Not Nuremberg – Histories of Alternative Criminalisation Paradigms 1945-2021. Introduction to the Dossier

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Critiquing the Nuremberg Paradigm

A particular memory of the International Military Tribunal at Nuremberg has been central to the visions of many forms of international criminal law and post-dictatorial and post-conflict justice from the mid twentieth century to the present.[1] In its most influential liberal iteration, Nuremberg comes to represent the hope for a globally-accepted set of values and practices for international justice - a post-war promise of global accountability crushed by the political imperatives of the Cold War. This could then only be redeemed in its aftermath under western-led liberal order – first, with the creation of the UN ad hoc tribunals for the former Yugoslavia and for Rwanda in the early 1990s, then reaching its culmination in the establishment of the International Criminal Court (ICC) in 2002.[2] This account solidified into what has been termed the 'myth of Nuremberg', becoming a vital origin story and source of inspiration for some advocates of transitional justice and international criminal law.[3] As the President of the ICC put it three years after the Court's inauguration: "the ICC stands as a direct descendant of those trials. 'Nuremberg' has taken on added meaning as the beginning of a system of international criminal justice […] If we ensure that the ICC has the support to succeed, 'Nuremberg' will be forever remembered as the necessary and historic breakthrough which made this possible […] We must continue to carry forward the legacy of Nuremberg and to make an effective, permanent international court a lasting reality."[4]

Yet this version of history, as many have noted, is deeply political, employed in the main by some western actors to privilege certain forms of justice over others and thereby to narrow what might be considered criminal or worthy of the international community's attention.[5] From the very start, the liberal Nuremberg model excluded discussion of colonial crimes and helped render marginal possible global South contributions to international justice.[6] Indeed, the overemphasis on Nuremberg-as-event ever since has worked to obscure a range of other contemporaneous accountability processes, many of which did address, either marginally or centrally, questions of both the violence of Fascism and colonial crimes, from the IMT for the Far East to the UN War Crimes Commission. After the collapse of the Communist alternative, the Nuremberg myth was used to re-inforce post-Cold War narratives of a liberal western victory and dissemination of international criminal justice processes which in fact erased the central concerns of the 1945 military tribunal – as we shall see below.

While the Nuremberg paradigm and its supposed lessons have been increasingly criticised, its racist and colonial assumptions and exclusions critiqued, and its narrowing effects on international criminal law and transitional justice noted,[7] there has been much less interest in uncovering alternative histories of the criminalisation of violence since 1945. This collection brings together essays that explore these alternative pathways – from the Nuremberg era to the present day, highlighting the diverse forms that accountability can take.

Contributions here explore alternative origin points for the development of criminalisation paradigms, contest linear and western-dominated histories that start with Nuremberg and end with the inauguration of the ICC in 2002. They explore how Nuremberg-as-event and Nuremberg-as-myth have been mobilised to advance narrow prescriptions for societies tackling the legacies of authoritarian rule and mass violence, and how various groups have challenged this model of externally-delivered, individualised criminal justice, including local, consensual, non-prosecutorial attempts to resolve mass conflict, some of which have been framed explicitly in opposition to the perceived neocolonial imposition of Nuremberg-style justice. They variously demonstrate how ideas about criminalisation have been shaped by numerous shifting mid- to late twentieth and early twentieth century ideologies, such as anti-colonialism, Communism, various iterations of human rights, neoliberalism, or, more recently, populist re-imaginings of the global. They highlight the multiple locations from which initiatives emerged, and the importance of considering the development of international justice from beyond the West, and in the locality. They show how a range of actors – from Latin America to Eastern Europe to Africa – developed through regional or inter-regional networks, other perspectives on criminalisation and decriminalisation of the past. In retracing these alternatives, the contributors to this collection also demonstrate how actors made sense of exclusions of categories of the criminal (the everyday and local, Soviet crimes, colonial crimes) that Nuremberg for them represented – and how they sought to overturn them. In short, this collection tells an alternative history of criminalisation paradigms from 1945 and prompts us to consider the political salience of recapturing those forgotten pathways. We expect the collection will speak powerfully to a range of research areas from law and history, to scholars of transitional justice, to those working on post-atrocity memory and human rights. Through four post-1945 periods, this introduction sketches out the power and principal shortcomings of this Nuremberg myth, to which the alternative historical accounts in this collection provide a response.

The Limitations of Nuremberg 1940s-50s

The powerful mythology of international accountability that Nuremberg bequeathed obscured the way in which the narrowness of the process was contested even in its own era. It was important, certainly, that twenty-four Nazi defendants were the first individuals to ever be prosecuted in an international court for crimes committed during an armed conflict – delivering on an idea first raised during the First World War before the Kaiser fled to the Netherlands and scuppered any chance of a trial. Nuremberg detailed the planning and execution of the Holocaust, arraying evidence that became grist for generations of historians, and established legal categories such as crimes of aggression, war crimes and crimes against humanity that underpinned all subsequent post-atrocity courts and tribunals.[8]

Many noted the limitations of the process even in its own time.[9] Trials tell stories[10], and the narrow terms of the Nuremberg Trials enabled Nazi violence to be understood as a sudden outbreak of local aberrational atavism that did not question a belief in the superiority of western civilisation – and indeed was designed to smooth the pathway for the German people

back to the western fold.[11] Even if historians now note how Soviet thinking on imperialism found its way into the Nuremberg's framing of 'aggressive war' as the key charge, in ways that suggest the trials were more than just the expression of 'universalist humanism'[12], an mythological liberal narrativisation of Nuremberg nevertheless became internationally dominant, and was crucial to the re-establishment of the moral authority of the post-war West. What evil had been committed was now over. As Mamdani puts it, "the Allies in the West reinvented Nazism as an accumulation of individual crimes rather than a political project … all sought, with varying degrees of commitment, to punish individual Germans but not to reform political institutions."[13] The principal vehicles of depoliticization – the legal model designed to underpin the Western liberal myth – were the Nuremberg tribunal and the wider bureaucratic process of denazification in the Western occupied zones of post-war Germany. At Nuremberg, the Allies charged individual Nazi leaders in the context of a criminal court. The proceedings were designed to ensure that only the violent acts of certain small number of German elites would be assessed and punished. In the context of an emerging Cold War, previous Allied support for the prosecution of German industrialists and bankers was lost, often under pressure from their own economic elites at home, thus helping to 'spirit away' material economic explanations for the war.[14] Little effort was made in the West to address the predicates of Nazi violence, or its wider implications for a world of colonialism and capitalism.[15]

