War crimes: what are they? how can they be prosecuted?

by Francine Hirsch

Makeshift graves are seen at the Pishanske cemetery on September 23, 2022, in Izium, Ukraine. A total of 447 bodies were exhumed from the gravesite, including 22 soldiers and 5 children. The bodies will be examined by forensic experts for possible war crimes. (PAULA BRONSTEIN/GETTY IMAGES)

In the months since Russian President Vladimir Putin's brutal invasion of Ukraine on February 24, 2022, we've seen mounting evidence of Russian war crimes including the rape, torture, and murder of civilians, the bombing of schools and hospitals, and the abuse of prisoners-of-war. Horrifying stories about the kidnapping and deportation of Ukrainian children to Russia and shocking images of mass graves outside of Kyiv put the world on high alert. During a visit to Bucha in mid-April, the prosecutor of the International Criminal Court (ICC), Karim Khan, called Ukraine "a crime scene." World leaders, including U.S. President Joseph Biden and U.S. Secretary of State Antony Blinken, publicly accused Russia's leaders of committing war crimes in Ukraine and carrying out a genocide of Ukrainians. The discovery of burial pits in a birch forest outside the northeastern Ukrainian city of Izyum, after its liberation from Russian forces in September, prompted fresh calls for justice and accountability.

International lawyers and politicians have vowed that the criminal actions of Russian leaders and soldiers will not go unpunished. International institutions such as the ICC, along with dozens of national governments, have mobilized to investigate Russian war crimes and crimes against humanity in Ukraine. Ukraine's Prosecutor General's office has also launched its own effort to document Russian war crimes and has begun to prosecute Russian war criminals. In May, Ukraine held its first trial of a Russian soldier—a 21-year-old sergeant charged with fatally shooting an unarmed Ukrainian man. A Kyiv court found the soldier guilty of violating the laws and customs of war. Other trials have followed.

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At the same time, some international lawyers and world leaders, including Ukrainian President Volodymyr Zelenskyy, argue that these current efforts do not—and cannot—go far enough. They are calling for the creation of a "special tribunal," possibly on the Nuremberg model, to try Russian leaders for the "fundamental crime" of planning and waging an illegal war of aggression.

Back in March, just a few weeks after Russia's invasion, the editors of JusticeInfo.net, a website devoted to justice initiatives related to mass violence, observed that the war in Ukraine "has put into action the entire contemporary landscape of international justice, with a speed unprecedented in history." But what exactly is international justice—and what does its contemporary landscape look like? Put differently: What are the different categories of war crimes under international law? And what kinds of institutions are in place to investigate and prosecute them? How effective is our current system of international law and what are the chances of bringing Russian soldiers, officers, and leaders to justice? Finally, what kind of role could or should the United States, which is not a member of the ICC, play in these efforts?

Categories of war crimes

What exactly are we talking about when we talk about war crimes? The news media often uses "war crimes" as an umbrella term for a long list of transgressions, including violations of the rules of warfare, the mistreatment of civilians during a military conflict, the breaking of international treaties, and the waging of a predatory war of aggression. International lawyers and international organizations, however, generally use the term to refer more specifically to certain grave violations of the laws and customs of war elaborated in international law conventions such as the Hague Conventions, the Geneva Conventions and their protocols, and the Rome Statute.

The laws and customs of war were first codified in multilateral treaties in the late 19th and early 20th century—most notably the Hague Conventions of 1899 and 1907. These conventions prohibited certain methods of warfare, such as the use of poisons or dumdum bullets (that expand in the human body) and the attack or bombardment of undefended towns and cities. They forbade the pillaging of conquered territory, as well as the mistreatment and murder of civilians and prisoners of war. Special clauses in the Hague Conventions banned attacks on hospitals and the destruction of culture, stipulating that "all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, [and] hospitals" which were "not being used at the time for military purposes." The Hague Conventions also included the provisions of the Geneva Convention of 1864 (updated in 1906) for the treatment of sick and wounded soldiers.

The Hague and Geneva Conventions made major contributions to the development of international humanitarian law and initiated critical conversations about the role of international institutions in safeguarding and promoting the welfare of humanity. However, these conventions, while calling for peace, took as a given the legality and even the inevitability of war. The signatories to the Hague Convention of 1899 adopted a resolution on the peaceful settlement of international conflicts and created the Permanent Court of Arbitration, the first international body explicitly established to review and rule on disputes between states. But they did not give this body real power: it remained voluntary, not compulsory, and its decisions were not binding.

How then were war crimes to be punished? Significantly, these early international law conventions did not address the criminal responsibility of individual perpetrators, focusing instead on the rights and obligations of sovereign states. The Hague Conventions stipulated that a state whose military violated the laws and customs of war owed compensation or reparations to its adversary. That adversary, the aggrieved state, could also formally respond with "proportionate" reprisals—temporarily lifting its own observance of the laws and customs of war. The Hague Conventions did not explicitly grant states permission to try captured enemy soldiers for breaching the laws and customs of war. But such trials by national or military courts in fact became commonplace during wars. After the conclusion of a peace treaty, states typically granted amnesty to enemy combatants. This would change with the First World War.

The question of individual criminal responsibility came to the fore during the First World War. The German military's massacres of civilians provoked international outrage and demands for justice. But what did justice look like and how could it be attained? Reparations were more or less a given and played a major role in the postwar settlement. But could individual leaders and soldiers be held criminally responsible for the murder of civilians and the mistreatment of prisoners of war? Could they be tried for these and other war crimes by an international body?

At the Paris Peace Conference in 1919, the victors set in motion plans to try German soldiers and generals as well as Germany's former leader, Kaiser Wilhelm II, as war criminals. The Treaty of Versailles called for a special tribunal to try the Kaiser—not for war crimes per se but for "a supreme offense against international morality and the sanctity of treaties." This was a bold move that pushed the bounds of international law. It challenged the prevailing belief that heads of state were immune from prosecution. It also introduced the idea of an illegal war and suggested that waging such a war was a criminally punishable act. The plan collapsed after the Dutch, who were sheltering Wilhelm II, refused to extradite him for trial.

Plans for an international tribunal of German soldiers and generals also fell apart. When the victors sought to

See p. 2 for a map of Ukraine.

