



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas Wesleyan Law Review

Volume 12 | Issue 1

Article 6

10-1-2005

The Failure of the International Laws of War and the Role of Art and Story-Telling as a Self-Help Remedy for Restorative Justice

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Available at: <https://doi.org/10.37419/TWLR.V12.I1.5>

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TRANSNATIONAL NARRATIVES

THE FAILURE OF THE INTERNATIONAL LAWS OF WAR AND THE ROLE OF ART AND STORY-TELLING AS A SELF-HELP REMEDY FOR RESTORATIVE JUSTICE

Susan Tiefenbrun^{1†}

Dedicated to Alex Petrushka, who survived years in Auschwitz, and who taught me to play the piano.

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1. ¹Susan Tiefenbrun is a Professor of Law and Director for the Center of Global Legal Studies at Thomas Jefferson School of Law, and President of the Law and Humanities Institute (LHI). She is also a pianist who has studied with a Polish piano teacher who survived several years in Auschwitz and whose survival story is reminiscent of Wladyslaw Szpilman’s horrifying narrative recounted in the book and the film, *The Pianist*. Professor Tiefenbrun wishes to thank her research assistant, Mr. Chris Ramey, for his invaluable assistance with the research for this article. A shorter version of this article was presented at a Conference on Law and the Humanities’ Representation of the Holocaust, Genocide and Other Human Rights Violations at Thomas Jefferson School of Law on January 16-17, 2005. Professor Tiefenbrun wishes to thank Professor Jordan Paust, Justice Richard Goldstone, formerly of the Constitutional Court of South Africa, and Judge Theodor Meron, President of the International Criminal Tribunal for Crimes Against the Former Yugoslavia, for their comments on earlier drafts of this article.

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I. INTRODUCTION

Lawyers *represent* the interests of their clients. In accordance with the Rules of Professional Responsibility,² lawyers must defend their clients zealously through the art of persuasion. Writing memoirs, reading a book, making a movie, and watching a film are different acts of the same process known as *representation*, which is presentation again and anew with persuasion. Like novelists and film makers, lawyers try to communicate information clearly and persuasively,³ while proposing and defending their own interpretations⁴ of the meaning of a specific passage in a legal text that needs interpretation and decoding.⁵

2. MODEL RULES OF PROFESSIONAL CONDUCT R. 1.3, cmt. 1 (2005), *reprinted in* PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES: 2005–2006 ABRIDGED EDITION 13 (John S. Dzienkowski ed., 2005) (“A lawyer shall act with reasonable diligence and promptness in representing a client. . . . A lawyer must also act with commitment and dedication to the interests of the client and *with zeal* in advocacy upon the client’s behalf.” (emphasis added)) The lawyer’s duty to defend “with zeal” is analogous to the artist’s endeavor to communicate persuasively through rhetorical figures and literary style.

3. See Susan Tiefenbrun, *Legal Semiotics*, 5 CARDOZO ARTS & ENT. L.J. 89, 92 (1986).

4. See generally Ronald Dworkin, *Law as Interpretation*, 60 TEX. L.REV. 527 (1982) (discussing the exercise of interpretation in legal practice).

5. See generally BERNARD S. JACKSON, SEMIOTICS AND LEGAL THEORY 19–21 (1985) (differentiating decoding and interpretation); See Tiefenbrun, *supra* note 3, at 92 (applying semiotics to legal discourse).

Whether they are legal or artistic in nature, messages are carried by media⁶ such as legal opinions, laws, cases, contracts, books, or movies. Writers and film makers of artistic media typically communicate messages via a literary discourse that contains rhetorical figures, tropes, and other types of concretization that transmit meaning indirectly through a concentration on form rather than content.⁷ Literary discourse produces in the reader's and viewer's mind a heightened awareness of the author or film maker working between the lines and behind the scenes to convey meaning artfully through a skillful manipulation of form and a subtle delivery of content. Thus, artistic discourse is dominated by form over content. In contrast, legislators and lawyers dealing with legal media typically try to keep the legal discourse in the realm of content, shunning style and literary intrusions that can bring vagueness and multiplicity of meaning to the legal document. Thus, legal discourse is dominated by content over form. Lawyers are taught to avoid metaphor and other rhetorical devices in their legal writing in order to achieve clarity and to reduce ambiguity. Lawyers are taught to remain on the solid ground of scientific language, which is more quantitative, direct, clear, precise, and less encumbered by the indeterminacy and multiplicity of meanings created by tropes and other rhetorical figures.

This simplified and reductionist dichotomy between literary and legal language is misguided because it focuses only on the differences between the two disciplines and does not recognize their similarities. Literary discourse is not strictly artistic, and legal discourse is not strictly scientific. While some judges enjoy using metaphor and literary or rhetorical flourishes to persuade readers of their legal opinions,⁸ others actually deny the benefits of looking at law through the lens of literature because of their belief in the essentially different na-

6. Marshall McLuhan's proverbial remark, "The Medium is the Message" emphasizes the importance of media and the role that form plays in the communication of the message. See MARSHALL MCLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 7 (1965); see also MARSHALL MCLUHAN & QUENTIN FIORE, *THE MEDIUM IS THE MESSAGE* 8 (1967) (discussing the influence of style versus content).

7. See generally SUSAN TIEFENBRUN, *A STRUCTURAL AND STYLISTIC ANALYSIS OF LA PRINCESSE DE CLEVES* (1979) (discussing the nature of literary discourse, the role of style and the predominance of rhetorical devices in literary language, and the concentration of form over content in literary discourse).

8. See Julie Stone Peters, *Review Essay*, 9 *CARDOZO STUD. L. & LITERATURE* 259, 264 (1997). Storytelling and rhetoric are central to law practice and study—"matters" (writes Paul Gewirtz) "internal to its discipline, quite apart from interdisciplinary adventures." Cicero or Adam Smith or, for that matter, Oliver Wendell Holmes—though (by 1925) Cardozo seems to have understood that matters had indeed changed—would have been surprised by the need to explain that the reading of literature has something to say to the reading of law. In fact, defense is not really necessary, because neither the study of literature as window on the law nor the claim that rhetoric and narrative are essential components of legal argument are really under attack.

ture of literary and legal discourse.⁹ Nevertheless, like readers and viewers of film, lawyers, too, must interpret, and they do so according to theories of interpretation oftentimes borrowed from literature (e.g. historical analysis, structuralism, post-structuralism, deconstructionism, linguistics, semiotics, stylistics, narrativity, and post-modernism). Because of the nature of literary discourse, whose messages are hidden and conveyed indirectly by a predominance of style and rhetorical devices, readers of literature and viewers of film must engage actively in the interpretation of literary discourse, and they do so by decoding¹⁰ hidden meanings that are embedded in the deep narrative structures of the respective artistic medium.¹¹ Even though legal discourse is supposed to be direct, clear, and unambiguous, it, too, oftentimes requires interpretation especially when the words used to convey the legal messages have more than one meaning. Lawyers and judges resort to various interpretive theories, known as hermeneutics, original intent, textualism,¹² and many other interpretive theories used by literary scholars in order to clarify the meaning of ambiguous constructions in legal texts. Since the processes of persuasive representation and interpretation are the essence of lawyer's work as well as the work of literary writers and film makers, there is no wonder that law and novels or law and film have often been linked in an international and interdisciplinary movement called "law and literature."¹³

Proponents of the law and literature movement look at law through the lens of the humanities with an aim toward humanizing the judicial system. These laudable aims of the law and literature movement happen to coincide with a similar trend in public international law toward the humanization of the laws and customs of war.¹⁴ International hu-

9. See RICHARD A. POSNER, *LAW AND LITERATURE* 7 (rev. ed. 1998). Judge Pierre Leval has also expressed reluctance to consider legal opinions as literature. At a Yale symposium, Judge Leval stated: "I will use the occasion to object to a movement that tells judges we should consider our opinions literature and invest them with the power of literary and dramatic rhetoric," Peters, *supra* note 8, at 264.

10. See JACKSON, *supra* note 5, at 19–21 (distinguishing between decoding and interpretation).

11. See Tiefenbrun, *supra* note 3, at 92.

12. See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23 (1997) (discussing "textualism," which Scalia distinguishes from "strict constructionism"). Scalia correctly emphasizes the role of "context" in textual interpretation. *Id.* at 37.

13. See POSNER, *supra* note 9, at 4, for a history of the law and literature movement, beginning with the publication in 1973 of James Boyd White's book, *The Legal Imagination*, and continuing with Richard Weisberg's *The Failure of the Word*, in 1984, and the establishment of the Law and Humanities Institute in 1979, which has grown into an international institution devoted to research and writing in the area of law and the humanities.