The Allies absolved the particular form of liberal bureaucratic nation-state they shared with Germany, lest they be forced to account for their own nationalist and racist violence at home and in their colonies (which, in the case of the United States, was home). The United States further avoided difficult conversations about its own hypocrisy, as the prototype whose methods were taken to a new extreme in Germany.[16] More imminently, during and after the war, the Allies committed large-scale atrocities in Europe and Asia, including the forced migration of millions of Europeans in an effort to create homogeneous ethno-states— a political project uncomfortably similar to that of the Nazis. Roughly half a million Germans died in that effort, some in the very concentration camps where Nazis implemented the Final Solution. These were ignored. Had Nazism instead been understood as a political project, and its violence defined as 'crimes against humanity' rather than 'waging a war of aggression' - all of these uncomfortable—but vital—truths would have been on the table, potentially leading to a revolutionary reimagining of modern political organization.[17]

Moreover, the trial functioned to delink Nazi violence from the ongoing violence of European colonialism. The war might have ended the Nazi and Japanese Empires, but for the victorious Western Allies the struggle to retain Empire overseas had not. Soviet colonial desires persisted too, as their attempts to gain control Italy's former Empire in Africa after 1945 demonstrated.[18] And for those critical of the international status quo, Nuremberg's framing of violence and criminality appeared to bolster colonialism of various hues. Raphael Lemkin, who first proposed the term 'genocide' in his 1944 book *Axis Rule in Occupied Europe*, criticised the Nuremberg trials – during which prosecutors regularly deployed his definition – for their singular focus on crimes of *aggressive war*. This choice of category appeared to delegitimize the possibility of future anti-imperial wars of liberation, while cementing past imperial gains.[19] Moreover, ignoring Nazi peacetime atrocities against Jews and other

minorities before 1 September 1939 sidelined attempts to craft a broader legal category of 'crimes against humanity' that could be used to prosecute other forms of atrocity committed outside the state of war. For some contemporaries such exclusions further shored up colonial rule by excluding recognition of western Europeans' increasing recourse to crimes of violence in the face of anti-colonial movements. Victims of the Sétif and Guelma massacre of June 1945, carried out by French colonial authorities and settler militias five months before the beginning of the Nuremberg trials, were not on the table. As Gevers noted, "African victims were never officially present in the international justice dispensed at Nuremberg… Justice for these crimes remained unthinkable in the minds of those who mattered."[20] Nor was Moscow's colonialism a focus for judgement: the secret protocols of the German-Soviet Non-Aggression Pact of 1939, which divided Eastern Europe as colonies between Hitler and Stalin, were, following effective Soviet lobbying, absent from sections accounting for the start of the war.[21] Black American intellectual W.E.B. Du Bois in his *Color and Democracy* (1945) noted that the Soviets had been rendered nationalist and imperial by the war; for him, the contours of their geopolitical desires were less and less distinct from those of an imperialist West — as their refusal after the war to withdraw from either oil-rich Iran or Eastern Europe showed.[22] The British Indian justice Radhabinod Pal at the Tokyo Military Tribunal was the best-known critic of post-war justice: he argued that the point of such tribunals was to exonerate Europe and solidify a colonial status quo now under increasing attack. Connections between violence in Europe in the Second World War and the ongoing colonial violence of the major European powers, which were readily apparent to Black American intellectuals, anti-racist activists and anti-colonial leaders, were not the point.[23]

Such colonial exclusions continued in the work of the Genocide Convention (1948) – a critical disjuncture as the Convention became a vital link between the Nuremberg trials and all courts that have prosecuted 'international crimes' from the 1990s onwards. Immediately after the Nuremberg judgment, on October 1 1946, three United Nations Member States— India, Cuba, and Panama— used Lemkin's criticisms to propose a resolution that might broaden the potentialities of Nuremberg – to create a legal framework for the prosecution of crimes committed by European colonial powers. This initiative directly informed the wording of the UN Genocide Convention, ratified by the UN General Assembly in 1948. In Schabas's view, "It was Nuremberg's failure to recognize the international criminality of atrocities committed in peacetime that prompted the first initiatives at codifying the crime of genocide. Had Nuremberg recognized the reach of international criminal law into peacetime atrocities, we might never have seen a genocide convention." [24] Nevertheless, even here the Convention's definition of genocide restricted its reach. Martin Shaw and others have highlighted how the root problem has lain in the Genocide Convention's framing which ignores 'colonial genocide'.[25] Shaw, Dirk Moses, Jen Direnwater and others argue that the five acts of harm detailed in the Convention – with their emphasis on physical injury – exclude various modes of cultural harm (especially exercised by colonial powers) designed to precipitate the cultural destruction of particular groups.[26] Specifically, these commentators cite denying self-determination, banning indigenous cultural rituals, forced assimilation, forced mass displacement and mass incarceration as colonial practices designed to eliminate native cultures that are excluded from the Genocide Convention.

Yet a much more complex history of criminalisation and accountability from that era is being recovered by scholars. Nuremberg-centric accounts long ignored the range of concurrent international and national judicial processes.[27] In their contribution to this special issue, Owen and Plesch highlight that prosecutorial efforts after the Second World War were more "large-scale, more ambitious and more progressive (in terms of legal thinking and in terms of participation beyond the European-American core) than the [International Military Tribunal]". They focus on the work of the UN War Crimes Commission (UNWCC), which operated alongside the IMT and aided the prosecution of 36,000 Axis war crimes suspects in domestic trials held in sixteen Allied member states (including China, India and Ethiopia) between 1943 and 1948. "The Commission's work," Owen and Plesch state, "was largely ignored by generations of legal, Second World War and Holocaust scholars, in favour of a narrowly-focused model that typically draws more on the model set down by Nuremberg". Yet, as they note, the Commission was closed down in 1948 after pressure from the Allies, who feared that it might go on to investigate violence in the colonies, and thus complicate a post-war narrative that positioned the liberal West as saviours of civilisation from Nazism.