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extradite almost nine hundred German soldiers and generals (as agreed to in the Treaty of Versailles), Germany's new government protested that this infringed on its sovereignty and would lead to domestic unrest. A compromise was reached. From May 1921, Germany's Imperial Court of Justice in Leipzig held a series of war crimes trials under German military law. The Leipzig Trials were a bust: only seventeen German soldiers were actually brought before the court, and all either received light sentences or were acquitted. In one case, a soldier was excused for torpedoing a hospital ship on the grounds that he had been following "superior orders."

As efforts to punish individuals for war crimes floundered, world leaders and international lawyers looked for ways to establish a more robust system of international law that could preserve the peace. The Charter of the new League of Nations established a Permanent Court of International Justice to mediate disputes between states. Unlike the Permanent Court of Arbitration set up by the Hague Conventions, participation was compulsory for member states, who were required to take part in dispute resolution before (ideally, instead of) resorting to war. Like the Permanent Court of Arbitration, this court did not have the jurisdiction to try individuals. Proposals by international lawyers to create a separate international court under the League to try individuals, including leaders, for war crimes were shot down. For many countries, concerns about state sovereignty were paramount. In fact, in spite of the tireless efforts of President Woodrow Wilson (who had first proposed an "association of nations"), the Senate voted against U.S. membership in the League, wary of any institution that might serve as a world government.

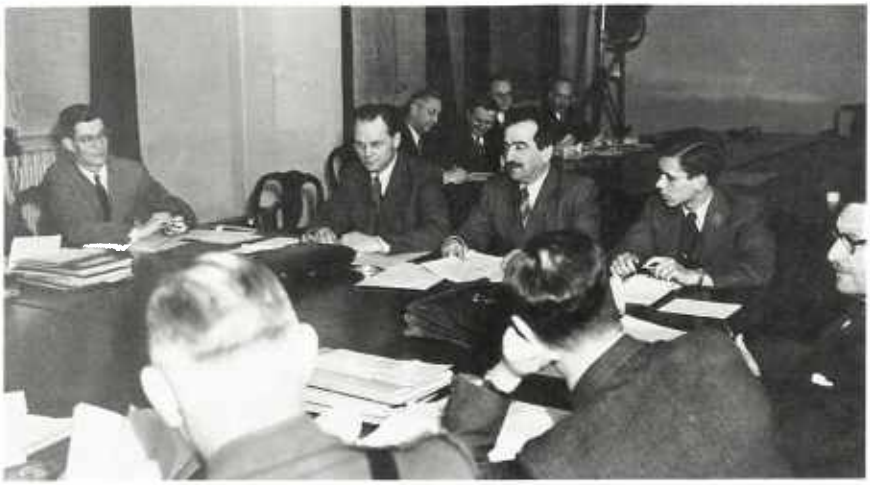
The effort to expand the bounds of international law gained new momentum in the 1920s as delegates to the League of Nations challenged the very legality of war. Newly proposed treaties sought to pin down the difference between a lawful and an unlawful war, but none were ratified. Then in September 1927 the League's Assembly unanimously adopted a resolution stating that "a war of aggression can never serve as a means of settling international disputes, and is in consequence an international crime." The resolution conferred an obligation on League members but was not legally binding.

8/27/1928, Washington, DC: President Calvin Coolidge signs the Kellogg-Briand Pact in his office. Secretary of State Frank B. Kellogg is seated to the left of the President. Also pictured are: Andrew Mellon; Charles Dawes (seated R); and Senator William E. Borah (R, behind President Coolidge). (BETTMANN/GETTY IMAGES)

These deliberations in the League of Nations were shaped by, and also shaped, a broader conversation in many countries about how to prevent future wars. Lawyers and politicians from non-League countries, including the United States (which had its own "outlawry of war" movement), participated in these discussions and also addressed key questions: Should all wars be declared illegal? Or only wars of aggression? What should be the consequences for waging aggressive war? These discussions helped pave the way for an ambitious multilateral peacekeeping agreement: the Kellogg-Briand Pact. Led by the United States and France, representatives from twelve countries signed the pact in Paris in August 1928. Dozens of other countries soon came on board; by late 1929 there were 62 signatories, including the Soviet Union. The pact condemned "recourse to war for the solution of international controversies" and renounced war "as an instrument of national policy." It required signatories to resolve their disputes "by peaceful means" but (like the League's resolution of a year earlier) did not set legal consequences for states or rulers that refused or failed to do so. Could war really be considered a crime if there was no clearly stipulated punishment? Notably, the Geneva Conventions of 1929 demanded the humane treatment of prisoners of war, but took war itself as a given.

By the mid 1930s it had become clear that neither the League of Nations nor the Kellogg-Briand Pact could do much to stop a country set on war, and that the international community could not be counted on to respond decisively after the fact. Japan's invasion of Manchuria in 1931 and Italy's invasion of Abyssinia in 1935 were cases in point: both withdrew from the League after being rebuked for their actions, but faced no meaningful consequences. Meanwhile there were other developing dangers to world peace. Adolf Hitler withdrew Germany from the League in 1933 and remilitarized the Rhineland in 1936 in violation of the Treaty of Versailles.

Wasn't it time for international organizations to do more to deter and punish those who planned and waged aggressive war? The Soviet Union had joined the League in 1934, and its international lawyers soon began to explore



A.N. Trainin (center with mustache), head of the Soviet delegation to the War Crimes ExecutiveCommittee, speaks to his colleagues. To his right sits I.T. Nikitchenko, who later represented the U.S.S.R. on the International MilitaryTribunal. This body worked out the Allied agreement to create the International Military Tribunal toprosecute German war criminals at Nuremberg. (CHARLES ALEXANDER/COURTESY OF HARRY S.TRUMAN LIBRARY / UNITED STATES HOLOCAUST MEMORIAL MUSEUM)

this question in depth. In a 1937 book, *The Defense of Peace and Criminal Law,* the Soviet lawyer Aron Trainin argued that the League of Nations and the Kellogg-Briand Pact had both fallen short by not making the waging of war a criminally punishable offense. He called for the creation of an international criminal court to try "persons violating peace." Trainin's proposal was prompted by the combined threat of Germany and Japan, who had joined together in November 1936 to sign an Anti-Comintern Pact that was clearly directed against the Soviet Union. Meanwhile, Soviet leaders and diplomats were working behind the scenes to secure an agreement with Nazi Germany. The Soviet and German foreign ministers signed a Treaty of Non-Aggression on August 23, 1939, pledging their countries to "desist from any act of violence, any aggressive action, and any attack on each other."