14. THEODOR MERON, *International Law in the Age of Human Rights: General Course on Public International Law*, in 301 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1, 24 (2003) [hereinafter MERON, HAGUE ACADEMY]. See also Society of Professional Journalists, *A Brief History of the Laws of War* (2003), <http://www.globalissuesgroup.com/geneva/history>.

manitarian law,¹⁵ also known as the laws of armed conflict¹⁶ or the laws of war,¹⁷ is evolving and “acquiring a more humane face”¹⁸ by the adoption or application of human rights law¹⁹ and the principles of humanity²⁰ after 1945. This article is about decoding the principles of international humanitarian law illustrated dramatically in the narrative and cinematic representations of the life of one man, Wladyslaw Szpilman, a Holocaust survivor, who lived to tell his story in the memoirs he wrote shortly after the war. Szpilman’s memoirs became a book and later a film called *The Pianist*, directed by Roman Polanski.

The book and the film, *The Pianist*, represent more than just the story of one survivor of a war. These two different art forms reflect the failures of international humanitarian laws²¹ that were systemati-

html (last visited Sept. 24, 2005) (timeline of the history of the laws of war).

15. See Johannes Chan, *Implementation of International Humanitarian Law*, 8 ASIA PAC. L. REV. 211, 211–28 (2000) (introducing the concept, its development, and its implementation in Asia, particularly Hong Kong). See generally THE NEW HUMANITARIAN LAW OF ARMED CONFLICT (Antonio Cassese ed., 1979) (presenting several different perspectives on the development of humanitarian law and its problems).

16. See generally THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS (Dieter Fleck et al. eds., 1995).

17. See THE LAW OF WAR: A DOCUMENTARY HISTORY (Leon Friedman ed., 1972); See generally Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT’L L.J. 49 (1994). The laws of war have been assembled piecemeal, and are, in fact, still under construction. See generally Elliott L. Meyrowitz, et al., *The Past 75 Years and the Laws of War*, 75 AM. SOC’Y INT’L L. PROC. 214 (1981) (discussing the failure to incorporate restrictions on nuclear weapons in the laws of war). For a brief history of the laws of war, which have been around since the beginning of recorded history, see Society of Professional Journalists, *supra* note 14.

18. MERON, HAGUE ACADEMY, *supra* note 14, at 24.

19. See generally JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES (2d ed. 2003) (discussing that the human rights movement is said to have been born out of the disasters of the Second World War in 1945, although human rights laws had a rich history prior to World War II). *Id.* at Chapters 5–6. Reaction to the horrors of the Holocaust and other war crimes and crimes against humanity during World War II contributed to the reaffirmation of human rights and human dignity through international agreements and institutions. Human rights include civil, political, social, economic and cultural rights enshrined in post 1945 treaties and international instruments including, but not limited to, the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights, the Convention Against All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture, and the Convention on the Rights of the Child. See generally INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, AND MORALS 99–100, 118–22 (Henry J. Steiner & Philip Alston eds., 1996) (discussing how the atrocities committed during World War II helped create the above mentioned treaties and international instruments).

20. See MERON, HAGUE ACADEMY, *supra* note 14, at 24. See *infra* text accompanying notes 144–45 for a discussion of the principle of humanity.

21. This Article discusses the failings of the laws of war as implemented during the Second World War due to the inadequacy of the laws and their insufficient enforcement. For a more recent assessment of the adequacy of the laws of war enacted after

cally violated by the Nazis during the Warsaw occupation, the Warsaw Ghetto uprising, and the Warsaw rising. Moreover, the book and the film reveal the power of art, the therapeutic and curative roles that music played in the victim's life during the Second World War, and the beneficial role that literature and film can play as self-help remedies in a system of restorative justice. Can art act as a preventive measure to deter the commission of atrocities in the future by educating society about history and moral values?

This Article asks several questions that seem particularly relevant in view of the current state of war that our peace-loving society is engaged in today. What is the role of the laws and customs of war if the warriors don't play by the rules? What is the role of art and music during and after the commission of atrocities? Can art prevent further atrocities, assuage victims of catastrophic events, inspire the collective conscience of perpetrators, and protect victims from the reality of pain caused by war and the violations of the international laws of armed combat? Can a book or a film that substantially recreates and authentically memorializes large scale violations of the law act in the interests of justice? Can art provide a form of self-help equitable remedy like a declaratory judgment that offers non-monetary compensation and restorative justice to the victim as well as moral education to society in an aim toward preventing further atrocities? This challenging issue is of critical importance today as the twenty-first century finds itself once again caught up in wars, genocides, and inhumanity.

This Article discusses the following four issues: (1) the legitimacy of an interdisciplinary approach to the study of the laws and customs of war; (2) the failure of international humanitarian laws to deter the large scale perpetration of inhumane acts committed during World War II, as represented in the film and book, *The Pianist*; and (3) the role of retributive justice after World War II and the Nuremberg Trials, as compared to (4) the role of restorative justice that stories told in artistic representations of massive violations of the laws of war can provide. This Article argues that story-telling through art is a form of self-help remedy available to the victims of atrocities. Art that produces a historic and authentic record provides society at large with a form of moral education. Art, then, has the capacity to be a long-term preventive measure against the commission of genocide, war crimes, and human rights violations in the future.

World War II, see Mark L. Sacharoff, *Problems and Paradoxes of the Laws of Warfare (The Aftermath of the Persian Gulf War: Strengthening the Laws of Warfare)*, 6 TEMPLE INT'L AND COMP. L.J. 71, 71-79 (Spring 1992); See generally Marco Sassoli & Laura M. Olson, *International Humanitarian Law*, 94 AM. J. INT'L L. 571 (2000) (discussing the 1949 Geneva Conventions, international criminal law, and the conflict in Bosnia and Herzegovina).

II. THE LEGITIMACY OF AN INTERDISCIPLINARY METHOD

A. *The Law and Literature Movement*

This Article uses an interdisciplinary method adopted by scholars in the law and literature movement²² in order to examine the laws and customs of war during World War II, as represented in *The Pianist*, a book written by the famous Polish pianist, Wladyslaw Szpilman, who was a survivor of the Warsaw Ghetto, and as illustrated in a film of the same name directed by Roman Polanski, who also survived the horrors of the Holocaust and the discrimination of the Cracow Ghetto.

1. Three Analytical Approaches to Law and Literature: Law-in-Literature, Law-as-Literature, and The Impact of Law on Literature

Law and literature is an interdisciplinary field of investigative research that is classified into three different types of analytical approaches: the study of law-in-literature, the study of law-as-literature, and the study of the impact of law on literature and on the arts in general.²³ For example, some scholars in the law and literature movement examine classical literary works that embody and reflect the law with an aim toward humanizing the law (*i.e.* the law-in-literature approach). These law-in-literature scholars look closely at the great works of literature that feature lawyers as protagonists or trials as drama in order to decode the author's particular point of view of the legal system or to decipher the role that lawyers play in society.²⁴

Other scholars in the law and literature movement choose to examine and interpret legal texts such as legislative enactments, cases, contracts, or judicial opinions through the lens of the humanities (*i.e.* the law-as-literature approach). These law-as-literature scholars look at legal texts as if they were literary discourses capable of being analyzed and interpreted by the careful application of well-known literary theories of interpretation (like structuralism or deconstructionism) to the language of legal documents.

Other scholars in the law and literature movement prefer to look at areas of the law that have an important impact on the arts, such as

22. See generally Robin West, *The Literary Lawyer*, 27 PAC. L.J. 1188 (1995–1996) (discussing the history and development of the law and literature movement). See generally JAMES BOYD WHITE, *ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS* (1994) (discussing the creation of authority in literature, law, and politics). See generally JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985) (discussing the movement of literature and the laws).

23. See generally Gary Minda, *Law and Literature at Century's End*, 9 CARDOZO STUD. L. & LITERATURE 245 (1997) (discussing the three analytical approaches).

24. See generally RICHARD H. WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* (1984) (analyzing the lawyer's role in society).

intellectual property law, copyright regulations, the role of parody in copyright protection, censorship of fiction, and the constitutional protection of freedom of speech.

These three different types of investigative research have one element in common. Each one of these analytical approaches uses an interdisciplinary method that enables the researcher to see issues in one field (the law) from a new and enriching perspective of a different field (literature). This Article adopts the law-in-literature approach by uncovering international legal principles and laws of war hidden in the interstices of the literary and cinematographic narratives of *The Pianist*.