Unearthing this often counter-hegemonic institution – whose work, Owen and Plesch argue, was "suppressed by the exigencies of the Cold War" – provides a more complex narrative of the origins of international criminal law, including evidence of substantial contestation among states over the optimal forms of post-war justice. That this included direct contestation by less powerful states over the mode of accountability at Nuremberg is particularly salient. In contrast to the IMT, the UNWCC enabled the prosecution of a wider range of suspects through a wider range of legal mechanisms, reflecting the particular legal, social and political contexts in the 16 states where prosecutions took place. Owen and Plesch argue that this "stronger and more flexible system of international response to international crimes" provides a richer paradigm of justice than the Nuremberg model, which should inspire more diverse and contextually driven modes of accountability today.

The End of Empire, Anti-Colonialism and Criminalisation Paradigms

Adopting a Cold War framing of the Nuremberg myth – justice quashed in a bipolar world to be redeemed only after the collapse of Communism – sidelines a history of attempts to develop international law to address the criminality and violence of racism and colonialism outside the West in the decades after the Second World War.[28] As several contributions to this special issue highlight, the idea that justice 'hibernated' for over four decades often untethers the development of international law from critiques of the racist underpinnings – brought recently into focus by the perceived 'neo-colonial' agenda of the ICC – and excludes from ICL's master narrative the developments in global justice that came from movements for racial justice outside the West.[29] From the late 1950s, as Afro-Asian decolonisation accelerated, there was also an explosion of international work at the United Nations and beyond in response to the racist violence of decolonisation – in Algeria, Biafra and Vietnam – and against the further strengthening of apartheid in South Africa. Newly independent states from the South, Communist regimes and a western New Left all reacted to the violence of decolonisation by turning to international criminal law.[30] An African bloc at the UN placed Apartheid South Africa on trial at the International Court of Justice (est. 1945) concerning its

controversial Mandate over Southwest Africa – but the case functioned as a broader attempt to delegitimise apartheid by demonstrating how its expansion beyond South Africa held back African development. The case failed in 1966: the court eventually dismissed it on the grounds that neither Ethiopia nor Liberia had a legally recognised interest in the issue[31], collapsing the attempt to turn it into 'an agent of transitional justice'. [32]

Nevertheless, in reaction to the atrocities of Vietnam, Nuremberg became a focus once again, less critiqued for its colonialist and restrictive legacies, but rather seen as having built a base for the recognition of criminality internationally that might now be imbued with meaningful anti-colonial content. The narrowness of the Nuremberg myth does not account for its employment for more emancipatory ends. The Russell-Sartre Tribunal for Vietnam, for example, established without judicial power to conduct symbolic trials of the US military for the atrocities committed in the American War in Vietnam, viewed itself as a natural extension of Nuremberg.[33] Vietnam was also key in reshaping the perceived lessons of Nuremberg: it marked the beginnings of a shift in international criminal law from the prosecution of *aggressive war making* – the central charge in 1945 – to a focus on culpability for *atrocity*. American media of the period often referred to the need to extend Nuremberg to the violence of Vietnam, but interpreted its legacies (misleadingly) as primarily about the protection of civilians from mass violence.[34] On US television on June 7 1971, John Kerry, future US presidential candidate, and Telford Taylor, author of 'Vietnam and Nuremberg: An American Tragedy', discussed the extent to which Nuremberg could be a model for prosecuting atrocities in Vietnam and Cambodia such as My Lai.[35] International media compared the My Lai massacre in particular to the Nazi massacre at Lidice in 1942, or French killings in Algeria, and covered the court proceedings where Lieutenant Calley was famously tried for it. There was no sustained call for an international trial for the pursuit of aggressive war by the US; over the next generation, it was to be *atrocity* that became the focus for international criminal law.

Likewise, Communist states also focussed on US atrocities, and did not seek to maintain Nuremberg's focus on aggressive war making. Nevertheless, they did draw on, and remake, its legacies in other ways. In this collection, Sebastian Gehrig addresses this question from the perspective of the Communist German Democratic Republic – a country which defined itself in the rejection of not only Nazism but also the capitalist imperialism which, it argued, had led to it. Its Communist leaders thus saw in their own attempts to forge a new world a natural solidarity with the anti-colonial and anti-racist struggles in Africa and Asia. Communist regimes have still to be fully written into histories of the later twentieth century internationalisation of criminalisation practices.[36] Despite the presence of the Soviets at Nuremberg, its legacies and lessons were little invoked under European Communist regimes. Moscow's weak influence on the outcome, a legacy in part of withdrawal from the global arena in the 1930s and a consequent lack of cosmopolitan experts who could effectively work through international institutions, meant it quickly came to be viewed as a failure to be forgotten. Later, with the expansion of anti-colonial and anti-racist international law at the UN in the 1960s, Moscow feared that such legal developments might eventually provide the basis for an international court to prosecute wartime and post-war deportations as 'Soviet

genocide'.[37] Communist states thus in general resisted incursions on state sovereignty that the Nuremberg model of external Western intervention implied.[38]

Yet in other ways, their participation was essential for the post-war consolidation and professionalisation of international criminal law – building some of the foundations for the explosion of 'atrocity justice' after the end of the Cold War.[39] Poland's judicial apparatus for instance had long played a pioneering role in the prosecution of Nazi war criminals. Owen and Plesch here note that Eastern European and African countries, principally Poland, Yugoslavia and Ethiopia, were already working together for justice in the face of Italian aggression against Ethiopia before the Second World War ended, long before the Communist takeovers in the region. Polish attempts at judicial internationalisation through the Nuremberg Trials were severely circumscribed, however. Its government had claimed the right of special representation on the basis of the level of devastation Poland had suffered. And facing the sting of foreign criticism of continuing Polish anti-Semitism after the war's end, its delegates sought to highlight the specificity of Jewish suffering. They were marginalised, however, and the specificity of the genocidal violence committed against Jews continued to play little role at the Trials.[40] After the Communist takeovers, however, lawyers from Eastern European Communist states, from the late 1950s, worked across the Iron Curtain to ensure that the anti-fascist justice started at Nuremberg would expand.[41] As Gehrig explores, European Communist internationalism played an important supporting role, alongside countries from Africa, Asia and the Caribbean, in internationalising justice for colonial crimes – in addition to their work in protecting cultural heritage from wartime destruction, post-conflict reconstruction and developing psychiatric methods to address the traumas of anti-colonial struggle.[42] Their frequent privileging of class over race notwithstanding, they embraced advocacy for international laws and commissions to address racism from the late 1950s. Such states connected their own national experience of suffering under Nazi occupation to the violence of post-war decolonisation in southeast Asia and southern Africa.[43] Unlike Western states that wished to confine the debate to those crimes defined at Nuremberg, the Eastern Bloc and states from the South advocated widening such definitions to include "crimes against peace and…colonialism" and the introduction of "inhumane acts resulting from the policy of apartheid" as part of this definition.[44] In 1965, Communist Poland's proposal to the UN Commission on Human Rights to end statutory limitations on international crimes committed by the Axis Powers during the Second World War provoked a wider international debate about the nature of "crimes against humanity".[45]