The Soviet-German non-aggression pact paved the way for the conquest of Poland. On September 1, 1939, German forces invaded Poland from the west. Two weeks later, on September 17, Soviet forces invaded Poland from the east. The Soviet Union did not declare war on Poland, but cynically claimed that it had launched a campaign of liberation to protect Belarusians and Ukrainians within Poland's borders. By October 6, Poland was defeated and divided (along lines that Stalin and Hitler had agreed to in the non-aggression pact's secret protocols). The Second World War was well under way. For the first twenty-one months of the war the Soviet Union supported Germany with exports of grain, oil, and other resources. During that time Norway, Denmark, Belgium, the Netherlands, Luxembourg, France, Yugoslavia, and Greece all fell to Germany. Then, on June 22, 1941, Hitler launched Operation Barbarossa and violated his treaty with Stalin by invading the Soviet Union. By the time the United States entered the war six months later, some fifty countries had become involved in the conflict and most were actively fighting.

The Second World War was the deadliest military conflict in history, bringing unimaginable suffering and destruction to Europe. Nazi forces occupied huge swaths of the continent, committing mass atrocities and implementing plans to wipe out entire peoples. The deportation and murder of civilians was on a scale no one could quite believe—but the evidence kept coming in, thanks largely to the efforts of the European governments-in-exile. International organizations and treaties had not been able to stop the war or prevent the commission of horrific war crimes. But as people throughout occupied Europe dreamed of vengeance and restitution, some leaders and international lawyers pinned their hopes on a robust program of postwar justice. Their efforts to hold Nazi leaders and soldiers accountable for war crimes would lead to a revolution in international law, as ideas about individual criminal responsibility and individual human rights were finally put into action.

While the Americans and the British vowed that Nazi perpetrators would be brought before courts in the countries they were oppressing, the Soviets set their sights on an international tribunal. On October 15, 1942, Soviet Foreign Minister Vyacheslav Molotov proclaimed the criminal responsibility of the Nazis for atrocities in occupied Europe and invited the other Allied governments to cooperate in bringing Hitler, Herman Goering, and other Nazi leaders before a "special international tribunal" to be punished with "all of the severity of criminal law." The United States and Britain opposed such an approach. The U.S. government worried about reprisals against Allied prisoners of war. The British maintained that the crimes of Hitler and Goering were far too serious for a trial and argued instead for punishment by an executive decree of the Allied governments. The Soviets went down their own path. They created their own war crimes commission, the Extraordinary State Commission, and asked Soviet lawyers to assess the criminal responsibility of Nazi leaders for invading other countries in pursuit of "predatory goals."

As the war raged on, Allied lawyers found themselves sharply debating the definition of "war crimes." The United Nations War Crimes Commission (UNWCC) began meeting in London in October 1943. All of the Allies except for the Soviet Union participated. The chair of the commission, the British judge Sir Cecil Hurst, wanted to define "war crimes" as a violation of the laws and customs of war as set out in the Hague Conventions. But representatives from occupied Europe fought for a broader definition. The Belgian lawyer Marcel de Baer and the Czechoslovak lawyer Bohuslav Ečer argued that the commission must extend its reach to acts that fell outside of the Hague Conventions, such as the persecution of Germany's Jews. The U.S. delegate

Herbert Pell agreed and introduced a motion to treat crimes committed because of the religion or race of the victims, and crimes against stateless persons, as war crimes. He called such acts "crimes against humanity"—reviving a term that the Russians, French, and British had used in a declaration in 1915 to condemn the Ottoman slaughter of Armenians. Pell's proposal received a mixed reception in the UNWCC (and criticism from within the U.S. State Department), but the idea that certain abuses were crimes against humanity soon took hold.

De Baer and Ečer also urged their colleagues in the UNWCC to expand the definition of war crimes to include "the crime of war." They argued that "without the crime of aggressive war there would be no war crimes" and deemed it "illogical" to "punish the products of the crime and not the crime itself." Soviet lawyers had come to the same conclusion. In the summer of 1943, Trainin completed a report for Soviet leaders titled "The Criminal Responsibility of the Hitlerites," which the Soviets published as a book the following year. Trainin argued for the criminal responsibility of perpetrators at all levels. Calling the plea of superior orders a "saving bunker" for war criminals, he maintained that soldiers should face punishment for breaches of the laws and customs of war. But the greatest degree of criminal responsibility, he suggested, belonged to Germany's leaders. He argued that Hitler and his circle should be tried not only for traditional war crimes but also for waging the war—committing a "crime against peace"—in the first place. Trainin coined the term "crimes against peace" and defined it as: acts of aggression; propaganda of aggression; the conclusion of international agreements with aggressive aims; the violation of peace treaties; provocations designed to stir up trouble between states; terrorism; and the support of fifth columns. To try Nazi leaders for crimes against peace, he called, not surprisingly, for an international tribunal.

Trainin's arguments spread across Europe to London. In October 1944, his ideas were discussed by the UNWCC. Ečer continued to insist that Nazi leaders be held responsible for launching an illegal war. He further argued that defining the war as "criminal" made it possible to see acts like "the extermination of foreign races" not "as simple 'violations of laws and customs of war' but as instruments of a general criminal policy." Ečer noted that Soviet jurists strongly supported "the opinion that the preparation and launching of this war are crimes for which the authors must bear penal responsibility." Using Trainin's term, he proclaimed that the war "must be punished as a crime against peace." In the wake of the October meeting, Ečer presented the UNWCC with a detailed report on Trainin's book. Many of the delegates brought copies of the report back to their governments; in November it was forwarded to the State Department, which sent it on to the White House with a copy of the book in translation.

In January 1945 two lawyers from the U.S. War Department's Special Projects Branch, Murray Bernays and D. W. Brown, wrote a secret report for President Franklin D. Roosevelt on the question of whether starting the current war was a crime for which Nazi leaders could be tried and punished. They answered yes. International law evolves with "the public conscience" and it could no longer "be disputed that the launching of a war of aggression today is condemned by the vast majority of mankind as a crime," they argued. They noted that a number of Allied lawyers, including Trainin and the British lawyer Hersch Lauterpacht, shared this view. An Allied declaration calling out the criminality of aggressive war would "rest on solid grounds," and would itself take on the power of "valid international law."

