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## The Third Wave – Accountability for International Crimes in an Age of Extremes

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# THE THIRD WAVE—ACCOUNTABILITY FOR INTERNATIONAL CRIMES IN AN AGE OF EXTREMES<sup>1</sup>

*David M. Crane*<sup>2</sup>

*It is impossible to found a civilization on fear and hatred and cruelty. It would never endure.*<sup>3</sup>

George Orwell

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We live in an age of extremes, where kaleidoscopic dirty little wars break out across the globe and xenophobic heads of state, clutching to nationalism and populism as a base of political support, step away from

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1. *See generally The Third Wave-Accountability for International Crimes in an Age of Extremes: Hearing on Pursuing Accountability for Atrocities before the H. Comm. on Foreign Affairs, Tom Lantos Human Rights Commission* (2019), [https://humanrightscmission.house.gov/sites/humanrightscmission.house.gov/files/documents/PursuingAccountability\\_DMCrane\\_SFR.pdf](https://humanrightscmission.house.gov/sites/humanrightscmission.house.gov/files/documents/PursuingAccountability_DMCrane_SFR.pdf) [<https://perma.cc/DRS6-QNYN>] [hereinafter *Third Wave*] (statement of David M. Crane, Principal, Justice Consultancy International, LLC) (discussing the ebbs and flows of international humanitarian law throughout the twentieth century).
  2. Founding Chief Prosecutor of the international war crimes tribunal for West Africa called the Special Court for Sierra Leone, 2002-2005. Principal, Justice Consultancy International, LLC. Founder of the Syrian Accountability Project and the Yemeni Accountability Project. Professor of Global Social Justice Practice, Ohio University; Retired member of the Senior Executive Service of the United States.
  3. GEORGE ORWELL, 1984 338 (1949).

an age of accountability to a threatening age of the strongman.<sup>4</sup> This geo-political phenomenon, the likes of which we have not seen since the early 1930's, threatens over seven decades of a world order that was cobbled together from the ashes of World War Two<sup>5</sup> International peace and security was the cornerstone of keeping or restoring that peace.<sup>6</sup>

This unforeseen step away from a world order based on the rule of law and international peace and security by settling our disputes peacefully and using force only as a last resort threatens this new century and weakens our ability to hold tyrants, dictators, and thugs accountable. Many have worked hard to maintain a sense of stability through the rule of law, but that work is threatened. In some ways, we are going backwards. Let us consider recent history.

### HISTORICAL BACKDROP-THE BLOODY 20TH CENTURY

Almost a quarter of a billion people died of unnatural causes in the 20th century, read that as 225 million dying from war, disease, famine, and atrocity.<sup>7</sup> Of that number, over a 100 million died at the hands of their own government.<sup>8</sup> The beast of impunity fed on the edges of civilization for decades.<sup>9</sup> Atrocity in Turkey, Germany, the Belgian Congo, behind the iron curtain, in Central and South America, China, the Soviet Union to name a few went unaccounted for.<sup>10</sup> Humankind chose not to use the rule of law to settle the problem, but resorted to looking the other way for political expediency.<sup>11</sup> Just in the Cold War

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4. See David M. Crane, *The Kaleidoscopic Conflict That Is Syria*, THE HILL (Feb. 24, 2019), <https://thehill.com/opinion/national-security/431036-the-kaleidoscopic-conflict-that-is-syria> [<https://perma.cc/BRU5-BECS>].
  5. See David M. Crane et al., *FBI's Human Rights Investigators Critical to Prosecuting 'Atrocity Crimes'*, THE HILL (Feb. 22, 2019, 9:30 AM), <https://thehill.com/opinion/criminal-justice/430482-fbis-human-rights-investigators-critical-to-prosecuting-atrocity> [<https://perma.cc/9DKN-HHBD>].
  6. See *id.*
  7. See generally Hannah Ritchie & Max Roser, *Causes of Death*, OUR WORLD IN DATA (April 2019), <https://ourworldindata.org/causes-of-death> [<https://perma.cc/YX8E-EPTL>] (giving statistics on causes of death in the 20th century, including an emphasis on unnatural causes).
  8. See David Satter, *100 Years of Communism—And 100 Million Dead*, WALL ST. J. (Nov. 6, 2017, 6:43 PM), <https://www.wsj.com/articles/100-years-of-communism-and-100-million-dead-1510011810> [<https://perma.cc/3M2R-UMD8>].
  9. See generally, R. J. RUMMEL, *DEATH BY GOVERNMENT* (1994) (describing incidents of genocide and government mass murder).
  10. *Third Wave*, *supra* note 1.
  11. *Id.*

alone almost 90 million people perished, more than the two world wars combined.<sup>12</sup> The Cold War checkmated any sense of justice for victims of atrocities.<sup>13</sup> It was an age of the dictator, who, unfettered by any sense of maintaining the rule of law, ran amok.<sup>14</sup> As long as they pledged allegiance to one side of this bi-polar world, the powers at the time allowed them to do as they wished within their own borders.<sup>15</sup>