2. The History of the Law and Literature Movement

At first glance, the history of the law and literature movement may appear to be rather short and simple, having begun as recently as 1973. However, the law and literature movement is actually a complex field that has developed over the years into an intellectually diverse²⁵ hydra with its tentacles firmly planted in antiquity. Seeing the obvious interconnection between law and literature, classical poets, playwrights, and novelists like Homer, the Greek tragedians, Shakespeare, Moliere, Dostoevsky, Kafka, Melville, Camus, and many other literary giants have written expressively and extensively about the law, about trials, about natural law, and about the drama of revenge.²⁶ Since many famous people in the arts were actually practicing lawyers, or at least legally trained, it is no wonder that legal reasoning permeates their artistic works.²⁷ John Donne, Fielding, Sir Walter Scott, Honore de Balzac, James Fenimore Cooper, Flaubert, Tolstoy, Kafka, Galsworthy, Wallace Stevens, Tchaikovsky, Robert Schumann, Hogie Carmichael, and Cole Porter are just a few of the many artists, musicians, and writers who were either practicing lawyers or who had legal training.

The law and literature movement began as an interdisciplinary field of organized scholarship with the publication in 1973 of James Boyd

25. See Minda, *supra* note 23, at 245.

26. POSNER, *supra* note 9, at 5.

27. See DANIEL KORNSTEIN, *THE MUSIC OF THE LAWS* 107–10 (1982) (discussing why legal interpretation is like musical interpretation). Writers also reflect legal reasoning. For example, many of the plays of Corneille are often structured like a succession of arguments for the defense followed by arguments for the prosecution. Corneille, like most French writers before the eighteenth century, had a typically classical education which amounted to an education in the law and legal reasoning. This legal education is reflected in Corneille's writing style. See generally Susan Tiefenbrun, *The Big Switch: A Study of Cinna's Reversals*, in *SIGNS OF THE HIDDEN: SEMIOTIC STUDIES* (1980) (examining Corneille's *Cinna*). See also CHRISTIAN BIET, *DROIT ET LITTÉRATURE SOUS L'ANCIEN RÉGIME: LE JEU DE LA VALEUR ET DE LA LOI* (2002).

White's book, *The Legal Imagination*,²⁸ which established the legitimacy of the law-in-literature approach. Unlike many legal positivists who conceive of the law and of legal language as a science rather than as an art, James Boyd White views the law as an *art*; and the lawyer as an *artist*.²⁹ White sees the value of constructing a conception of the law and of the "good lawyer" as reflections of a humanistic and literary tradition.³⁰ In contrast to James Boyd White's optimistic view of the legal profession, Richard Weisberg's groundbreaking work in law-in-literature, *The Failure of the Word*,³¹ presents the lawyer as a "pontificating" protagonist who "makes . . . linguistic 'promises' with neither the intent nor the effect of enhancing social life or strengthening community."³² Weisberg's view of lawyers and the law is also expressed in his book, *Vichy Laws and the Holocaust*,³³ which exposes the casuistic legal reasoning and justification that lawyers found for drafting patently discriminatory laws that denied Jews the right to fundamental human rights during World War II.

In the late 1970s and 1980s, some scholars in the law and literature movement turned away from the law-in-literature approach which views literary texts as embodiments of the law and began, instead, to study legal texts as a unique "genre" of literature.³⁴ This phenomenon is known as the "law-as-literature" approach. These law-as-literature scholars believe that law can be translated, deconstructed, interpreted, and decoded in accordance with different interpretive theories borrowed from literature: structuralism,³⁵ deconstruction,³⁶ linguistics, semiotics,³⁷ stylistics,³⁸ and post-modernism. The legitimacy of the

28. JAMES BOYD WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973).

29. West, *supra* note 22, at 1189.

30. *Id.*

31. WEISBERG, *supra* note, at 24.

32. West, *supra* note 22, at 1204.

33. RICHARD H. WEISBERG, *VICHY LAWS AND THE HOLOCAUST* (1996).

34. Minda, *supra* note 23, at 245.

35. See generally JONATHAN CULLER, *STRUCTURALIST POETICS STRUCTURALISM: LINGUISTICS, AND THE STUDY OF LITERATURE* (1975) (discussing structuralism in linguistics and literature); FREDRIC JAMESON, *THE PRISON-HOUSE OF LANGUAGE: A CRITICAL ACCOUNT OF STRUCTURALISM AND RUSSIAN FORMALISM* (1972) (illustrating application of structuralism).

36. See generally JACQUES DERRIDA, *DE LA GRAMMATOLOGIE* (1967) (showing that Jacques Derrida is the father of the Deconstructionist movement); see generally JACQUES DERRIDA, *LA DISSEMINATION* (1972) (illustrating the technique of deconstruction); see generally JACQUES DERRIDA, *L'ECRIURE ET LA DIFFERENCE* (1967) (providing another look at Derrida's early deconstruction work); see generally GEOFFREY H. HARTMAN, *SAVING THE TEXT: LITERATURE, DERRIDA, PHILOSOPHY* (1981) (discussing Derrida's work); See generally Thomas Keenan, *Deconstruction and the Possibility of Justice*, 11 *CARDOZO L. REV.* 1675 (1989-1990) (providing an explanation of Derrida's role in the law and the use of deconstructionism in legal interpretation).

37. See generally JACKSON, *supra* note 5; see generally Tiefenbrun, *supra* note 3 (discussing the use of semiotics in legal analysis).

law-as-literature approach has been the subject of much debate. While some lawyers and judges remain committed to the recognition of irreconcilable differences between literature and the law, scholars adopting the law-as-literature approach focus instead on the similarities between law and literature. The law-as-literature scholars consider the fields of law and literature to be similar because they are both composed of languages, discourses, cultures, and interpretable narratives. These scholars examine the complex and mutually beneficial relationships between the two disciplines. Thus, law-as-literature involves the study of legal and literary texts as languages that reflect ethical, political, and cultural values, as well as meanings.³⁹

In defense of the law-as-literature approach, proponents claim that the more traditional approaches to the law, known as rights theory, legal process, neutral principles, and pragmatism, have resulted in subtle forms of discrimination against non-traditional cultures. Adopting a more interdisciplinary approach to the analysis of the law, like the law-as-literature method, may have the beneficial effect of humanizing the law by focusing lawyers' attention on cultural differences.⁴⁰ But others reject outright the study of law-as-literature and prefer to remain in the literature-in-law tradition, believing that law was never meant to be a literary discourse fraught with multiple meanings, indeterminacy, or infinite interpretations.⁴¹ Those who reject the study of law-as-literature claim that law must aim at clarity, persuasion through precision, and determinacy.⁴² Richard Weisberg, who pioneered the law and literature movement, holds a more balanced view, arguing that the law and literature movement is sufficiently broad to encompass all these different theoretical perspectives.⁴³

As the studies of law-in-literature and law-as-literature developed in the 1970s and 1980s, many law schools began to offer courses, called "law and literature"⁴⁴ or "law and film" in which law students

38. See generally STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* 68–97, 246–68 (1980) (discussing stylistics).

39. Minda, *supra* note 23, at 248.

40. See *id.* at 251.

41. See generally Michel Rosenfeld, *Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism*, 11 *CARDOZO L. REV.* 1211 (1990) (showing Jacques Derrida was the original proponent of deconstructionism).

42. See POSNER, *supra* note 9, at 7. Posner states:

Law and literature have significant commonalities and intersections, but the differences are as important. Law is a system of social control as well as a body of texts, and its operation is illuminated by the social sciences and judged by ethical criteria. Literature is an art, and the best methods for interpreting and evaluating it are esthetic.

Id.

43. Richard H. Weisberg, *Family Feud: A Response to Robert Weisberg on Law and Literature*, 1 *YALE J.L. & HUMAN.* 69, 76 (1988).

44. Minda, *supra* note 23, at 245.

were asked to read literature and view films in order to discover the legal principles embedded in these narratives. In some of these courses students might also be asked to examine hermeneutics and theories of literary interpretation as applied to the interpretation of legal documents. Many scholars in the critical legal studies movement⁴⁵ have embraced these diverse theories of literary interpretation, applied them to the law, and have adopted an interdisciplinary approach to the study of the law.⁴⁶

In 1979, during the heyday of the law and literature movement, The Law and Humanities Institute (LHI) was formed in order to support scholars in the law and literature movement. LHI encourages interdisciplinary research and writing in this burgeoning field, holds literary and law salons, and organizes national and international conferences devoted to the study of law and the humanities in general. The pioneers of the law and literature movement were then and still remain on the Board of Governors of LHI, including Professor Richard Weisberg, Professor Stanley Fish, and Judge Richard Posner. The law and literature movement has grown since 1979, much to the efforts of LHI and its expanding membership. LHI⁴⁷ has now become an international institution that holds conferences on the East and West Coasts of the United States, Europe, and Asia and fosters interdisciplinary research, focusing particular attention on human rights issues represented in the arts.

This Article will look at the international laws and customs of war as represented in the literary and cinematographic narratives of Wladyslaw Szpilman and Roman Polanski in the tradition of law-in-literature and film. The Article will examine some of the causes of the failure of international humanitarian law to prevent serious war crimes, crimes against humanity, genocide, and human rights violations committed during World War II.