As Allied victory began to seem all but certain, American and British leaders came to embrace the idea of bringing Nazi leaders before an international tribunal. After the Nazi surrender in May 1945, plans to organize the International Military Tribunal (IMT) began in earnest. Representatives from the United States, Great Britain, the Soviet Union, and France met in London that summer to discuss the IMT's framework. Among the participants were prominent lawyers such as French law professor André Gros, Supreme Court Justice Robert H. Jackson, and the Soviet lawyer Trainin. Much of the discussion centered on the charges, which comprised Article 6 of the Nuremberg Charter. It was agreed that the defendants would be charged with traditional war crimes (violations of the rules and customs of war) as well as the crime of waging an illegal war. The latter was labeled "crimes against peace" and included the "planning, preparation, initiation, or waging of a war of aggression,

1946: The International Military Tribunal in Nuremberg. The four judges and their four alternates (left) preside in the courtroom of the Palace of Justice. From left to right are Alexander Volchkov (USSR), Iona Nikitchenko (USSR), Norman Birkett (Britain), Geoffrey Lawrence (Britain), Francis Biddle (USA), John Parker (USA), Henri Donnedieu de Vabres (France), and [not visible] Robert Falco (France). (HULTON ARCHIVE/GETTY IMAGES)

or a war in violation of international treaties, agreements or assurances." The idea of an illegal war no longer seemed quite so controversial.

The most heated discussions about Article 6 centered on crimes against civilians, labeled in an initial draft as "atrocities, persecutions, and deportations on political, racial or religious grounds." All the participants agreed that these crimes should be tried and punished—but once again questions about state sovereignty came into play. Could the IMT address Germany's treatment of its own citizens? The charge of crimes against civilians was soon renamed "crimes against humanity" and defined as "murder, extermination, enslavement, deportation, and other inhumane acts" committed against civilian populations as well as "persecutions on political, racial or religious grounds." But it was ultimately limited to crimes committed "in execution of or in connection with" the planning or waging of aggressive war. Germany's persecution and extermination of its Jewish population would only be prosecutable as a crime against humanity if it could be tied to the Nazi war of aggression.

In November 1945, the United States, Great Britain, France, and the Soviet Union convened the IMT at the Palace of Justice in Nuremberg, Germany, to try 22 former Nazi leaders for war crimes, crimes against peace, crimes against humanity, and conspiracy. Those in the dock included members of Hitler's inner circle as well as government ministers, military leaders, and propagandists. For ten months, the world learned in shocking detail about the horrors of the concentration camps and the crematoria, the mobile killing squads and gas vans, and the death pits of Babi Yar. The word "genocide" was introduced to the world, thanks to the efforts of Raphael Lemkin, a lawyer with the U.S. War Department (and a Polish-Jewish refugee) who coined the term. It appeared in Count Two of the Indictment—War Crimes—and was defined as the intentional destruction of "particular races and classes of people and national, racial, or religious groups." During the trials the

Raphael Lemkin (© ESTATE OF ARTHUR LEIPZIG, COURTESY OF HOWARD GREENBERG GALLERY, NEW YORK/NATIONAL PORTRAIT GALLERY, SMITHSONIAN INSTITUTION)

term came to be used more broadly to describe a "deliberate and systematic plan" to wipe out peoples and cultures. British chief prosecutor Sir Hartley Shawcross argued in his closing speech that the Nazis had pursued genocide "in different forms" against different peoples, and that the methods had included deportation, death by starvation, forced assimilation, and outright murder.

In many ways Nuremberg was a success. The Allies had put their differences aside and had worked together to create a comprehensive record of the crimes of the Third Reich and to bring the former Nazi leaders to justice. The vast majority of those tried (nineteen defendants) were convicted, most on multiple charges. The IMT established the criminal responsibility of those who waged aggressive war and committed crimes against humanity. It served as a precedent for further trials, such as the Tokyo Trial of 1946-48 and the subsequent U.S.-led Nuremberg Military Tribunals of 1946-49, and it opened up a new era in international law. Ideas about justice and human rights that were articulated during the trials fed into a broader discussion about the role that new institutions like the United Nations (established in October 1945) could play in preserving the peace.

The Charter of the United Nations required member nations to resolve their disputes "by peaceful means" and to refrain from "the threat or use of force against the territorial integrity or political independence of any state." The United Nations' court of arbitration, the International Court of Justice (ICJ), began operations in April 1946 in The Hague. But after a second devastating world war, many lawyers and leaders were hoping for something more ambitious than a reboot of the Permanent Court of International Justice. In December 1946, two months after the Nuremberg verdicts, the United Nations General Assembly passed a resolution affirming "the principles of international law" recognized in the Nuremberg Charter and judgment and asked the United Nations Codification Committee to incorporate these "Nuremberg principles" into a new international law code of "crimes against the peace and security of mankind." In the same session the General Assembly declared genocide an international crime and asked the United Nations Economic and Social Council to draft a genocide convention.

Nuremberg also had its limitations—and these too shaped the postwar discussion about war crimes. The IMT had been circumscribed from the start by concerns about state sovereignty. Crimes against humanity had been defined particularly restrictively, as only prosecutable in the context of an aggressive war. As work began on the new international law code, some lawyers called for a broader definition that would extend to a state's persecution of its own subjects or citizens during both wartime and peacetime. The IMT had also been dogged by the criticism that as a court of the victors it had no hope of being impartial. After the trials, the French judge on the IMT, Henri Donnedieu de Vabres, revealed that he had been deeply troubled at Nuremberg by such allegations of victor's justice. He argued that the creation of a permanent international criminal court would remedy this problem. Unlike the ICJ, which could only arbitrate disputes between sovereign states, this court would be able to try individuals for war crimes, crimes against humanity, and crimes against peace. It would eliminate the need for ad hoc tribunals like the IMT in the future. But as the Cold

War set in, concerns about state sovereignty only intensified. By 1952 efforts to draft a new international law code and establish an international criminal court had both run aground.