Yet the question of how far this was a gestural politics to prove anti-colonial solidarity on an international stage that had little bearing on states' policies domestically – where racism was seen to be structurally irreproducible under socialism – became an important part of anti-Communist critique. In the late 1960s, Poland was accused of highlighting racism abroad to hide the realities of anti-Semitism at home - and Poland's representatives at the UN in the late 1960s managed to exclude anti-Semitism from the International Convention on the Elimination of All Forms of Racial Discrimination.[46] Indeed, despite the murder of over three million Polish Jews, and the location of the Nazi genocide in significant part on Polish soil, the Communist government there did little to seek redress – or highlight in memorial policy – the specific suffering of the country's Jewish population. Gehrig here provides an account of

the complex relationship between the international and national. He demonstrates not only the role that anti-apartheid movements had in internationalising rights work as a Cold War weapon from the late 1950s, but also how these initiatives were entwined with attempts to embed socialist legality in the GDR after the experience of the violence of Stalinism in the GDR. The barriers between home and abroad were partially collapsed, and the regime brought international ideas around anti-racism to the fore in a new domestic criminal code to combat the remnants of Nazi racist thought.

By the late 1980s, these attempts to domesticate international anti-racist norms had stalled. He then examines how internal security and crime prevention began to push back against the foreign ministry and progressive international law scholars. As in most eastern bloc countries, GDR elites withdrew from race and rights work at the UN – although GDR support for anti-apartheid forces continued. Increasing barriers were erected between progressive anti-racist international law and domestic legislation, and the GDR returned to a much more domesticated confrontation with the Nazi past, more and more unchained from struggles outside Europe. The creative ways in which its messages had been internationalised through comparison, analogy and solidarity fell away. In this, Gehrig provides an important perspective on the late Communist provincialisation of anti-racist law, an anti-fascist variation on the late twentieth century return of Europeans to a much more civilisationally bordered vision of the continent. After the collapse of Communism, this earlier support for the criminalisation of racism in international law could boomerang back home in new forms of anti-communist criminalisation. Bulgaria and Hungary both brought the crime of apartheid into their domestic law – the former in 1966, the latter in 1978.[47] Bulgarian Communists' adoption of apartheid into domestic law was turned against them in the 1990s, accused of having persecuted the country's Turkish minority on racial grounds during the previous decade.[48]

Democratic 'Transitions' and Closing Down the Anti-Colonial and Welfarist Alternatives 1970s-1990s

While the conventional propagation of the Nuremberg myth belies various attempts to reconfigure international law to very different ends, especially as a response to racism and colonialism, it also shrouds the centrality of Nuremberg in the construction and assertion of a post-war liberal order that caused widespread political, social and economic damage in the global periphery. Scholars such as Hopgood see this liberal order, with its emphasis on universal human rights, as laying the foundations for the destructive neoliberal turn in global politics and economy from the late 1970s.[49] This occurred, he argues, through the embrace of individualistic and legalistic conceptions of civil and political rights, which would eventually sideline more collectivist and welfare-oriented notions of rights that had been developed in the anti-colonial and socialist worlds. This period enshrined the individual as the principal rights-bearer and a universal morality rather than contextual politics as the basis for criminal accountability and societal change. As Slaughter and Whyte have argued, the focus on individual victims and criminality bolstered a western system that reasserted individual rights and the market economy and, in doing so, depoliticised the past, defanging history through justice as a resource to claim social justice or economic equality.[50] On this basis, dominant

western powers successfully saw off radical claims in the Global South for real collective self-determination through a new international economic order that would reallocate resources in the world economic system and address the effects of colonial inequalities that were still being reproduced following the collapse of formal Empire.[51]

Hopgood in particular traces a normative genealogy from Nuremberg through the growth of the global human rights movement in the 1970s – which spawned organisations such as Amnesty International and Human Rights Watch – and the modernisation and structural adjustment policies imposed on the Global South by the Bretton Woods institutions in the 1980s. Western powers used such practices to 'discipline' their former colonies, enmeshing them in the global economy, rendering them economically and politically subservient to their former colonial masters and thwarting efforts at meaningful self-determination and post-colonial redress. In his 2020 book, *Neither Settler Nor Native*, Mamdani echoes many of Hopgood's concerns but does so through a more sustained critique of the Nuremberg model. For Mamdani, the principal problem with the individualist, legalist liberal conception of justice that Nuremberg bequeathed to current human rights frameworks and post-conflict state-building is the stymieing of *political* responses to atrocity through stressing punitive accountability for individual perpetrators rather than structural change.[52] Focusing on the cases of Germany, South Africa, Sudan and Israel, Mamdani argues that the Nuremberg framework undermined post-conflict attempts to fundamentally restructure states and to reconceive notions of citizens and subjects. He argues that this framework leaves most of the pre-existing (usually colonial) political dispensation in place.