Ironically, in the middle of this very dark century, humankind created unwittingly a future for accountability today.<sup>16</sup> In four amazing years, 1945-1949, the international community created/drafted the United Nations, the International Military Tribunal at Nuremberg, the Universal Declaration of Human Rights, the Genocide Convention, and the revamped Geneva Conventions of 1949.<sup>17</sup> These efforts would go dormant for 40 years during the Cold War, yet would be the glowing embers from which sprang the fire of justice in the 1990's, called the Age of Accountability.<sup>18</sup> Helen Keller stated forcefully in this century, "until the great mass of the people shall be filled with the sense of responsibility for each other's welfare, social justice can never be attained."<sup>19</sup> The next Age of Accountability started us on that road, or did it?

#### FROM THIS BLOODY CENTURY AN AGE OF ACCOUNTABILITY

With the end of the Cold War and the shifting of political dynamics worldwide, the stresses created by this power-shift caused great strife and a rise of international crimes.<sup>20</sup> Stepping from the Cold War model of "looking the other way" regarding an atrocity; as the beast of impunity began to once again feed on the edges of civilization in Africa,

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12. *Id.*

13. *See id.*

14. *See* David M. Crane, *A Darkened Age—The Rule of Law in Protecting Morality and Humanity*, JURIST (June 6, 2017, 5:37:30 PM), <https://www.jurist.org/commentary/2017/06/david-crane-a-darkened-age/> [<https://perma.cc/45TY-SAAF>].

15. *See id.*

16. *Third Wave*, *supra* note 1.

17. *Id.*

18. *Id.*

19. HELEN KELLER, *OUT OF THE DARK: ESSAYS, LECTURES, AND ADDRESSES ON PHYSICAL AND SOCIAL VISION* 35 (1905).

20. *Third Wave*, *supra* note 1.

Europe, Asia, and elsewhere, the world for the first time resorted to courts and tribunals to account for those crimes.<sup>21</sup>

Five courts were created that will forever show that the rule of law is a powerful and stabilizing force.<sup>22</sup> They were the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts for Cambodia, and the International Criminal Court.<sup>23</sup>

Important jurisprudence was established, showing the world that it had the capacity to resort to the power of the law to create international peace and security.<sup>24</sup> Due to the efforts of these justice mechanisms, the jurisprudence established allows for holding accountable heads of state who commit international crimes; goes after those who harm women and children; destroy cultural property; and use of rape as a tool of genocide; among many other jurisprudential points.<sup>25</sup> It was a golden age, lit by the flame that burst forward in the early 1990's from the embers of Nuremberg and Tokyo and buttressed by those bright and shining for years in the middle of the bloody 20<sup>th</sup> century.<sup>26</sup>

During this Age of Accountability, we saw the creation of modern international criminal law.<sup>27</sup> At all levels the foundation for the jurisprudence and rules of procedure and evidence were laid for all

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21. *See e.g.*, United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827 (May 25, 1993); United Nations International Tribunal for Rwanda, S.C. Res. 955 (Nov. 8, 1994).
22. United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827 (May 25, 1993); United Nations International Tribunal for Rwanda, S.C. Res. 955 (Nov. 8, 1994); Special Court for Sierra Leone, G.A. Res. 135 (Aug. 14, 2000); Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, G.A. Res. 57/228 (Dec. 18, 2002); Rome Statute of the International Criminal Court (July 1, 2002) 2178 U.N.T.S. 3.
23. *Id.*
24. *Id.*
25. *Id.*
26. *See generally*, Hiram Abtahi, *Crimes Against Humanity and the Armed Conflict Nexus: From Nuremberg to the ICC*, ESIL Conference Paper Series, 3 EUR. SOC. INT'L L. 1, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2363608](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363608) [<https://perma.cc/RN3C-GYTU>].
27. *Id.*

time.<sup>28</sup> International tribunals and courts across the globe sought accountability for the destruction of millions.<sup>29</sup> In large measure, they succeeded.<sup>30</sup>

Though generally expensive, these new justice mechanisms showed the jaded international community that with a political will, accountability was there to be had.<sup>31</sup> It was a heady time to be sure, but certain fundamental legal doctrines were established such as: that heads of state can be tried for international crimes;<sup>32</sup> the United Nations can create tribunals and courts under the charter directly or in bilateral arrangements with member states;<sup>33</sup> the crimes of rape can be used as a tool of genocide;<sup>34</sup> the destruction of cultural property is an international crime;<sup>35</sup> the use of child soldiers is also an international crime;<sup>36</sup> among many other key rulings.