Work on the Genocide Convention went more smoothly, but only with serious compromises. In December 1948, the United Nations General Assembly unanimously approved the convention, declaring genocide (as well as inciting genocide or attempting genocide) a crime under international law. The convention defined genocide as one of several acts committed "with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group." These acts included: killing or inflicting serious physical or mental harm to the members of the group; preventing births within the group or forcibly transferring the group's children to another group; and deliberately inflicting conditions "calculated to bring about the group's physical destruction." The intent of the perpetrator was key to the crime. Drafts of the convention had included "political groups" as a category and had also covered cultural genocide (the intentional destruction of a group's identity and culture). But these clauses had provoked significant controversy and were dropped. The convention treaded carefully around the question of enforcement. It stipulated that persons charged with genocide could be tried by a national tribunal or by an international tribunal—provided that the contracting parties accepted the latter's jurisdiction. The idea of an international genocide tribunal also proved controversial and was soon scrapped. Even so, some states worried about infringements on their sovereignty: the United States signed the treaty but did not ratify it until 1988.

During the Cold War, the Nuremberg principles shaped the international community's understanding of criminal responsibility and war crimes, even as plans to create a new international law code and an international criminal court came to naught. Terms like "crimes against humanity," "crimes against peace," and "genocide" became central to discussions about international law and human rights, as did a greater awareness of the need to protect civilians in war zones. The Geneva Conventions of 1949 contained specific provisions on providing humanitarian relief to the civilian populations of occupied territories. At the same time, though, this Nuremberg-inspired language of human rights and international law quickly became highly politicized: the Soviet Union and the United States began to regularly denounce one another's foreign and domestic policies as "crimes against peace" and "crimes against humanity."

Three hundred skulls sit in lines outside a chapel in Rwanda on November 6, 1994, as authorities investigate the genocide that resulted in the death of one million Tutsis in April 1994. (SCOTT PETERSON/HULTON ARCHIVE/GETTY IMAGES)

As Europe was becoming divided into east and west, Western European lawyers and politicians also created their own postwar institutions, such as the Council of Europe, a human rights organization founded in 1949, and its European Court of Human Rights (ECtHR). The latter, which began operations in 1959 in Strasbourg, France, adjudicated complaints submitted by states or individuals concerning abuses of civil and political rights. It did not deal with war crimes per se, but ruled on a wide range of human rights violations, including the rape, torture, and murder of civilians as well as attacks against protected civilian sites such as hospitals, schools, and residential buildings. Council of Europe members were expected to enact the ECtHR's decisions, as the court had no enforcement mechanisms of its own.

Cold War politics had made an international criminal court untenable. After the collapse of the Soviet Union in 1991, the United Nations gradually revisited the possibility of a more robust system of international justice. In the 1990s, the Yugoslav Wars and the genocide in Rwanda brought questions about war crimes, international law, and individual criminal responsibility back into the spotlight. The absence of a permanent court to try atrocity crimes meant that there was still a need for ad hoc tribunals. The United Nations Security Council established such tribunals for Yugoslavia and Rwanda: in 1993 it created the International Criminal Tribunal for the Former Yugoslavia (ICTY) and in 1994 the International Criminal Tribunal for Rwanda (ICTR). Both tribunals successfully prosecuted individuals, including leaders, for crimes against humanity, genocide, and other grave violations of international humanitarian law. Both were inspired by the IMT and gave new force to the Nuremberg principles and to the international law conventions that the horrors of the Second World War had inspired.

The ICTY and the ICTR both adopted the definition of genocide from the Genocide Convention. But they differed in other respects. The ICTY statute defined "war crimes" as grave breaches

of the Geneva Conventions of 1949 as well as "other violations of the laws and customs of war." The ICTR statute did not use the term "war crimes," but instead spoke of "war victims" and listed prosecutable violations of the Geneva Conventions of 1949 (and their 1977 Additional Protocol) such as murder, torture, pillage, the taking of hostages, rape, and enforced prostitution. Both tribunals based their understandings of crimes against humanity loosely on the Nuremberg Charter—as "inhumane acts" committed against civilians, including murder, extermination, enslavement, deportation, imprisonment, torture, rape, and persecutions on political, racial and religious grounds. The ICTY restricted crimes against humanity to acts committed during military conflicts, but allowed that such conflicts could be internal. The ICTR limited crimes against humanity to crimes committed during internal armed conflicts (reflecting the situation in Rwanda); it stipulated that such crimes had to have been committed "as part of a widespread or systematic attack" against civilians "on national, political, ethnic, racial or religious grounds." The ICTY and the ICTR had something else in common: neither had the authority to prosecute the crime of aggression (crimes against peace).

The work of these ad hoc tribunals gave new life to the idea of a permanent international criminal court. In 1994 the United Nations International Law Commission set to work on a new statute for such a court and worked with fresh momentum on a Draft Code of Crimes Against the Peace and Security of Mankind. The draft code was completed in 1996, but never ratified. The International Criminal Court (ICC), on the other hand, after intense negotiations and numerous compromises, actually came into being. In July 1998, at a United Nations conference in Italy, 120 states adopted the Rome Statute, the ICC's founding treaty. The Rome Statute created the ICC as an independent judicial body separate from the United Nations. The court began operations in July 2002 in The Hague. The Rome Statute did not grant immunity to state leaders, recognizing that they are often "at the root of war crimes." Nor did it exempt military officers from responsibility for crimes committed by their subordinates. The ICC has the jurisdiction to investigate crimes committed on the territory of member states, crimes committed by the nationals of member states, and crimes that were referred to it by the United Nations Security Council—opening the way to the possible prosecution of leaders of countries that had not ratified the Rome Statute.

The ICC was authorized from its start to investigate and rule on three categories of crimes: genocide, crimes against humanity, and war crimes. The definition of genocide in the Rome Statute was lifted directly from the Genocide Convention. The definition of crimes against humanity built upon previous understandings of the term—but went significantly further. It included the persecution of "any identifiable group" on "political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law." It also included murder, extermination, enslavement, unjust imprisonment, torture, deportation, sterilization, forced pregnancy, rape, and other sexual crimes when committed as part of "widespread or systematic attack against any civilian population" (regardless of whether the victims are part of an identifiable group). Finally, the definition included conduct that had come to be recognized as criminal well after Nuremberg, such as apartheid and enforced disappearances. The ICC's understanding of crimes against humanity also differed from the Nuremberg (and ICTY) definition in another important respect: it allowed that such crimes could occur during peacetime.