B. *What is Representation?*

Books and film can represent legal principles. Representation is a complex process located in a system of signs.⁴⁸ Semiotics, which is the

45. See generally Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623 (1984) (discussing the critical legal studies movement); see also David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984); see generally Mitchell Lasser et al., *Critical Legal Theory*, in LAW AND THE ARTS 115, 115–45 (Susan Tiefenbrun ed., 1999) (discussing the role of critical legal studies in the law among Duncan Kennedy, David Kennedy, Nathaniel Berman, Mitchel Lasser, Norman Silber and Lawrence Kessler).

46. See Tiefenbrun, *supra* note 3, at 153–55 (discussing the critical legal studies movement and its use of literary theories for legal interpretation).

47. The author of this Article has been President of LHI from 1998 to 2005 and is a long-standing member of LHI's Board of Governors.

48. See generally Tiefenbrun, *supra* note 3 (discussing semiotics and a bibliography related to semiotics and the law); see also UMBERTO ECO, A THEORY OF SEMIOTICS

science of signs, is offered as a fundamental course in many fields of study such as medicine, law, and literature. Signs are words or images that can send (*rep-re-sent*) clear or vague, direct or indirect messages to a receiver, who might be a listener, reader, or viewer. The clarity and understanding of the messages sent depend upon many variables, including the mode and effectiveness of the connection between the sender and the receiver of the messages and the type of communication medium chosen by the sender.

Representation is a *re-presentation* of reality, a step removed from the thing itself (*rep-res-ent*, *res* in Latin meaning “thing”); therefore, the representation of an event or an idea is always partially fictional and never totally factual.⁴⁹ This gap between truth and fiction is referred to in semiotic theory as the *referential fallacy*.⁵⁰ Testimony in court is a form of representation of reality, and the farther the witness deviates from recreating the actual thing itself, the less authentic is that witness’s representation, and the less valuable is the testimony.

Representation is also arguably the re-enactment of resentment (*rep-resent*), the expression of deep-seated and hidden emotions (*res-sentiment* in French) that can surface after the bitter experience of a catastrophe. The book and the film, *The Pianist*, are textual and cinematic representations of Szpilman’s secret thoughts and emotions, which the author expresses in a coded language in the book and which the film maker expresses somewhat differently in the movie, despite attempts by Polanski to remain close to Szpilman’s original depiction in the book. During the process of reading the book and viewing the film, both the reader and the viewer are naturally induced to decode or interpret the representations of these hidden emotions in order to find meaning in the narratives. Out of fear, embarrassment, denial, or the desire to identify with the aggressor, the victim as writer has consciously and unconsciously hidden his forbidden thoughts and feelings between the lines of his memoirs, and the film director has similarly buried these horrifying thoughts and emotions behind the scenes, so to speak, of his movie. But the victim’s frightening thoughts and emotions are not lost forever, only temporarily buried, waiting for the reader to excavate them from the deep structures of the narratives. A good reader and a good observer can unravel these secrets by studying the language of the narratives, the denotation and connotation of the words, and by taking into consideration the context and placement of the words and images on the page and on the screen.

3–31 (1979) (explaining an overview of the field of semiotics).

49. Witness’ testimony, which is a representation of reality from the witness’s point of view, is also somewhere between fact and fiction and, therefore, not totally reliable.

50. See Eco, *supra* note 48, at 58–59, for a discussion of the referential fallacy and the role of the “representamen” in Pierce’s semiotic theory.

The craftsman, writer, and film maker arrange their respective narratives carefully into segments, known as chapters or scenes, like parts of a puzzle, in which each piece plays an integral and structural role in delivering significant messages.⁵¹ Understanding the relationships between these segments, the placement of the chapters in the whole book, or the arrangement of the scenes in the movie constitutes a kind of structural analysis of the narrative that, if done systematically, can unearth hidden messages. Once decoded, these messages further reveal a system of paradoxical thought and emotion that plagues victims of torture and prolonged enslavement.

The paradox in Szpilman's life is expressed in his curiously antithetical mode of feeling both pain and pleasure during his long and symbolic ordeal in the Warsaw Ghetto. Szpilman experiences physical and psychological pain as he becomes more and more aware of the nihilism of destructive war. But Szpilman also experiences a kind of forbidden pleasure by living in the memory of his recent past, when he was the great Polish concert pianist, basking in the glory of fame and personhood. Szpilman's personhood is systematically removed during his dehumanizing and humiliating life in occupied Poland and in the Warsaw Ghetto. He is just one of many victims wearing a blue arm band, like the nameless prisoners in Nazi concentration camps with tattooed identification numbers on their forearms. During his ordeal, Szpilman tries continuously and vicariously to relive the joys of his past life through the beauty of transcendent music.

Music is another medium of communication or form of representation that is expressive, non-verbal and, therefore, more open to interpretation than written language; nevertheless, like literature or law, the interpretation of music is not indeterminate but limited by the confines of musical notation, historical context, and tradition. Music for Szpilman is a form of representation that has the power to revive his weakened body and revitalize his spirit. Music keeps Szpilman alive.

C. *The Narratives in the Book and the Film The Pianist*

1. Szpilman symbolizes all oppressed people in occupied territory

The central figure in the book and film is Wladyslaw Szpilman, who recounts his horrifying experiences in and out of the Warsaw Ghetto⁵²

51. See Tiefenbrun, *supra* note 3, at 125–29 (discussing structuralism and its application to the law and legal discourse).

52. See NORMAN DAVIES, *RISE '44: THE BATTLE FOR WARSAW 97* (2004) (discussing similar experiences in the Warsaw Ghetto);

The Ghetto functioned from November 1939 to May 1943. . . From 15 October 1941 the gates were permanently closed, inmates were subject to immediate execution if discovered outside, and the Ghetto gradually assumed the characteristics of a concentration camp. From January 1942, the Ghetto began to be emptied by regular, forced deportations to the death camps, princi-

in memoirs which he wrote shortly after the war. The fact that Szpilman wrote these memoirs so soon after he experienced and witnessed these actual occurrences increases the authenticity of Szpilman's representation of reality. Szpilman published his memoirs under a different title in Poland in 1946, and these memoirs became a book subsequently called *The Pianist*.⁵³ Years later in 2003, and in a more visual medium of communication, Roman Polanski, also a Polish survivor, retells Szpilman's story again but anew in a film similarly entitled *The Pianist*.

Szpilman's story is unique, but it is also representative of a large population of victims of the Holocaust because Warsaw possessed the largest Jewish community in the world.⁵⁴ Therefore, Szpilman's story is the story of one man and every man, *Jederman*, who suffered and survived during the war.

2. History is recounted as personal testimony in memoirs and in film

Events in the book and the film cover Szpilman's personal experiences and ultimate survival during the period of 1939–1945 when Germany invaded Poland, occupied Warsaw, and created the infamous Warsaw Ghetto. During this period, the Polish Jews established an underground resistance, and engaged heroically but tragically in the Warsaw Ghetto uprising, followed by the equally heroic and tragic rising⁵⁵ in the city of Warsaw by the Polish underground resistance. Since Szpilman's representation of his own personal experiences is done with authenticity, veracity, and sincerity, his memoirs and book serve as a source of history.

3. Differences between the representation in the book and in the film

In interviews⁵⁶ about the making of the film, Roman Polanski claims that he tried to be as faithful as possible to the original book

pally to Treblinka. After an armed uprising in April and May 1943, it became a silent, smouldering graveyard inhabited only by a handful of SS guards and a body of prisoners detailed to tidy up the ruins. It was an unspoken warning of what could happen to the city as a whole.

Id.

53. WLADYSŁAW SZPILMAN, *THE PIANIST* (Anthea Bell trans., 1999), originally published in Poland in 1946 under the title *Death of a City*.

54. *Id.* at 75.

55. See generally DAVIES, *supra* note 52 (distinguishing between the term “uprising” and “rising” to differentiate the events of the Warsaw Ghetto resistance and the resistance by citizens of the whole city of Warsaw).