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28. See United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, G.A. Res. 827 (May 25, 1993); United Nations International Tribunal for Rwanda, G.A. Res. 955 (Nov. 8, 1994); Special Court for Sierra Leone, G.A. Res. 135 (Aug. 14, 2000); Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, G.A. Res. 57/228 (Dec. 18, 2002); Rome Statute of the International Criminal Court (July 1, 2002) 2178 U.N.T.S. 3.
29. Abtahi, *supra* note 26.
30. *Id.*
31. Jon Silverman, *Ten Years, \$900m, One Verdict: Does the ICC Cost Too Much?*, BBC NEWS (Mar. 14, 2012) <https://www.bbc.com/news/magazine-17351946> [<https://perma.cc/8W9N-8JKE>].
32. See *Leaders Facing Justice*, CFR, available at <https://www.cfr.org/timeline/leaders-facing-justice> [<https://perma.cc/B62X-UEAM>] (stating that heads of state can be prosecuted internationally).
33. See United Nations, *UN Documentation: International Law*, UN DAG HAMMARSKJÖLD LIBRARY available at <https://research.un.org/en/docs/law/courts> [<https://perma.cc/7B26-VAKG>].
34. See *Prosecution v. Muhimana*, Judgment, Case No. ICTR-95-1B-T, (Apr. 28, 2005), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-95-1b/trial-judgements/en/050428.pdf>.
35. See *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Appeal Judgement (Int'l Crim. Trib. For the Former Yugoslavia July 15, 1999).
36. See *Landmark ICC verdict over use of child soldiers*, AMNESTY INTERNATIONAL (March 14, 2012) available at <https://www.amnesty.org/en/latest/news/2012/03/landmark-icc-verdict-over-use-child-soldiers/> [<https://perma.cc/SD3Y-2RA6>].

THE LIGHT OF THE RULE OF LAW DIMS IN AN AGE OF  
EXTREMES

The balance created by the paradigm of international peace and security, that is the hallmark of the United Nations, is threatened in this surprising age of extremes or what I refer to as the age of the strongman. The entire 74-year structure of a global order that arose from the horrors of the Second World War is cracking, wobbling, and shifting in its foundation.

Nationalism not seen since the early 1930's is on the rise.<sup>37</sup> In many regions of the world, leaders are turning inward, looking to their own resources to create political dynamics that will have long-term geopolitical consequences.<sup>38</sup> It is an unanticipated dynamic in a world that once embraced the concept of a global village.<sup>39</sup>

In this climate, the rule of law is questioned, particularly at the international level. The wind in the sails of accountability that blew strongly across the globe in the age of accountability, have diminished or are dead calm. The bright red thread of accountability is politics and the political will today is not one supporting international justice mechanisms. There is no leadership in rallying support for seeking justice for the oppressed. As strongmen around the world consolidate power and chip away at freedom, the suffering has increased with little hope of a just future.<sup>40</sup>

Strongmen across the globe are belittling the rule of law and questioning our international paradigm that is the United Nations.<sup>41</sup> We are in an unsettled time the future of which is cloudy and dark.

THE IMPACT? THE THIRD WAVE IN ACCOUNTABILITY AND  
MOVEMENT FORWARD

Accountability for international crimes is not perfect and was never touted as such.<sup>42</sup> In many respects, progress in accountability can be two steps forward and one-step back, but it does move forward. Despite

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37. Florian Bieber, *Is Nationalism on the Rise? Assessing Global Trends*, 17: 5 ETHNOPOLITICS 519, 519 (2018).

38. *Id.*

39. *Id.*

40. Bieber, *supra* note 37, at 519.

41. *Id.*

42. *See President of International Criminal Court Calls for Greater Cooperation in Holding Atrocity Crime Perpetrators Accountable*, UN NEWS, (Oct. 27, 2017) <https://www.un.org/press/en/2017/ga11966.doc.htm> [<https://perma.cc/8VV9-PDUY>].

the challenges presented, they are just new challenges, ones that have been dealt with before and these challenges will continue to nip at the heels of modern international criminal law and accountability.