The "war crimes" category in the Rome Statute was the most extensive, with a long and detailed list of offenses. These included grave breaches of the Hague and Geneva Conventions, such as the mistreatment of civilians and prisoners of war, as well as other violations of the laws and customs of war, such as the use of prohibited weapons and the bombing of undefended towns and villages. Like the Hague and Geneva Conventions, the statute specifically called out attacks on hospitals, schools, historic monuments, and places dedicated to religion, art, science, or charitable purposes. The Rome Statute's list of war crimes also included "outrages upon personal dignity" such as rape, sexual slavery, forced prostitution, forced pregnancy, and forced sterilization. And it included more recently recognized war crimes, such as the conscription of children into military service.

The fourth possible category of crimes included in the Rome Statute was preparing and waging a war of aggression. However, the signatories could not agree on the meaning of "aggression" (which the Nuremberg Charter had left undefined) and the court's jurisdiction over this crime was put on hold. Finally, at a 2010 conference in Uganda, an agreement was reached. The Kampala Amendments (codified as Article 8bis of the Rome Statute) defined the "crime of aggression" as "the planning, preparation, initiation or execution" of "an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation" of the Charter of the United Nations. An "act of aggression" was then defined as "the use of armed force" by one state to attack "the sovereignty, territorial integrity or political independence" of another state with or without a declaration of war. Examples could include invasion, bombardment, occupation, and annexation.

Aggression was defined specifically as a leadership crime. The ICC could investigate and prosecute "the planning, preparation, initiation or execution" of "an act of aggression" committed by someone with the authority "to exercise control over or to direct the political or military action of a state." The language "control or direct" was intended to be significantly limiting; the IMT, by contrast, had applied a broader "shape or influence" standard. The ICC's power to prosecute leaders for aggression was further constrained by limitations on its jurisdiction that were added to appease states concerned about their sovereignty. Non-ICC states (their leaders and cit-

izens) were exempted from prosecution for aggression even if they invaded an ICC member state. Member states were given the choice to opt out of ICC jurisdiction for "aggression crimes." The Kampala Amendments went into force in 2018. But to date, only a modest number of ICC member states—43 out of the 123 parties to the Rome Statute—have agreed to accept the court's jurisdiction over the crime. These are significant limitations on the ICC's jurisdiction, as we are now seeing very clearly in the context of Russia's war against Ukraine.

The current landscape of international justice

So, what are the international institutions currently in place to investigate Russian war crimes in Ukraine, and how much can each actually do? What are the chances of bringing Russian soldiers, officers, and leaders to justice? The ICC and the Council of Europe's ECtHR have both embarked on investigations. Each has a different jurisdiction and different limitations. Only the ICC can try individual war criminals. The ECtHR's mandate is to resolve disputes between states pertaining to the European Convention of Human Rights; it can deal with war through the lens of this convention. But it has long been stymied by Russia's refusal to heed its rulings. In February, the Council of Europe expelled Russia; in June, the Russian State Duma passed a bill ending the ECtHR's jurisdiction in the Russian Federation.

The ICJ has also been involved in trying to quell the conflict. Ukraine brought a case against Russia to the ICJ in late February. It argued that Russia had invaded on false pretenses, with a phony claim that Ukraine was carrying out a genocide against Russian speakers within its borders. The ICJ made a significant ruling in Ukraine's favor in March, issuing an emergency order directing Russia to stop the war and cease all military operations in Ukraine. The vote was 13-2, with the Russian and Chinese judges dissenting. The ICJ ruling was a moral victory—but it had no teeth. The ICJ counts on the promise of states to follow its rulings. It has no enforcement mechanism of its own, but must rely on the United Nations Security Council, where Russia (one of five permanent members) has a veto which it has used to oppose any actions against its leaders.

A playground in front of a school that was shelled and destroyed by Russian forces on July 21, 2022. (IVA ZIMOVA/PANOS PICTURES/REDUX)

The fact is that Russia has shown no interest in adhering to international law or in abiding by any international institution's decisions. Putin has been cynically manipulating the language of international law to make bogus accusations against Ukraine, while acting with impunity. Investigations into Russia's war crimes have been continuing and fact-finding missions have been launched nonetheless—even as the mechanisms for justice remain uncertain.

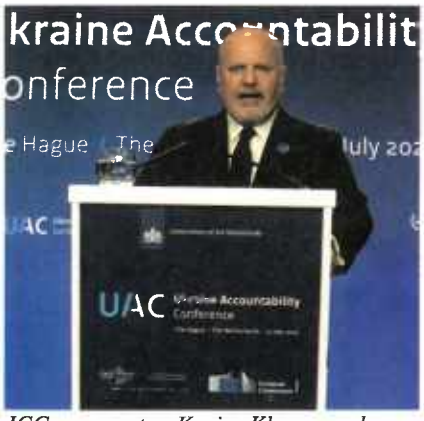
In April the United Nations General Assembly voted to suspend Russia from its Human Rights Council. A few weeks later, the Human Rights Council set up a Commission of Inquiry which has been gathering evidence of human rights abuses and international humanitarian law violations carried out by Russia in Ukraine. It has pledged to focus on violations of the rights of children and other vulnerable populations, as well as sexual crimes. It has been interviewing local authorities and victims. At the end of its investigation, the Commission of Inquiry will make recommendations toward the goals of holding perpetrators accountable and ensuring justice for victims. But it can only do so much. The commission can publicize information about Russian war crimes and share its findings with governments (as the UNWCC did during the Second World War), but it does not have a mandate to organize trials. Once again, it would likely be up to the United Nations Security Council to act—and Russia's veto means that this won't happen.

A number of other organizations have also been gathering evidence of Russian war crimes and crimes against humanity in Ukraine. These include the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE), which has documented numerous human rights violations including the torture, deportations, and targeted killing of civilians, and the enforced disappearances of local Ukrainian officials. None of these organizations have their own mechanisms for accountability.