In his contribution to this collection, Josh Bowsher joins this critical chorus, exploring, in his contribution on Sierra Leone after its civil war (1991-2002), how justice was inimitably tied to the post-war neoliberal settlement; the human rights movement's "restrictive focus on individualised acts of violence crucially left unchallenged the broader political economy", as he puts it.[53] Transitional justice paradigms, he argues, underpinned economic structural adjustment, as they propagated a neoliberal account of socio-economic causes of war, which turns explanations towards "the nationally bounded, internal problem of bad governance" in which "governance discourses obfuscate the histories of neoliberal structural adjustment as a key socioeconomic antecedent of the conflict". Such erasures stoked socio-economic conflicts which could explode into violence in the future.[54] In this he sees a broader western move to make questions of global inequality less visible by shifting focus toward, and then delegitimising, the Global South state. Judicial mechanisms after Third Wave democratisations focused on the overbearing authoritarian nation-state as a source of criminality and usually ignored, or provided no mechanisms through which to scrutinise or prosecute, businesses or transnational corporations that had committed human rights abuses.[55] Such processes underpinned the "transnational stabilization of a neoliberal consensus […] the abandonment of the politics of redistribution, the erosion of social and economic rights, deregulation and privatization".[56]

Such erasures were also present during the so-called Third Wave democratic transitions to a politically liberal democratic and neoliberal economic order that took place across Southern Europe, Latin America, Eastern Europe and sub-Saharan Africa between the mid-1970s and

mid-1990s.[57] The contribution by Sophie Baby, Daniel Kressel and James Mark in this collection explores how – often contrary to the prescriptions of the Nuremberg model – these post-dictatorial settlements ultimately favoured collective amnesties, forgetting and reconciliation over either claims to socio-economic justice or criminalisation of perpetrators after the fall of authoritarian regimes. Former dictators, or their networks, were usually incorporated into new political orders in ways that did not disturb marketization or global economic integration. Challenging Nuremberg teleologies which often frame the Cold War as wasteland years, they highlight the role of the left, from Social Democratic and Communist parties to the Socialist International, from the late 1950s onwards, in the international circulation of ideas about justice, conflict, dictatorship and political demobilization. They show how such groups turned away from radical anti-colonial struggle, and in so doing, sidelined questions of justice, whether structural or individual. They explore the importance of the Spanish *consenso* after the death of Franco as a globally-resonant exemplar contrary to Nuremberg, through which democratising elites in both Latin America and Eastern Europe worked through questions of peaceful transition, impunity and the limits to justice.

As elsewhere in the collection, Baby et al advocate a different geography of criminalisation. Like Owen and Plesch, they stress the importance of addressing the political and cultural complexities of inter-regional encounters, often beyond western Europe and north America, to explore the contestation of the Nuremberg model. They focus on the complex circulation of criminalisation norms within networks, highlighting the role of Spain in spreading decriminalisation paradigms after dictatorship in Latin America and Eastern Europe. This illuminates complex geographies of learning and transmission, which used international bodies and bilateral links to share ideas between countries and regions.

After the Cold War: The Revival and Contestation of the Nuremberg Paradigm

At the end of the Cold War, many western scholars called for the promise of Nuremberg to be revived.[58] Their narratives invoked a bleak Cold War world of divided ideologies and frustrated hopes to naturalise the supposedly inevitable realisation of Nuremberg's values in a unipolar world.[59] Their histories often leap from the late 1940s to the 1990s,[60] ignoring not only the development of transnational networks in international criminal law, but also a variety of projects, particularly from the Communist and anti-colonial worlds, that sought to expand the promise of justice established through Nuremberg.[61] Yet after the collapse of the Communist alternative, this fresh post-Cold War call to 'revive Nuremberg' had the effect of closing down these alternative judicial projects. The UN International Law Commission, which worked on a draft code of crimes against the peace and security of mankind between 1983 and 1996, and included the crimes of colonialism and apartheid, was sidelined by western states in favour of the process that led to the ICC.[62] As in the late 1940s, actors and processes that extended this western liberal model of international justice to ask questions about neo-colonial and structural responses to violence were marginalised.

The Nuremberg myth was invoked to build a universal approach to atrocity that could be policed by an 'international community' – one now led and shaped by a 'victorious West' – which could intervene in sovereign countries in the name of protecting rights from

overbearing states.[63] Protecting human rights was essential for what was now called global governance – a term, which, as Bowsher explores, was used once again to allocate blame for criminal acts to national spaces and individual actors, ignoring structural and interconnected accounts of the roots of violence.

Although initially enthusiastically embraced by African states, the greatest symbol of the post-Cold War globalisation of the reach of international criminal law – namely the ICC – nevertheless soon came to be seen to embody its colonial and racialized features.[64] Western powers appeared excluded from its remit: indeed, the British Foreign Secretary Robin Cook plainly stated that it was "not set up to bring to book Prime Ministers of the United Kingdom or Presidents of the United States".[65] With the exception of the Yugoslav Wars of the 1990s, dictators in Eastern and Southern Europe had not faced justice through the ICC's predecessor tribunals.[66] Some defended the Court as the first step on the road to universal justice, within a world of unequal power relations.[67] Many in the African Union rather pointed to ICC's incapacity to prosecute western aggression in Iraq, and some of its members argued that the Nuremberg crime of aggressive war be added to its remit (which it was in 2017, with highly restrictive legal conditions).[68] After all, the ICC, despite invoking Nuremberg as a key staging post in the development of international criminal law, in fact abandoned Nuremberg's main concern of aggressive war – a charge that might have been used to prosecute western countries for the violence precipitated by post-Cold War liberal interventionism. Instead, it chose to focus on accountability for atrocities. Ugandan President Yoweri Museveni, his Kenyan counterpart Uhuru Kenyatta and Rwandan President Paul Kagame all criticised the focus of the Court – the latter claiming it was never about justice "but politics disguised as international justice".[69] South Africa and the Gambia threatened to leave the ICC, with Burundi (2017) and the Philippines (2019) actually taking that step. It should be noted that some domestic opponents of African leaders critiqued such arguments made on an international stage about the neo-colonialism of international criminal justice as merely a cover to ensure impunity for political violence.[70]