It is best to look at this evolution of accountability as waves hitting the rocky coast of lawlessness. The First Wave was the efforts by the four victorious powers after World War II deciding to hold the leaders of Nazi Germany (and concurrently in Tokyo the Japanese leaders) accountable for their international crimes against the world.<sup>43</sup> This was an important step forward and set up the ground floor for future efforts.

<sup>44</sup>

The International Military Tribunal at Nuremberg and the subsequent Council 10 trials there established procedures, jurisprudence, and frankly a new idea that nations can resort to the law and not the gun to account for atrocity crimes.<sup>45</sup> Yet all this went very dark during the bi-polar tragedy of the Cold War that almost washed away any gains made at Nuremberg.

The Second Wave in accountability was after the Cold War and the fall of the iron curtain across central Europe.<sup>46</sup> As the world began to adjust to these new realities, political and ethnic strife erupted in several parts of the world such as in Yugoslavia and Rwanda.<sup>47</sup> For the first time in history, the international community reached for the law and created the first modern tribunals, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.<sup>48</sup> Both adhoc tribunals established under Chapter 7 of the UN Charter were mandated to prosecute those

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43. See Abtahi, *supra* note 26, at 4.

44. *Id.*

45. See Alexander Sukharev, *The Nuremberg Tribunal and the Problems of International Rule of Law*, 77 REVUE INTERNATIONALE DE DROIT PENAL 711, 712 (2006).

46. See Pierre Hazan, *How the ICTY has changed our world*, JUSTICEINFO, (Jan. 3, 2018) <https://www.justiceinfo.net/en/tribunals/36013-how-the-icty-has-changed-our-world.html> [<https://perma.cc/QZ7C-S3E6>].

47. See Zachary Winkler, *Ongoing Ethnic Tensions in Bosnia and Rwanda: A Comparative Study*, VANDERBILT HISTORICAL REVIEW, (Nov. 16, 2016) <http://vanderbilthistoricalreview.com/ongoing-ethnic-tensions/> [<https://perma.cc/ELW6-3UYF>].

48. United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827 (May 25, 1993); United Nations International Tribunal for Rwanda, S.C. Res. 955 (Nov. 8, 1994).

responsible for the war crimes, crimes against humanity, and genocide.<sup>49</sup> The perpetrators faced the power of the law.<sup>50</sup>

During the last decade of the 20th century, a horror story was percolating in West Africa that saw the destruction of tens of thousands of human beings in Sierra Leone, Liberia, and Guinea.<sup>51</sup> The world drawing upon this new concept of accountability, created the world's first hybrid international tribunal, a tribunal I helped found, the Special Court for Sierra Leone.<sup>52</sup>

During this period, the international community came together in Rome to create a permanent criminal tribunal to prosecute the gravest of crimes.<sup>53</sup> Additionally, the world looked back and created a unique internationalized domestic court in Cambodia to account for what is now called 'the killing fields'.<sup>54</sup>

This was the age of accountability, referred to above, where the international community attempted using various justice mechanisms to account for the tragedies of Yugoslavia, Rwanda, Sierra Leone, and Cambodia with a permanent court in The Hague to carry forward the giant steps of these other courts and tribunals.<sup>55</sup> As stated earlier, we now have the jurisprudence, the rules of evidence and procedure, and the experience to face the many new accountability challenges we now face in this age of extremes and the strongman.<sup>56</sup>

As the world steps away from international accountability as the standard for atrocity accountability, the Third Wave shows the resilience of humankind's focus on accountability. However, as the world has stepped away from tribunals and courts, new methodologies and ideas are working across the globe maintaining the standard that those who commit war crimes, crimes against humanity and genocide will be held accountable.

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49. *Id.*

50. *Id.*

51. See Jon Lee Anderson, *Charles Taylor and the Killing Tree*, THE NEW YORKER, (Apr. 26, 2012) <https://www.newyorker.com/news/news-desk/charles-taylor-and-the-killing-tree> [<https://perma.cc/VMV3-YWCL>].

52. Special Court for Sierra Leone, G.A. Res. 135 (Aug. 14, 2000).

53. See Amy McKenna, *The International Criminal Court (ICC)*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/story/the-international-criminal-court-icc> [<https://perma.cc/Z74A-38ZN>] (stating that the Rome Statute created the ICC in 1998).

54. See generally, Anne Heindel and John D. Ciorciari, *Hybrid Justice: the Extraordinary Chambers in the Courts of Cambodia* (University of Michigan Press, Feb. 20, 2014).