56. The DVD version of the film, *The Pianist*, is followed by an interesting interview with Roman Polanski who explains how he made the film, his intentions to remain as close to the original book as possible, and Polanski's credentials as a film maker of this particular subject because of his personal experience as a Holocaust survivor in Poland. DVD: *THE PIANIST* (Universal 2002).

written by Wladyslaw Szpilman. Nevertheless, every artist, writer, and film maker inevitably puts his own imprimatur on the work he produces. Therefore, Polanski uses poetic license to make some justifiable changes from the book, especially in the selection of the musical pieces actually played by Szpilman. For example, Polanski shows Szpilman playing for his life in front of a somewhat enlightened German officer who understands the principle of humanity, appreciates music, and ultimately saves Szpilman's life. Towards the end of the film, when Szpilman is thoroughly exhausted from starvation and from the travails he has had to endure for years, Szpilman chooses unrealistically to play for this German officer the technically demanding Chopin Ballade in G Minor, which he plays flawlessly on a miraculously clean and perfectly tuned piano that suddenly appears in the midst of the rubble and chaos around him. Yet, in the book, according to Szpilman, he more realistically plays on "the glassy, tinkling sound of the untuned strings"⁵⁷ of a piano whose "action was swollen by the damp and resisted the pressure of the keys."⁵⁸ In the book, Szpilman tells us that he actually played the Chopin C-sharp Minor Posthumous Nocturne, which is much shorter and less technically challenging than the Chopin Ballade in G Minor. Nevertheless, the C-sharp Minor Posthumous Nocturne and the Chopin Ballade in G Minor are both brooding and dark. Moreover, in the book, Szpilman admits that in this very exceptional moment of survival, he played the Chopin Nocturne with difficulty, after not touching the piano for two and a half years, and having not cut his nails for a long period of time.⁵⁹ This alteration of the truth between Szpilman's and Polanski's representation of reality is an example of poetic license. Polanski changes the choice of music in order to better convey the role of hope in times of despair. Polanski understood intuitively that at this time in his life, Szpilman needed to believe that a miracle could actually happen to save him. Polanski's poetic fantasy corresponds with Szpilman's use of music throughout his ordeal. Music has the power to change Szpilman's reality into fantasy which enables him to escape or at least minimize the pain and to remain somewhat removed from the slaughter of the Poles and the absurdist nihilism surrounding him in his beloved Warsaw, which he sees reduced to ruins by the excesses of war.

Polanski's film, which he produced more than fifty years after the publication of the book, is a more visual representation of reality, which the film maker achieves with artistry, authenticity, and immediacy. Like Szpilman, who lived in the Warsaw Ghetto as a young adult, Polanski grew up as a Jew in the Cracow Ghetto. Like Szpilman, Polanski was separated from his parents when he was very young. Polanski found out second hand that his mother had died in a Nazi

57. SZPILMAN, *supra* note 53, at 178.

58. *Id.*

59. *Id.*

concentration camp, and he wandered among supporters in Catholic homes for years seeking shelter and protection until the ghetto was ultimately destroyed.⁶⁰ Polanski reports that he was used by German soldiers as target practice. Thus, Polanski the film maker was quite familiar with the complex emotions of survivors and the particular customs of occupied Warsaw. In interviews, Polanski expressed a keen desire to remain very close to the depiction in Szpilman's book and to the reality of the Warsaw Ghetto, its uprising, and the destruction of Warsaw after its own rising during the Nazi occupation. The film is a work of art, and its visual depiction of historical events shall remain in the annals of cinematic history as one of the greats.

4. The empowerment and remedial effects of writing memoirs and making films

The Nazi occupiers of the Warsaw Ghetto systematically deprived Jews of their human rights, dignity, humanity, and the basic necessities of survival in order to strip them of their personhood. It is no wonder, then, that Wladyslaw Szpilman chose to write his memoirs after his experience in the Warsaw Ghetto. Memoirs are a literary genre that significantly gives power to the writer-narrator whose voice is represented frequently on the pages of the text by the "I" of the first-person narration. The empowerment of the narrator by memoir writing is also arguably an attempt by the victim to identify with the aggressor who has assumed power over the victim throughout the ordeal. The writing of memoirs also has a cathartic and restorative effect on Szpilman in light of the years of dehumanization and self-effacement that this well-known Polish pianist was forced to endure in the Warsaw Ghetto under Nazi occupation.

Szpilman memorializes his thoughts, feelings, and recollections of past events dramatically, with authenticity, and poignancy in the form of memoirs that serve an important purpose for the victim, for other victims like the memorialist, for the perpetrators, and for society. The act of writing memoirs is an attempt to immortalize events of the past, to create a written record, and to provide a therapeutic remedy to the memorialist by a process of self-help. It is well-known that Holocaust survivors rarely want to or are able to "speak" about their ordeal, but many did and do continue to write about the atrocities they suffered. There is a swelling body of literature of the Holocaust,⁶¹ and authors

60. Harvey Karten, Review of *The Pianist*, <http://www.all-reviews.com/videos-5/pianist.htm> (last visited Sept. 16, 2005).

61. See generally EVA HOFFMAN, *AFTER SUCH KNOWLEDGE* (2004) (referring to stories about the Holocaust); See generally GEOFFREY H. HARTMAN, *SCARS OF THE SPIRIT: THE STRUGGLE AGAINST INAUTHENTICITY* (2002) (depicting other stories of the Holocaust) [hereinafter *SCARS OF THE SPIRIT*]; see generally GEOFFREY H. HARTMAN, *THE LONGEST SHADOW: IN THE AFTERMATH OF THE HOLOCAUST* (1996) (discussing the role of artistic responses to the Holocaust and the links between representational techniques and ethical concerns) [hereinafter *THE LONGEST*

like Primo Levi and Elie Wiesel are just two of the many writers whose great works about the Holocaust come to mind. Thus, the act of writing memoirs not only valorizes the narrator, but also provides the victim with a catharsis, a therapeutic remedy, or a form of self-help. The memoirs provide care for the victim's deep and festering psychological wounds that continue to drain in the memories of the survivors of catastrophe and their families.⁶²

But memoirs do more than assuage the pain of the victim. Memoirs help to establish a historic record, induce empathy for the victim by the readers, and raise the consciousness of society about the atrocities that ordinary people can perpetrate on ordinary people during wartime,⁶³ especially if the laws of war are neither enforced nor obeyed. Memoirs and other literary works like them may have inspired the collective conscience of the perpetrators and their families to feel shame and guilt, which lasted in Germany for many long years after the war. Germans were reportedly in a state of guilt or abject denial for years about the atrocities their people perpetrated on the Jews. Many visitors who intend on seeing the German concentration camps in Dachau or Matthausen report that the local townspeople refuse to admit that a concentration camp was once actually located in that town. The townspeople simply refuse to give directions as to its current location. Whether the beneficial effects of this guilt and shame inspired by books and films about the Holocaust can prevent future genocides is a question that must be asked but cannot easily be answered.

III. LAWS OF ARMED CONFLICT REPRESENTED IN THE PIANIST

A. *Brief History of the Laws of War Before 1939*

Long before the start of World War II, there were numerous attempts to codify the rules of appropriate military behavior during armed conflict. Laws of war putting limits on wartime conduct date back to the beginning of recorded history.⁶⁴ For example, in the sixth century B.C., Chinese warrior Sun Tzu suggested regulating the way

SHADOW]; *see also* THANE ROSENBAUM, *THE GOLEMS OF GOTHAM* (2002) (discussing Jewish persecution during the Holocaust); *see also* THANE ROSENBAUM, *SECOND HAND SMOKE* (1999) (illustrating literature of the Holocaust).

62. *See generally* HOFFMAN, *supra* note 61 (showing that children of survivors, known as the Second Generation, have also written extensively about the effects of the Holocaust on the survivors of their family); *See generally* BERNHARD SCHLINK, *THE READER* (1997) (displaying a stunning portrayal of the guilt of a young German boy who, after the war, falls in love with an older woman who turns out to have been a Nazi concentration camp guard and executioner).

63. *See generally* DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996) (examining motivations of ordinary people in committing extraordinary horrors).

64. For a timeline covering the history of the laws of war, see Society of Professional Journalists, *supra* note 14.

wars were conducted.⁶⁵ The notion of war crimes appeared as early as 200 BC in the Hindu code of Manu.⁶⁶ The ancient Greeks fought many wars, and they observed rules of battle prohibiting summary execution of prisoners, attacks on noncombatants, the pursuit of defeated opponents beyond a limited duration, and many other forms of warfare that are condemned and codified today.⁶⁷

Various efforts to codify laws of armed combat continued in the Middle Ages through the nineteenth century. “In 1305, the Scottish national hero Sir William Wallace was tried for the wartime murder of civilians.”⁶⁸ In 1625, Hugo Grotius wrote *On the Law of War and Peace*,⁶⁹ focusing on the humanitarian treatment of civilians. In the eighteenth and nineteenth centuries, scholars like De Vattel in France wrote rules regulating the conduct of armed conflict.⁷⁰ The most important early codification of the customs and usages of war was the Lieber Code⁷¹ issued by President Lincoln to the Union forces in the American Civil War in 1863. The first Geneva Convention, which was inspired by Henri Dunant, the founder of the Red Cross, was signed in 1864⁷² to protect the sick and wounded in war time. “Ever since then, the Red Cross has played an integral part in the drafting and enforcement of the Geneva Conventions.”⁷³ The *St. Petersburg Declaration Renouncing the Use, In Time of War, of Explosive Projectiles Under 400 Grams Weight*⁷⁴ was enacted in 1868.