The international institution best positioned to bring at least some Russian perpetrators to justice may very well be the ICC. Russia and Ukraine are not members of the ICC. But back in 2014 Ukraine accepted the ICC's jurisdiction to investigate war crimes committed on its territory. As a result, the ICC can investigate allegations of genocide, crimes against humanity, and war crimes committed in Ukraine "by all parties to the conflict." The ICC opened such an investigation in early

March, with support from dozens of member states—and has sent a large team of detectives to Ukraine to gather evidence. The European Union Agency for Criminal Justice Cooperation (Eurojust) has been supporting this effort. In March, Eurojust established a Joint Investigation Team, bringing together the ICC Prosecutor's Office and Ukrainian, Polish, Lithuanian, Estonian, Latvian and Slovakian judicial authorities. Its mandate is to "collect, analyze, and preserve evidence in relation to core international crimes" and to share this evidence with the ICC and other relevant international and national institutions.

As the ICC and Eurojust continue their work of gathering evidence, Ukraine has been preparing its own investigations of Russian soldiers for murder, rape, the bombing of schools and hospitals, and other breaches of the laws and customs of war. In August, Ukraine's Prosecutor General's office announced it was looking into more than 25,000 possible war crimes and was receiving hundreds of new reports every day. Ukraine has already tried several cases in its own national and regional courts. The ICC is also working with Ukraine's Prosecutor General's Office to decide how to coordinate their work. International lawyers point out that that ICC is meant to be a court of last resort. And ICC prosecutor Khan has affirmed that Ukraine has "the first right and indeed the first responsibility to investigate and prosecute crimes" committed within its borders. But Khan has also suggested that given "the scale of criminality, which is absolutely massive," Ukraine cannot do this alone. He has proposed that the ICC and Ukraine might coordinate their efforts and decide on a case-by-case basis whether the best forum is the ICC or Ukraine's national court system.



ICC prosecutor Karim Khan speaks on July 14, 2022, during an ICC-hosted conference in The Hague about pursuing justice for the victims of Russian war crimes in Ukraine. Representatives from forty countries, including Ukraine, agreed to coordinate their efforts to investigate crimes and hold perpetrators accountable. (SELMAN AKSUNGER/ANADOLU AGENCY VIA GETTY IMAGES)

At least a dozen European countries (including Lithuania, Germany, and Sweden) have also launched independent investigations into Russian war crimes, under the principle of "universal jurisdiction"—which allows states to investigate and prosecute certain grave international crimes regardless of where they were committed. The idea of universal jurisdiction (which has its roots partly in the Geneva Conventions of 1949) remains controversial and has been used sparingly in the past. (It was used by Israel in 1961 to try Adolf Eichmann.) Some international lawyers believe that it holds great promise for bringing Russian perpetrators to justice. Here too, ICC prosecutor Khan has spoken of the need for coordination and for the international community to adopt "an overarching strategy." Other international law experts and United Nations officials have agreed, warning that the overlapping efforts of different states and institutions may lead to "the re-traumatization of victims arising from being interviewed multiple times by different investigators."

What role should the United States have in these and other efforts? The United States never ratified the Rome Statute, and its role in the ICC's efforts will necessarily be limited. U.S. Ambassador for Global Justice Beth Van Schaack has met with ICC prosecutor Khan to discuss U.S. support for the ICC's work in Ukraine. The Biden administration has also been considering ways to support Ukraine's own investigations. In May, the United States joined the European Union and the United Kingdom to establish the Atrocity Crimes Advisory Group for Ukraine, which, according to Secretary of State Blinken, will directly support Ukraine's efforts "to document, preserve, and analyze evidence of war crimes and other atrocities committed by members of Russia's forces in Ukraine, with a view toward criminal prosecutions." It will assist in a number of areas including forensic investigations. Also in May, the State Department launched the online platform Conflict Observatory as a central hub to preserve and share satellite images and other evidence of Russian atrocities in Ukraine for use in future possible trials.

The ICC is moving forward with plans to try Russian war crimes, but cannot try Russian leaders for aggression—since Russia is not a state party to the Rome Statute (or its Kampala Amendments). There has been growing momentum among world leaders and international lawyers to create an ad hoc tribunal that could try Russia's leaders specifically for preparing and waging an aggressive war. One possible option is a special international tribunal established by a treaty among interested states or by an agreement between Ukraine and the United Nations or by the European Union. Various draft indictments have been drawn up for a special international tribunal; they all imagine Russian President Vladimir Putin as the chief defendant.

Another proposed option is the creation of a special Ukrainian court to prosecute aggression in close collaboration with the European Union, comprised of Ukrainian and other European judges. Some lawyers have argued that such a court would have to be international in order to prosecute Putin; they maintain that leaders have immunity from prosecution before any national court under customary international law. In the meanwhile, Ukraine is poised to prosecute lesser figures for aggression on its own. Ukraine's Prosecutor General's office announced this summer that it had already identified over six hundred Russians to indict and try for this crime; its list includes government officials, military officers, police chiefs, and Kremlin propagandists.

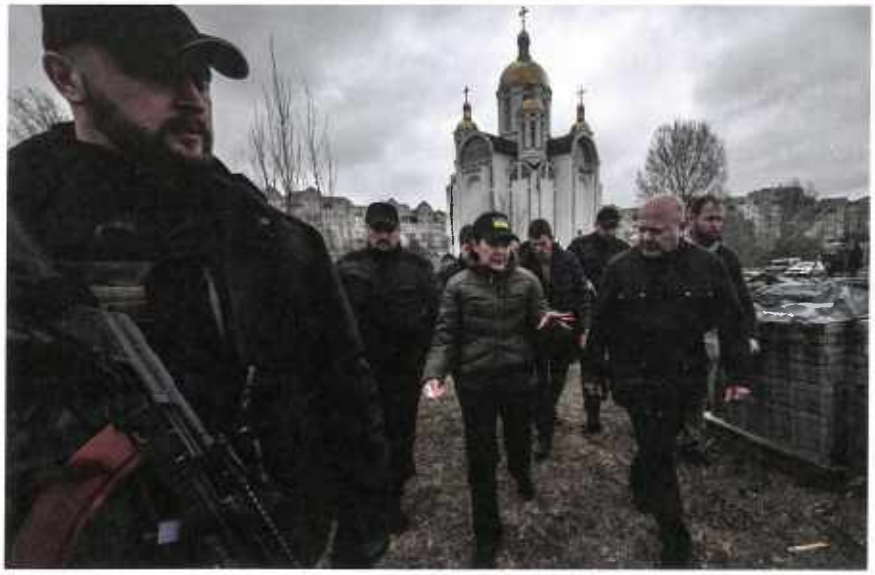
Where do we go from here?