It was only after Russia's invasion of Ukraine in 2022 that parts of the American establishment softened their stance towards the ICC and supported its investigation of Russian war crimes. This was the first time a sitting president of a major power was indicted by the Court. Yet Western countries were however still very reticent about Ukrainian (and other Eastern European) calls for an ad hoc special tribunal to prosecute Russian President Vladimir Putin for the crime of aggression, once again fearing that the precedent it set could be turned against them.[71] Many elites in Africa and South America were ambivalent, seeing in the West's support for Ukraine a selective enthusiasm for international justice born out of a still racial and colonial ordering of the world. South African leaders, for example, whose country had remained neutral in the war, were faced with the possibility of having to arrest Putin at a BRICS summit in August 2023 after a warrant issued against him for the deportation of Ukrainian children. Given their long-standing ties with Moscow, derived in part from a historical sympathy drawn from anti-colonial and anti-apartheid internationalism, they first sought to offer him immunity, and later to avoid the confrontation altogether.[72] This same history informs South Africa's 2023 claim before the International Court of Justice that

Israel has committed genocide in Gaza – after South Africa had branded Israel an "apartheid state" before the UN General Assembly in 2022.[73]

Another central critique of the Nuremberg model has been its use to spread international norms in such a way that closes down space for regional or local attempts to find justice after periods of violence. As Owen and Plesch note in this issue, this is based on a misremembering of the Nuremberg era itself: there was a vast array of local and national processes spawned to address the violence of fascism that had far greater and more effective reach than Nuremberg and developed different legal principles for accountability.[74] They conclude that this erasure – which began soon after the UNWCC concluded its work, as the Nuremberg myth and model were already being consolidated – deepened as such stories had little use in an age that sought to bolster the internationalist claims of the ICC: "efforts since the 1990s to rebuild international criminal justice have been based on a needlessly narrow paradigm, drawing on a handful of wartime prosecutions…Much of 1940s international criminal law was local, with a strong social base and sense of accountability across continents and cultures." Throughout this collection, these essays highlight the importance of considering local or regional responses to violence as legitimate even if they do not refer to the internationalisation paradigm provided by Nuremberg.

With the re-emerging neo-colonial critiques of international criminal justice, a key manifestation of the African challenge to Nuremberg has involved recourse to diverse forms of 'community-based' or 'customary' justice, which have often evolved in explicit opposition to, and embody very different values and modalities from, international criminal law. In Rwanda, for example, the gacaca community courts emerged out of deep dissatisfaction with both the UN International Criminal Tribunal for Rwanda (ICTR) and the Rwandan national courts in addressing the hundreds of thousands of criminal cases stemming from the 1994 genocide against the Tutsi.[75] Challenging the Nuremberg model, gacaca involved trials conducted in the same communities where genocide crimes took place and were overseen by locally elected judges. They prosecuted all levels of suspected perpetrators (not only the elite orchestrators of the genocide), encouraged active participation of the local population in all aspects of the trials and deployed creative sentencing (including community service rather than imprisonment) to aid the reintegration of perpetrators. Among many Rwandan policymakers and everyday citizens, gacaca was widely perceived as superior to the national courts but especially to the form of 'distant justice'.[76]

Central to gacaca, post-atrocity cleansing and reintegration rituals in northern Uganda and similar practices elsewhere in Africa is a stated desire for sovereignty in the face of international criminal legal interventions, such as those through the ICTR and ICC.[77] These calls for self-determination follow decades of foreign involvement through structural adjustment policies, peacekeeping missions and contingent aid delivery in support of the global 'good governance' agenda. Rwanda's use of gacaca and northern Ugandan community leaders' calls for local rituals to replace the ICC generated vociferous critique from international lawyers, donors and global human rights organisations, principally Amnesty International and Human Rights Watch.[78] Foreign actors' most common criticism was that community-based responses to atrocity fail to meet international legal standards of justice,

many of which are seen to derive directly from the Nuremberg model of criminal accountability. This perspective exacerbated domestic concerns over national sovereignty and entrenched the view that – because of foreign insistence on a universalist conception of trial-based justice for elite perpetrators stretching from Nuremberg to the ICC – African states could no longer decide on their own terms how to address the conflicts that occurred on their territories and affected their citizens.

It was not only concerns over external imposition of legal templates developed afar, greatly reducing the scope for Global South actors to determine contextually appropriate responses to atrocity, was challenged in the 2010s. A human rights paradigm that had in fact offered very limited forms of justice in the first decades of a neoliberal globalisation (1970s-) came under attack from a new generation in many countries that underwent consensual Third Wave transitions in which stability and market reform trumped justice for economic or structural violence – and very often saw very little individual accountability too. The incapacity of limited transitional justice processes in South America to sufficiently deeply embed the idea of the dictatorship as criminal, it is argued, contributed to the rise of new right populist forces that dismiss or relativize the violence of those regimes to attack a left-liberal order, including sexual and gender rights.[79] Transitional justice, which was once celebrated as evidence of a modern civilised form of political transformation that avoided violence, was now accused of both failing to ensure sufficient revolutionary breaks, or sufficiently involving the people in the shaping of new political systems, and hence laying the groundwork for possible returns to authoritarianism.[80] In 2019, Chilean protestors revolted against a system of economic privileges and corruption whose origin they located in their transition's failure to undo Pinochet's 1980 Constitution. One year later, on October 25, 2020, their fellow citizens voted overwhelmingly to annul this controversial legal document. In Latin America, calls for economic justice have included attempts to hold corporate actors accountable, drawing on transnational activist networks rather than recourse to international criminal law.[81]

This also became the case in South Africa. Mamdani argues that the Truth and Reconciliation Commission there was the exception from other transitions, rejecting the Nuremberg model of post-atrocity accountability in favour of a negotiated political settlement framed in anti-colonial post-ethnic and -racial terms. A new generation in South Africa has been more critical, arguing that the TRC in South Africa gave up on radical decolonial claims for collective economic justice and reproduced colonial forms of historical enquiry not to disturb market transition and further integration into the global economy.[82] Similarly, in post-Communist Europe, despite vocal anti-Communist rhetoric, punishment of former dictators was very limited. Here, however, it has mainly been right-wing parties that have led the charge, criticising '1989' as a betrayed revolution, and seeking to overcome a decriminalisation paradigm by (unsuccessfully) calling for 'Communist Nurembergs' to prosecute communist politicians. [83]