65. *Id.*

66. *Id.*

67. Eric A. Posner, A Theory of the Laws of War (John M. Olin Law & Econ., Working Paper No. 160,2002), available at http://www.law.uchicago.edu/Lawecon/WkngPprs_151-175/160.eap.laws-of-war.pdf [hereinafter *Laws of War*].

68. Society of Professional Journalists, *supra* note 14.

69. James Brown Scott, *Introduction to 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES IX, IX-X* (Francis W. Kelsey trans., Clarendon Press 1925) (1625).

70. See, e.g., EMERICH DE VATTEL, *LE DROIT DES GENS* (Luke White trans., 1792) (1758) (title translated in English is *THE LAW OF NATIONS*).

71. See generally WAR DEPARTMENT, GENERAL ORDERS NO. 100, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863) [hereinafter *The Lieber Code*] (discussing the Instructions for the Government of Armies of the United States in the Field and the President of the United States desire to have these instructions published); Theodor Meron, *Francis Lieber Code and Principles of Humanity*, 36 COLUM. J. TRANSNAT'L L. 269 (discussing extracts of the Lieber Code). For extracts of the Lieber Code, see JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT 94 (2000). See also Jordan J. Paust, *Dr. Francis Lieber and the Lieber Code*, 95 AM. SOC'Y INT'L L. PROC. 112, 112-14 (2001).

72. The Geneva Convention was revised in 1906, 1929, and 1949. See, e.g., American Red Cross, *The American Red Cross: The Geneva Conventions, the International Committee of the Red Cross and the Rights of Prisoners of War*, <http://www.redcross.org/museum/gc.html> (last visited Oct. 14, 2005).

73. Society of Professional Journalists, *supra* note 14.

74. See generally UK MINISTRY OF DEFENCE, *THE MANUAL OF THE LAWS OF ARMED CONFLICT* (2004) (dealing with the means and methods of warfare). Principles of armed conflict are set out in the Preamble:

The twentieth century was a banner year for the regulation of armed conflict. The Hague Peace Conferences of 1899 and 1907 were initiated by Russian Tsar Nicholas II to avoid a large outbreak of war by regulating the manner in which war could be fought. These two peace conferences resulted in the enactment of the Hague Convention of 1899 with implementing regulations⁷⁵ and the Hague Convention of 1907⁷⁶ with its implementing regulations. These treaties are commonly referred to as the “Hague Regulations,”⁷⁷ which were an official effort at the beginning of the twentieth century to codify the rules of war. Thus, the First Peace Conference at the Hague occurred on July 29, 1899, and resulted in four Hague Rules, three Declarations and one Final Act⁷⁸ concerning, among other issues, the use of asphyxiating gases and expanding bullets, and a general prohibition on weapons that cause “unnecessary suffering.”⁷⁹ The Second Peace Conference at the Hague occurred on October 18, 1907, where thirteen treaties and one declaration regulating the laws of war⁸⁰ were signed and entered into force on January 26, 1910.

That the Progress of civilization should have the effect of alleviating as much as possible the calamities of war; That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for the purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the suffering of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity.

Id. at 8.

75. Convention with Respect to the Laws and Customs of War on Land, with annex of regulations 32 Stat. 1803, July 29, 1899, 1 Bevans 247 [hereinafter Hague Convention of 1899]. See also The Avalon Project – Laws of War: Laws and Customs of War on Land (Hague II); July 29, 1899, available at <http://www.yale.edu/lawweb/avalon/lawofwar/hague02.htm>.

76. Convention Respecting the Laws and Customs of War on Land, 36 Stat. 2277, October 18, 1907, 1 Bevans 631 [hereinafter Hague Convention of 1907].

77. See *id.*

78. Hague Convention of 1899, *supra* note 75. It consists of four Rules and four Declarations and regulates the following issues of wartime conduct: Hague I: Pacific Settlement of International Disputes; Hague II: Laws and Customs of War on Land; Hague III: Adaptation to Maritime Warfare of Principles of Geneva Convention of 1864; Hague IV: Prohibiting Launching of Projectiles and Explosives from Balloons; The Declarations include: Declaration I: On the Launching of Projectiles and Explosives from Balloons; Declaration II: On the Use of Projectiles The Object of Which is the Diffusion of Asphyxiating or Deleterious Gases; Declaration III: On the Use of Bullets Which Expand or Flatten Easily in the Human Body. *Id.* The Final Act of the International Peace Conference was signed on July 29, 1899. *Id.*

79. Laws of War, *supra* note 67, at 2.

80. Hague Convention of 1907, *supra* note 76. The Hague Convention of 1907 regulates the following conduct during war: Hague I: The Pacific Settlement of International Disputes; Hague II: The Limitation of Employment of Force for Recovery of Contract Debts; Hague III: The Opening of Hostilities; Hague IV: The Laws and Customs of War on Land; Hague V: The Rights and Duties of Neutral Powers and Persons in Case of War on Land; Hague VI: The Status of Enemy Merchant Ships at the Outbreak of Hostilities; Hague VII: The Conversion of Merchant Ships into War-Ships; Hague VIII: The Laying of Automatic Submarine Contact Mines; Hague IX:

During World War I, commonly referred to as “the Great War,” the laws of armed conflict were adequate with respect to the treatment of the sick, the wounded, and prisoners of war, but training, supervision and enforcement of the laws were inadequate. The laws of armed conflict were inadequate for the protection of civilians, and to prevent the widespread use of aerial bombardment and gas.⁸¹ Many treaties were enacted after World War I to provide more protection. The Treaty of Versailles,⁸² which was a treaty of peace between the Allied and associated powers and Germany, was signed in 1919. The draft of the Hague Rules of Air Warfare,⁸³ which reflect general principles and customary rules regarding aerial bombardment, were published in December 1922–February 1923, but never adopted by states.⁸⁴ Aerial bombardment and its problems had been forbidden for a period of five years after the First Hague Peace Conference in 1899, and the Hague Convention of 1907 also prohibited bombing of undefended places.⁸⁵ Nevertheless, in World War I bombarding the enemy on his own territory became the strategy of all states capable of undertaking it.⁸⁶ Even though belligerents in World War I claimed they were obeying the principles of the law of war by restricting air bombardment to military objectives, the techniques available to them at that time prevented accurate bombing.⁸⁷ This resulted in the loss of civilian life and damage to civilian objects that were disproportionate to the military advantage gained⁸⁸ and a serious violation of the principles of military necessity, humanity, distinction and proportionality.⁸⁹

Bombardment by Naval Forces in Time of War; Hague X: Adaptation to Maritime War of the Principles of the Geneva Convention; Hague XI: Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War; Hague XII: The Creation of an International Prize Court (never ratified); Hague XIII: The Rights and Duties of Neutral Powers in Naval War. *See generally* 1899–1954: The Hague Convention, <http://www.lib.byu.edu/~rdh/wwi/hague.html> (last visited Sept. 26, 2005) (discussing the above mentioned policies).

81. *See* UK MINISTRY OF DEFENCE, *supra* note 74, at 10.

82. Treaty of Peace with Germany, June 28, 1919, 2 Bevans 43 (better known as “Treaty of Versailles”). *See also* The Avalon Project: The Versailles Treaty June 28, 1919, available at <http://www.yale.edu/lawweb/avalon/imt/parti.htm>.

83. FIRST BRITISH DELEGATE TO THE INTERNATIONAL COMMISSION, GENERAL REPORT OF THE COMMISSION OF JURISTS TO CONSIDER AND REPORT UPON THE REVISION OF THE RULES OF WARFARE, 1924, Cmd. 2201 (draft coverage of the Hague Rules on Air Warfare, Dec. 1922–Feb. 1923) [hereinafter HAGUE RULES OF AIR WARFARE]. *See also* International Committee of the Red Cross, International Humanitarian Law – Hague Rules 1923, available at <http://www.icrc.org/ihl.nsf/FULL/275?OpenDocument>.

84. UK MINISTRY OF DEFENCE, *supra* note 74, at 10.

85. Hague Convention of 1899, *supra* note 75, art. 25.

86. *See* UK MINISTRY OF DEFENCE, *supra* note 74, at 10.

87. *Id.*

88. *Id.*

89. *See infra* text accompanying notes 139–48 for a discussion of the principles of military necessity, humanity, distinction and proportionality.