The international community has come a long way since the Hague Conven-

tions when it comes to defining and punishing war crimes. Nuremberg was a critical turning point, fully affirming the idea that individuals—including leaders—could be held criminally responsible for atrocities and breaches of international law. At the same time, our understanding of international law greatly expanded as a result of Nuremberg to include important new categories of crimes: crimes against humanity, genocide, and crimes against peace. It is now generally agreed that waging a predatory war of conquest against another state is a punishable criminal act. Nuremberg, and the new international conventions it inspired, brought hope for enduring peace and the vision of a permanent international criminal court, even as the Cold War created new fault lines and tensions.

That international court, the ICC, finally became a reality after the end of the Cold War. And yet we still find ourselves living in the shadow of the postwar moment. We have numerous international institutions that have been established to protect individual and collective human rights and to punish those who violate them. But concerns about yielding sovereignty to these institutions have remained a huge issue for a number of powerful states. The United States, China, Russia, and India are among the 70 or so United Nations member states that have opted not to join the ICC, limiting its power and reach. The United Nations has been similarly constrained. Russia took the defunct Soviet Union's place on the Security Council and has been using its veto to prevent that institution from effectively functioning. Could international outrage over the war in Ukraine and the United Nations' limited ability to act ultimately lead to a rethinking of the purpose and utility of the Security Council? Might this outrage at Russia be powerful enough to lead the United States to consider joining the ICC? What role should the United States play in supporting international human rights and bringing war criminals to justice—in Ukraine and more generally?

Russian soldiers and leaders can be held individually criminally responsible for war crimes. There are mechanisms in place to prosecute Russian soldiers and officers for violations of the laws and customs of war and for crimes against civilians; such trials can be held by Ukraine and by the ICC. Some lawyers have argued that this is, and should be, enough. The crimes of genocide and aggression will be much harder to prosecute. Genocide is notoriously difficult to prove because of the need to show intent. Aggression poses its own set of challenges because of the conditions set out in the Kampala Amendments and other international-law restrictions on trying heads of state. But these crimes are also arguably the most important to prosecute and to talk about, for reasons that de Baer, Lemkin, Ečer, and Trainin well understood. Holding Russian leaders and officers accountable for aggression and genocide helps get at the purpose behind the war—something that is critical for making sense of things in the present and for posterity, something that is essential for justice. It makes it possible to see the murders, deportations, rapes, disappearances, and other terrible crimes being carried out by Russian forces in Ukraine not "as simple 'violations of the laws and customs of war'" but as instruments of a "general criminal policy" and as an all-out assault on the Ukrainian people.



Ukraine's former Prosecutor General Iryna Venediktova (C) and ICC prosecutor Karim Khan (R) visit a mass grave on the grounds of the Church of St. Andrew and Pyervozvannoho All Saints in Bucha, on the outskirts of Kyiv, on April 13, 2022. (FADEL SENNA/AFP VIA GETTY IMAGES)

In their 1945 memo, War Department lawyers Bernays and Brown told President Roosevelt that international law evolves with "the public conscience." Where are we today with regard to international law? We have well-defined categories of war crimes. We have international organizations and international courts devoted to international humanitarian law and human rights. But international law, like all law, loses meaning without enforcement. For war crimes to be punished, for our international legal system to work, states must be willing to get behind international principles, join international institutions, and pursue enforcement. States, even large and powerful ones, must be willing to cede some degree of sovereignty. In order to prosecute Russian leaders for the crime of aggression some kind of ad hoc tribunal will be necessary. But maybe someday in the future the dream of de Vabres and others will come true and we won't need ad hoc tribunals. For this to happen we would need a permanent international criminal court with a much broader mandate. Is this in America's interest or not? This is something that Russia's war of aggression against Ukraine and Putin's threats to the rest of the world might help us to decide.

discussion questions

1. What is more important, the establishment of an international law code or the preservation of state sovereignty? Explain why.

2. Are rulings by international courts valuable even if they have no enforcement mechanisms of their own? Why or why not?

3. Russia's veto power on the UN security council allows it to avoid any actions against its leaders. Is it time to restructure international organizations such as the United Nations?

4. What is the best course of action to hold Russian soldiers and leaders responsible for war crimes committed in Ukraine?

5. Many argue that the current international courts do not have enough power to deter war crimes from occurring. If an international court with a broader mandate is introduced, what would this mean for the U.S. and would we be likely to support it?

suggested readings

Bosco, David, **Rough Justice: The International Criminal Court in a World of Power Politics**. Oxford University Press, January 16, 2014. 312 pp. Analysis of the give-and-take involved in the creation of the International Criminal Court. Insightful discussion of the crime of aggression and the negotiations that led to the Kampala Amendments.

Crawford, Julia and Thierry Curvellier, **Ukraine Responds to Warfare with Lawfare**. Justiceinfo.net, March 25, 2022. Discussion of Ukraine's strategic use of the international legal system to fight back against Russian aggression. Maps out possible pathways to justice.

Fadel, Leila interview with Leila Sadat, **Why genocide is difficult to prove before an international criminal court**. NPR Morning Edition, April 12, 2022. Interview with international law professor Leila Sadat on the difference between "crimes against humanity" and "genocide" and on the need to prove intent for the prosecution of genocide. Also discusses possible U.S. cooperation with the ICC.

Heller, Kevin Jon, **Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis**. Journal of Genocide Research, July 6, 2022. Discussion and assessment of possible mechanisms for prosecuting Putin and other Russian leaders for waging a war of aggression against Ukraine. Evaluates international as well as domestic options and looks at the question of immunity.

Hirsch, Francine, **Soviet Judgment at Nuremberg: A New History of the International Military Tribunal after World War II**. Oxford University Press, July 8, 2020. 560 pp. Retells the story of the Nuremberg Trials, bringing in the positive and negative contributions of the Soviet Union. Reveals the unexpected critical role of Soviet lawyers in the postwar development of international law.

Hull, Isabel, **Anything Can Be Rescinded**. London Review of Books, April 26, 2018. Thoughtful critique of Oona A. Hathaway and Scott J. Shapiro's *The Internationalists* (2018). Argues that the Kellogg-Briand Pact should be seen not as the product of "ideas and thinkers" but as the result of "a long, halting and uneven process by which European states tried to limit war among themselves."

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