Conclusion

In 2020, the 75th anniversary of the start of the Nuremberg trials was the cause for much celebration among international criminal law practitioners and scholars. At a commemorative event in Nuremberg's Palace of Justice, the German President Frank-Walter Steinmeier invoked the well-established Nuremberg myth, "In November 1945, Nuremberg was in ruins. Many German cities were in ruins. Our country had been morally and physically razed to the ground. But here, in this very room, while the rubble was being cleared away outside, the four victorious powers of World War II laid the foundation for the legal order of a new world." Steinmeier then lamented that the US, China, Russia and India had weakened that global legal order by refusing to sign up to Nuremberg's principal successor institution, the ICC, while the US under Trump had "worked actively against the tribunal in The Hague".[84] His concern over the lack of support from the world's major powers, however, belied the behaviour of those same actors at Nuremberg, where they envisaged international justice as exclusively for their vanquished enemies. Their refusal to sign up to an international court that could investigate their own citizens was, in that key respect, consistent with their establishment of the Nuremberg tribunal from which an earlier group of global powers had remained legally insulated.[85]

The essays in this collection highlight these and other problematic continuities from Nuremberg, including the various narrowings of justice the Nazi trials have bequeathed to modern prosecutorial practices. The commentators here also highlight the many overlooked ruptures within and from the myth of Nuremberg. This includes the wider range of accountability mechanisms used concurrently to Nuremberg – as shown through the UNWCC – and later calls for post-colonial and socio-economic justice, modes of accountability embedded in specific cultural contexts, and more consensual attempts to facilitate political transition, all of which directly challenge the ideas and approaches inherent in the Nuremberg model. These alternative criminalisation paradigms highlight that this dominant judicial mythology has unnecessarily circumscribed our understanding of post-atrocity justice – how this idea has evolved over the last 70 years and how it can manifest in different parts of the world today. Highlighting the troubling inheritances, internal contradictions and myriad divergences from the classical articulation of the Nuremberg myth ultimately opens new pathways for recasting accountability and political change after mass conflict and dictatorial rule.

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[1] Mahmood Mamdani, "Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa," *Politics & Society*, 43 no.1 (2015), 61-88.

[2] Mark S. Berlin, "Revising the 'Hibernation' Narrative: Technocratic Legal Experts and the Cold War Origins of the "Justice Cascade," *Human Rights Quarterly* 42 (2020): 878–901; also Mark S. Berlin, *Criminalizing Atrocity: the Global Spread of Criminal Laws against International Crimes* (Oxford: Oxford University Press, 2020), 13-14. For an influential work framed by this hibernation idea, see the 'justice cascade' of Kathryn

Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York; London: W. W. Norton & Co., 2011).

[3] Marcos Zunino, *Justice Framed: a Genealogy of Transitional Justice* (Cambridge: Cambridge University Press, 2019), chapter 4.

[4] Speech by Philippe Kirsch, President of the International Criminal Court, 'From Nuremberg to The Hague', Palace of Justice, Nuremberg, 19 November 2005, https://www.icc-cpi.int//Pages/items.aspx (accessed August 1, 2023).

[5] Mahmood Mamdani, *Neither Settler Nor Native: the Making and Unmaking of Permanent Minorities* (Cambridge, MS: The Belknap Press of Harvard University Press, 2020), chapter 2. For the 'banal aesthetics' which shape which criminality is remembered: Randle DeFalco, *Invisible Atrocities: The Aesthetic Biases of International Criminal Justice* (Cambridge: Cambridge University Press, 2022).

[6] Christopher Gevers, 'Africa and International Criminal Law', in *The Oxford Handbook of International Criminal Law*, ed. Kevin Jon Heller et al.(Oxford: Oxford University Press, 2020), 154-193.

[7] Randle C DeFalco and Frédéric Mégret, "The Invisibility of Race at the ICC: Lessons from the US Criminal Justice System," *London Review of International Law*, 7 no.1 (2019): 55–87.

[8] For the extent to which the Nuremberg trials played a direct or ancillary role in addressing the events of the Holocaust, see Lawrence Douglas et al. (eds.), *History and Memory in the Courtroom: Reflections on Perpetrator Trials since 1945* (München: K.G. Saur, 2006); Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011).

[9] On this, see Kirsten Sellars, "Imperfect Justice at Nuremberg and Tokyo," *The European Journal of International Law* 21 no.4 (2010): 1085–1102.

[10] On justice and narration, see Marc Osiel, *Mass Atrocity, Collective Memory and The Law* (New Brunswick, N.J.: Transaction, 2000); Peter Brooks and Paul Gewirtz, *Law's Stories: Narrative and Rhetoric In The Law* (New Haven: Yale University Press, 1996).

[11] Lawrence Douglas, "The Shrunken Head of Buchenwald: Icons of Atrocity at Nuremberg," *Representations*, 63 (1998): 39-64.

[12] See, e.g. Amanda Alexander, who argued that the primacy of the charge of aggressive (imperialist) war over crimes against humanity or a recognition of Jewish genocide was in part due to Soviet influence: 'Lenin at Nuremberg. Anti-Imperialism and the Juridification of Crimes against Humanity', in *Revolutions in*

International Law. The Legacies of 1917, eds. Kathryn Greenman, Anne Orford, Anna Saunders and Ntina Tzouvala (Cambridge: Cambridge University Press, 2021), 56-82.

[13] Mamdani, *Neither Settler*, 102-3.

[14] G. Baars, "Capitalism's Victor's Justice? The Hidden Story of the Prosecution of Industrialists Post-WWll," in *The Hidden Histories of War Crimes Trials*, eds. Kevin Jon Heller and Gerry Simpson (Oxford: Oxford University Press, 2013), 191; Alexander Borisov, "Nuremberg 2 or Why the Trial on Sponsors of Nazi Germany failed," *SSRN*, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3755862 (accessed August 1, 2023).

[15] Ntina Tzouvala also draws attention to that fact South American initiatives immediately after the Second World War to widen definitions of force to include the use of excessive economic power were sidelined too.

[16] James Q. Whitman, *Hitler's American Model. The United States and the Making of Nazi Race Law* (Princeton: Princeton University Press, 2017).

[17] For this discussion, see Mamdani, *Neither Settler*, chapter 2.

[18] Sergei Mazov, "The USSR and the Former Italian Colonies, 1945–50," *Cold War History*, 3 no.3 (2003): 49–78.

[19] Samuel Moyn, "From Aggression to Atrocity: Rethinking the History of International Criminal Law," in *International Criminal Law*, ed. Kevin Jon Heller et al. (Oxford, Oxford University Press, 2020), 13.