After World War I, treaties were signed to provide more protection to the sick and wounded prisoners of war, to regulate the use of gas, and to prohibit slave labor. In 1925, the Geneva Gas Protocol,⁹⁰ prohibiting the use of poison gas and the practice of bacteriological warfare, was signed.⁹¹ The Slavery Convention⁹² was adopted in 1926. In 1929, two more Geneva Conventions were enacted to regulate the treatment of the sick and wounded and prisoners of war:⁹³ the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armies in the Field and the Geneva Convention Relative to the Treatment of Prisoners of War. Because of the extensive destruction of artistic historic monuments during World War I, the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact)⁹⁴ was enacted on April 15, 1935. Rules against perfidy were also recognized before 1939 and reflect “chivalric values” that date back to medieval times.⁹⁵ These were some of the treaties, rules of law, and values that existed before World War II, and which, if implemented, could have prevented the atrocities that took place between 1939 and 1945. World War II proved once again, that these laws of war as applied failed to protect combatants, non-combatants, and property outside military targets. Thus, after World War II, the Nuremberg Charter,⁹⁶ the Genocide Convention,⁹⁷ four 1949 Geneva Conventions,⁹⁸ and two 1977 Proto-

90. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

91. Society of Professional Journalists, *supra* note 14.

92. Slaver, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (Slavery Convention of 1926), *adopted* Sept. 25, 1926, 60 L.N.T.S. 253.

93. *See* Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *adopted* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter the Geneva Convention of 1929]. *See also* Geoffrey Best, *HUMANITY IN WARFARE* (1980).

94. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), *done* Apr. 15, 1935, 167 L.N.T.S. 289.

95. *See generally* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000) (illustrating the evolution of humanitarian law).

96. Charter of the International Military Tribunal, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 279 [hereinafter The Nuremberg Charter].

97. Geneva Convention for the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, *reprinted in* PAUST ET AL., *INTERNATIONAL CRIMINAL LAW: DOCUMENTS SUPPLEMENT*, *supra* note 71, at 263 (2000) [hereinafter Genocide Convention].

98. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, *adopted* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; *see also* Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *adopted* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 135; Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 19296 U.S.T. 3316, 75 U.N.T.S. 135; Convention

cols,⁹⁹ human rights laws that apply during war, the Charter of the International Military Tribunal for the Far East, and other laws were enacted to include most of the common protections and prohibitions during wartime conduct that we know of today.

B. *Causes of the Failure of International Laws of War in World War II*

This very brief survey demonstrates that even though laws and rules of war reflecting common values were encoded long before 1939 in treaties, in customary laws,¹⁰⁰ and in other international instruments,¹⁰¹ the Third Reich, Hitler and his officers, and others widely disregarded these norms and violated many, if not all, of the existing laws of war during World War II.¹⁰² Some explain the cause of this conduct on the inadequacies of the existing laws of war.¹⁰³ Some claim the technology of the period was insufficient to protect civilians,

(IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter The Geneva Conventions of 1949] (discussing another Geneva Convention of 1949).

99. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, reprinted in PAUST ET AL., INTERNATIONAL CRIMINAL LAW: DOCUMENTS SUPPLEMENT, *supra* note, 71, at 124 [hereinafter PROTOCOL I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, reprinted in PAUST ET AL., INTERNATIONAL CRIMINAL LAW: DOCUMENTS SUPPLEMENT, *supra* note 71, at 135 [hereinafter PROTOCOL II].

100. H. VICTOR CONDÉ, A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY 180 (2d ed. 2004). Discussing the applicability of crimes against peace, war crimes, and crimes against humanity, as set forth in the Nuremberg Charter, Condé writes: “These criminal norms . . . were largely based on the Hague Conventions of 1899/1907 as customary international law. Later the United Nations reaffirmed these rules as being declaratory of customary international law.” *Id.*; See UK MINISTRY OF DEFENCE, *supra* note 74, at 5. Further explaining customary laws:

Customary international law consists of the rules which, as a result of state practice over a period of time, have become accepted as legally binding. A rule of customary law is created by widespread state practice coupled with what is known as *opinio juris*, namely, a belief on the part of the state [and other actors] concerned that international law obliges it, or gives it a right, to act in a particular way.

Id.

See also JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 3–16 (2d ed. 2003), for an in-depth discussion of “customary international law.” *Opinio juris* involves expectations that something is legally appropriate or required. See Hague Conventions of 1907, *supra* note 76, at n. 106.

101. See UNITED NATIONS, HISTORICAL REVIEW OF DEVELOPMENTS RELATING TO AGRESSION 29 (2003).

102. Laws of War, *supra* note 67, at 2. See generally Jordan J. Paust, *There Is No Need to Revise the Laws of War in Light of September 11th*, AM. SOC’Y INT’L L. TASK FORCE ON TERRORISM, Nov. 2002, <http://www.asil.org/taskforce/paust.pdf>, for an explanation of the Laws of War in light of recent world events.

103. UK MINISTRY OF DEFENCE, *supra* note 74, at 12.

especially with regard to aerial bombardment.¹⁰⁴ Not all belligerents in World War II were parties to the Hague Convention of 1907 and its Regulations,¹⁰⁵ nor were all of them parties to the existing Geneva Conventions of 1864 and 1929 that dealt with the treatment of the sick and wounded and prisoners of war.¹⁰⁶ The Hague Regulations were arguably “insufficient to guide the conduct of authorities in control of vast areas of occupied territory” and were systematically violated during World War II.¹⁰⁷ Moreover, the Hague Regulations “were frequently ignored, and excessively harsh measures were adopted [by the occupying powers] to counter activities of partisans.”¹⁰⁸ Treatment accorded to prisoners of war during World War II was far below acceptable international standards.¹⁰⁹ Hitler’s notion of a total war resulted in civilians being heavily involved in war-supporting industries, area bombing methods, siege warfare, long-range rockets, and atomic weapons which resulted in extremely heavy civilian casualties.¹¹⁰ Furthermore, between 1930 and 1945 there were few treaty provisions to protect civilians who were subjected to deportation and extermination as part of a concerted policy of genocide.¹¹¹ In World War II there were extensive bombing offensives that resulted in the destruction of many civilian areas because there was no written code of law specifically governing air warfare that was binding on the belligerents during

104. *See id.* at 10.

105. *See* MERON, HAGUE ACADEMY, *supra* note 14, at 34. “The Fourth Hague Conventions’s *si omnes* clause threatened the integrity of Nuremberg prosecutions. In the *Trial of German Major War Criminals* (Nuremberg 1946), the defence [sic] raised the argument that the [Hague] Convention and its Regulations did not apply because several of the belligerents were not parties to it.” *Id.* The Nuremberg Tribunal held that “by 1939 these rules laid down in the [Hague] Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war.” *Id.*, n.28, citing *Trial of German Major War Criminals*, Cmd. 6924, Misc. No. 12, at 65 (1946). In other words, the Nuremberg Tribunal ruled that because the rights, duties, and protections reflected in the Hague Convention No. IV were universally applicable customary international law, then any limitations in the treaty (like the general participation clause which provided that the treaty as such only applied among signatories and their nationals) became irrelevant. *Id.*

106. *See* Geneva Convention of 1929, *supra* note 93, for a discussion of the Geneva Conventions of 1929. The term Geneva Conventions as we know it today refers to four conventions of 1949, see The Geneva Conventions of 1949, *supra* note 98.

107. UK MINISTRY OF DEFENCE, *supra* note 74, at 12; *see* Hague Convention No. IV, Annex, arts. 42–56 (exemplifying the regulation of occupied territory), *reprinted in* U.S. NAVY DEPARTMENT, HAGUE AND GENEVA CONVENTIONS 64–65 (1911). These articles are not extensive, and they were violated during World War II.

108. UK MINISTRY OF DEFENCE, *supra* note 74, at 12.

109. *See, e.g., id.* at 12, n.35 (citing The Nuremberg Judgment: XXII International Military Tribunal 451–53 (1947)).

110. UK MINISTRY OF DEFENCE, *supra* note 74, at 12; *See* Hague Convention No. IV, Annex, arts. 46–47, 50 (exemplifying treaty provisions protecting civilians), *reprinted in* U.S. NAVY DEPARTMENT, HAGUE AND GENEVA CONVENTIONS, 64–65 (1911).

111. UK MINISTRY OF DEFENCE, *supra* note 74, at 12.

this period.¹¹² Moreover, customary prohibitions broke down as violations by different sides intensified and states engaged in reprisals (which are now impermissible). "Air operations . . . when directed against ground targets, were, however, arguably subject to the same general principles of customary international law and certain treaty obligations as bound armed forces on land."¹¹³ In 1949, after the great damage and destruction was perpetrated in the face of existing law, the hope was that the Nuremberg Charter,¹¹⁴ the Genocide Convention of 1948,¹¹⁵ the four Geneva Conventions of 1949,¹¹⁶ the two 1977 Protocols,¹¹⁷ and the establishment of the United Nations would provide the protections, prohibitions, and enforcement that were lacking in the laws as implemented during World War II.

