, *From Pirates to Pinochet: Universal Jurisdiction for Torture, in* THE POLITICS OF THE GLOBALIZATION OF LAW 83, 95–98 (Alison Brysk ed., 2013)
7. By "atrocity justice," I mean criminal prosecutions, whether domestic or international, for so-called "atrocity crimes," that is, war crimes, genocide, and crimes against humanity. By "atrocity law," I mean the body of law that establishes individual criminal accountability for genocide, war crimes, and crimes against humanity. Atrocity law is a subset of international criminal law (ICL). ICL is a broader body of international law that aims to regulate not just accountability for atrocity crimes, but also other criminal offenses of international concern, such as drug trafficking and counterfeiting, that do not necessarily entail violations of human rights by political actors. *See* David Scheffer, *The Future of Atrocity Law*, 25 SUFFOLK TRANSNAT'L L. REV. 389 (2002); M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW (2013)
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12. *Id*. at 5.
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18. Bosco, *supra* note 10, at 30–32.
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