55. See Abtahi, *supra* note 26.

56. *Id.*

In this new Third Wave, we see the creation of international mechanisms for Syria and Myanmar that are collecting data and information on those conflicts and turning it into usable criminal information and evidence for future local, regional, or international justice mechanisms.<sup>57</sup> This is an important step in maintaining the ability of the international community to investigate, indict, and try aberrant heads of state and their henchman who ignore the law and kill their own citizens.<sup>58</sup>

Another step forward to fill the vacuum created by a lack of political will regarding courts and tribunals, is domestic courts in various jurisdictions, mainly in Europe; trying individuals for harms done to their citizens by those who violated domestic war crimes statutes in places such as Syria.<sup>59</sup> This is a positive step in getting state parties to the Rome Statute and other nations developing their domestic capacity in trying war crimes cases. Nations such as Germany, Sweden, Denmark, and Spain are to be commended for their efforts.<sup>60</sup>

The final accountability efforts in the Third Wave is the rise of grassroots efforts by nongovernmental organizations, taking the experience garnered from the Second Wave and the age of accountability, and professionally building criminal files on those who are committing international crimes in places such as Syria, Myanmar, South Sudan, and Yemen among other places. Organizations such as the Syrian Accountability Project, the Yemeni Accountability Project, the Syrian Justice Accountability Center, and the Commission for International Justice and Accountability are excellent examples of like-minded experts in the field of atrocity accountability coming together and building professional files on perpetrators of international crimes.<sup>61</sup>

Recently, the newly formatted International Humanitarian Roundtable<sup>62</sup> met at the world famous Chautauqua Institution to

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57. G.A. Res. 71/248 (Jan. 11, 2017); H.R.C. Res. 39/2 (Sept. 25, 2018).

58. *Id.*

59. Deborah Amos, *Mounting Syrian War Crime Cases Raise Hopes for Justice Against a Brutal Regime*, NPR, (Sept. 24, 2019, 5:08 PM) <https://www.npr.org/2019/09/24/754863320/how-europe-has-become-the-epicenter-for-syrian-war-crimes-cases> [<https://perma.cc/WAK8-GVRG>].

60. *Id.*

61. See *The Syrian Accountability Project*, available at: <https://syrianaccountabilityproject.syr.edu/> [<https://perma.cc/K5DH-J5WB>]; *The Yemen Accountability Project*, available at: <https://case.edu/law/centers-institutes/cox-international-law-center/yemen-accountability-project> [<https://perma.cc/WKH6-JGU4>].

62. The Thirteenth International Humanitarian Law Roundtable (a new evolution from the famed IHL Dialogs) met 25-27 August 2019. Charged

consider these challenges and how humankind is adapting to meet the challenges to hold those who commit international crimes are held accountable.<sup>63</sup> A subsequent white paper to be published in the fall of 2019 will capture the thoughts and perspectives of the Roundtable participants.<sup>64</sup> In some way, despite the appearance of retrenchment and stepping away from all that was achieved during the Second Wave, these new efforts of the Third Wave may even improve and solidify our ability to create accountability mechanisms. We will see.

### CONCLUDING THOUGHTS

We have come too far and have accomplished too much together to step away from accountability. The rule of law in a robust human rights paradigm keeps the world stable. In some ways, the great gyroscope balances a world in an age of extremes. We must never take our eyes off the horizon of hope, peace, and the law. We should support and encourage the efforts by many in this Third Wave of accountability.

In many outreach visits to my client the people of Sierra Leone, as Chief Prosecutor of the Special Court for Sierra Leone, I told them three things: that no one is above the law, the law is fair, and the rule of law is more powerful than the rule of the gun. It truly is more powerful than the rule of the gun, let us keep it so.

I will close with a quote from Naomi Wolf as the clouds of nationalism swirl about us darkening the landscape of accountability: “In a fascist system, it is not the lies that count but the muddying. When citizens cannot tell real news from fake, they give up their demands for accountability bit by bit.”<sup>65</sup>

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in a keynote by Justice Navi Pillay, Chairperson Brenda Hollis convened four subgroups chaired by esteemed scholars, practitioners, as well as students to consider these issues discussed above. The results were signed by Ms. Hollis as the first Roundtable Principles, and the work product will be published as a white paper in the Proceedings volume in 2020.

63. *Id.*

64. *Id.*

65. Naomi Wolf, *Fascist America in 10 easy steps*, GUARDIAN (Apr. 24, 2007, 3:02 PM), <https://www.theguardian.com/world/2007/apr/24/usa.comment> [<https://perma.cc/T2Y2-27Z3>].