[20] Gevers, "Africa and International Criminal Law", 164.

[21] Francine Hirsch, *Soviet judgment at Nuremberg: a new history of the international military tribunal after World War II* (Oxford: Oxford University Press, 2020), 151, 371, 374.

[22] W.E.B. Du Bois, *Color and Democracy: Colonies and Peace* (New York: Harcourt, Brace and Company, 1945), 114–15.

[23] On these connections, see Thomas Kühne, "Colonialism and the Holocaust: Continuities, Causations, and Complexities," *Journal of Genocide Research*, 15 no.3 (2013): 339-362. On the entanglement of Holocaust awareness and the experience of racial and colonial violence, Clive Webb, "The Nazi Persecution of Jews and the African American Freedom Struggle," *Patterns of Prejudice* 53 no.4 (2019): 337-362; Shirli Gilbert, "Jews and the Racial State: Legacies of the Holocaust in Apartheid South Africa, 1945–60," *Jewish Social Studies*, 16 no.3 (2010): 39-40.

[24] William A. Schabas, "Origins of the Genocide Convention: From Nuremberg to Paris," *Journal of International Law* 35 (2008): 35-36.

[25] Martin Shaw, "The Politics of Defining 'Genocide'," *Patterns of Prejudice*, 51 no.5 (2017): 468-470.

[26]Ibid; Dirk Moses, 'Raphael Lemkin, Culture, and the Concept of Genocide', in *The Oxford Handbook of Genocide Studies*, eds. Donald Bloxham and A. Dirk Moses (Oxford: Oxford University Press, 2010); Jen Drinkwater, 'Paper Genocide: The Erasure of Native People in Census Counts', *Rewire News*, 9 December 2019. https://rewire.news/article/2019/12/09/paper-genocide-the-erasure-of-native-people-in-census-counts/ (accessed August 3, 2023). The unlawful deportation of children was the only category from discussions over 'cultural genocide' that remained in the 1948 Convention – all others were removed following pressure, mainly from western states. It was this remaining charge that would be used by the 2023 ICC warrant against Russia following the transfer of population from Ukraine.

[27] On national processes in Eastern Europe, see Gabriel Finder and Alexander Prusin, *Justice Behind the Iron Curtain: Nazis on Trial in Communist Poland* (Toronto: University of Toronto Press, 2018); Andrew Kornbluth, *The August Trials: The Holocaust and Post-war Justice in Poland* (Cambridge, Mass.: Harvard University Press, 2021); Tamás Hoffmann, "Post-Second World War Hungarian Criminal Justice and International Law – The Legacy of the People's Tribunals," in *The Historical Origins of International Criminal Law – Vol. II.*, eds. Morten Bergsmo, Cheah Wui Ling and Yi Ping (Brussels: Torkel Opsahl, 2014), 735-763.

[28] Ntina Tzouvala, *Capitalism as Civilisation: a History of International Law* (Cambridge: Cambridge University Press, 2010), chapter 4.

[29] Oumar Ba, "Global Justice and Race," *International Politics Reviews* 9 (2021): 375-389; Oumar Ba, *States of Justice: The Politics of the International Criminal Court* (Cambridge: Cambridge University Press, 2020).

[30] Fabian Klose, *Human Rights in the Shadow of Colonial Violence: the Wars of Independence in Kenya and Algeria* (Philadelphia: University of Pennsylvania Press, 2013); Umut Özsu, *Completing Humanity: The International Law of Decolonization, 1960–82* (Cambridge: Cambridge University Press, 2023). For a similar argument with regard to the 1949 Geneva Conventions and the later expansion of the uses of international humanitarian law by anti-colonial movements and states, see Boyd van Dijk. *Preparing for War: the Making of the 1949 Geneva Conventions* (Oxford and New York: Oxford University Press, 2022), 321-3. On similar attempts to decentre accounts of global human rights in the age of decolonisation, Roland Burke, Marco Duranti and A. Dirk Moses, "Introduction," in *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics,* eds. A. Dirk Moses, Marco Duranti and Roland Burke (Cambridge: Cambridge University Press, 2020), 1-32.

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[33] Berthold Molden, "Vietnam, the New Left and the Holocaust: How the Cold War Changed Discourse on Genocide," in *Memory in a Global Age*, eds. Aleida Assmann and Sebastian Conrad (Basingstoke: Palgrave Macmillan, 2010), 79–96; Lena C. Christoph, "Tricontinental Reverberations: Anti-Imperialist Solidarity in the International War Crimes Tribunal on Vietnam," *Bandung* (ahead of print 2023), 17-18.

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[37] Francine Hirsch, "The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Post-War Order," *The American Historical Review*, 113 no.3 (2008),703; Francine Hirsch, "The Nuremberg Trials as Cold War Competition: The Politics of the Historical Record and the International Stage," in *Memory and Post-war Memorials Confronting the Violence of the Past*, eds. Marc Silberman and Florence Vatan (London: Palgrave MacMillan, 2013), 15, 26.

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[39] Raluca Grosescu and Ned Richardson-Little, "Revisiting State Socialist Approaches to International Criminal and Humanitarian Law: An Introduction," *Journal of the History of International Law*, 21 (2019):161–180.

[40] Finder and Prusin, *Justice Behind the Iron Curtain*, 98-9.

[41] Raluca Grosescu, "State Socialist Endeavours for the Non-Applicability of Statutory Limitations to International Crimes: Historical Roots and Current Implications," *Journal of the History of International Law*, 21 no.2 (2019): 239-269; Berlin, "Revisiting the 'Hibernation' narrative," 900-901.

[42] Nelly Bekus "'Protecting Culture Through International Law in the Post-War World: State Socialist Perspectives," in *Socialisms and International Law*, eds. Ralescu Grosescu and Ned Richardson-Little, (forthcoming); Péter Apor, "War and Peace" in *Socialism Goes Global*, eds. Mark and Betts,122; Ana Antić,

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[44] 'UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,' Adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (xxiii), 26 November 1968. On this, see Raluca Grosescu, "State Socialist Endeavours," 239–269.

[45] On Poland's role at the UN, see Paul Betts, "Rights," in *Socialism Goes Global*, ed. Mark and Betts, 199-200.

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