C. *Illustration of the Inadequacy of Laws of War in the Book and the Film*

The impact of the inadequate implementation or effectuation of existing laws of armed conflict during World War II is vividly illustrated in the film *The Pianist*, especially during the brutal and disproportionate siege on Warsaw by the German army. Laws prohibiting genocide were not yet written in 1939–1945,¹¹⁸ and existing laws of armed conflict were generally not enforced by the Third Reich, Hitler, or his German officers.

In a briefing to his generals at Obersalzberg on the eve of the invasion of Poland, Hitler revealed his intention to commit genocide on the Poles and Jews:

I have sent my Death's Head units to the East with the order to kill without mercy men, women and children of the Polish race or language. Only in such a way will we win the *Lebensraum* that we need. Who, after all, speaks today of the annihilation of the Armenians?¹¹⁹ (emphasis added)

This quote by Hitler reveals two important points: Hitler intended to wipe out the Poles, whom he despised and classed in the Nazi handbooks as *Untermenschen*, or "subhumans" simply because the Polish

112. The Draft Hague Rules on Aerial Warfare (1923) were never adopted by states. See HAGUE RULES OF AIR WARFARE, *supra* note 83.

113. UK MINISTRY OF DEFENCE, *supra* note 74, at 12; see The Nuremberg Charter, *supra* note 96, declaring indiscriminate bombardment to be a crime cognizable by the tribunal.

114. The Nuremberg Charter, *supra* note 96.

115. Genocide Convention, *supra* note 97.

116. The Geneva Conventions of 1949, *supra* note 98.

117. Protocol I, *supra* note 99; Protocol II, *supra* note 99.

118. Genocide Convention, *supra* note 97; See generally WILLIAM A. SCHABAS, INTERNATIONAL LAW: THE CRIME OF CRIMES (2000) (discussing the law regarding genocide prior to World War II); and DIANA L. SHELTON, ED., ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY 483 (2005): "The defining feature of the crime of genocide is the deliberate destruction of a group."

119. DAVIES, *supra* note 52, at 84.

people were not a pure race but rather a mixture of Slavs and Jews.¹²⁰ Hitler's quote also reveals that very few people had ever heard of the Armenian genocide, which, had it been disseminated widely as information to the public through books and films, perhaps the Holocaust could have been prevented. As Hitler launched a total war violating every existing custom, rule, and law of armed conflict, the victims did not realize that the inadequacy of the laws of war and the failure to enforce them would result in their destruction.

Viewers of the film, *The Pianist*, can witness the impact of inadequate legal protection of civilians as hundreds of thousands of Jewish people are herded like animals into the Warsaw Ghetto, made to dance like clowns, walk in the gutter, and suffer public humiliation and starvation, before they are deported to Treblinka where they are mistreated and eventually exterminated in gas chambers. In this cinematic depiction of war, viewers see no justice, no honor, no humanity, even though according to the existing laws of war and especially in the Lieber Code of 1863,¹²¹ "martial law" must be "strictly guided by the principles of justice, honor, and humanity."¹²² The Lieber Code states clearly that "[m]en who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God."¹²³

1. Illustration of War Crimes

Readers and viewers of *The Pianist* act as witnesses to the flagrant violations of the laws of war represented in the tragic siege on Warsaw. They see the unprecedented scale of deportation of Jews and Poles in cattle cars, mass murders, sadistic treatment of civilians, long hours of slave labor, and the systematic persecution of the Jews in the Warsaw Ghetto. These cinematic representations illustrate the commission of war crimes that are clearly delineated and defined in the Nuremberg Charter:¹²⁴

[V]iolations of the laws of customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private

120. *Id.* at 83.

121. *See generally* The Lieber Code, *supra* note 71 (referring to the existing policies set forth by the Instructions for the Government of Armies of the United States in the Field).

122. THEODOR MERON, BLOODY CONSTRAINT: WAR AND CHIVALRY IN SHAKESPEARE 13 (1998) [hereinafter BLOODY CONSTRAINT] (quoting The Lieber Code); *see also* THEODOR MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS: PERSPECTIVES ON THE LAW OF WAR IN THE LATER MIDDLE AGES 112 (1993) (discussing the Lieber Code and martial law).

123. The Lieber Code, *supra* note 71, art. 15, at 4.

124. *See* The Nuremberg Charter, *supra* note 96, art. 6.

property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.¹²⁵

2. Illustration of Crimes Against Humanity

The Pianist illustrates the widespread commission of crimes against humanity¹²⁶ as defined in the Nuremberg Charter:

[M]urder, extermination, enslavement, deportation and other inhumane acts committed against civilian populations, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹²⁷

Crimes against humanity or inhumane acts committed in the context of a widespread or systematic attack against civilian populations are clearly demonstrated in the film as we see women shot in the back for no reason while walking in the street; Jews reduced to speechlessness when they are told by other Jews about thousands of people being "exterminated" in Treblinka; or Jews forced to do long hours of back-breaking manual labor in slave-like conditions where a small infraction of one's unpaid forced labor would result in excessive punishment. Szpilman is beaten viciously until unconscious by a sadistic German guard when Szpilman looks up at the sky for hope and then accidentally drops some heavy bricks that he is forced to carry mindlessly on his back. In the absence of a law against genocide, crimes against humanity were the claims brought against the German officers at the Nuremberg trials.

3. Illustration of Human Rights Violations

Uncontroversial violations of human rights laws committed by the occupying Nazi power against the Polish people and especially the Jews are represented dramatically in the film. Human rights laws will be codified after World War II in the U.N. Charter (1945),¹²⁸ the Uni-

125. *Id.* art. 6(b). See *infra* text accompanying note 143 for a discussion of military necessity.

126. Crimes against humanity are listed in the Nuremberg Charter. See The Nuremberg Charter, *supra* note 96, art. 6(c); see *id.* art. 6(a)-(c), for the listing of three categories of crimes applicable to the defendants at the Nuremberg Trials: "crimes against the peace," "crimes against humanity," and "war crimes." See also CONDE, *supra* note 100, at 53 (discussing crimes against humanity which used to require a nexus with an armed conflict for applicability). Note that crimes against humanity in some Charters do not require a link with an armed conflict. See, for example, The International Military Tribunal at Nuremberg, which specifies that the crimes must be committed either "before or during the war." *Id.*

127. The Nuremberg Charter, *supra* note 96, art. 6(c).

128. Charter of the United Nations, June 26, 59 Stat. 1031, 1976 Y.B.U.N. 1043, reprinted in INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT, *supra* note 71, at 5.

versal Declaration of Human Rights (1948),¹²⁹ the Convention on the Elimination of All Forms of Racial Discrimination (1965),¹³⁰ the International Covenant on Civil and Political Rights (1966),¹³¹ International Covenant on Economic, Social and Cultural Rights (1966),¹³² the Convention on the Elimination of Discrimination Against Women (1979),¹³³ the Convention Against Torture (1984),¹³⁴ and the Convention on the Rights of the Child (1989),¹³⁵ among others.

In scene after scene of *The Pianist*, like stanzas of an epic poem, viewers observe collective executions, the denial to the Jews of their fundamental right to life, liberty, fair trial, freedom from torture, freedom to enjoy cultural activities, freedom to earn a living, and freedom to practice and manifest their religion. In this movie, the cinematic technique of piling one horrific short scene on top of another enhances the emotional impact and captures the enormity of the human rights violations committed by the occupying German Nazi power. With varying degrees of authenticity,¹³⁶ viewers of the film witness

129. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948), *reprinted in* PAUST ET AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT, *supra* note 71, at 29.

130. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, *reprinted in* PAUST ET AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT, *supra* note 71, at 267.

131. International Covenant on Civil and Political Rights, Dec. 9, 1966, 999 U.N.T.S. 171, *reprinted in* PAUST ET AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT, *supra* note 71, at 43; Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N. T.S. 17.

132. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

133. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, at 193, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/830 (Dec. 18, 1979).

134. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, at 197 U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/708 (Dec. 10, 1984).

135. Convention on the Rights of the Child, G.A. Res. 44/25, at 166, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/736.

136. The question of the authenticity of representations of the Holocaust and other atrocities is a much debated subject. Some famous writers of the Holocaust, like Thane Rosenbaum, believe that film can not and should not attempt to recreate the reality of the Holocaust because this re-enactment can not be historically accurate. *See* Thane Rosenbaum, *When the Truth is Too Traumatic: From 'The Diary of Anne Frank' to 'Schindler's List' to 'Amistad' and 'Anastasia,' American Dramatizations Put a Feel-good Spin on Barbarity*, NEWSDAY, Jan. 4, 1998, at D.16 available at <http://pqasb.pqarchiver.com/newsday/search.html>; *See generally* SCARS OF THE SPIRIT, *supra* note 61 (discussing the difficulty and necessity of the search for authenticity of Holocaust stories); Hartman discusses the role of art in the representation of the Holocaust, and he recognizes that "art . . . is under heavy pressure when it comes to Holocaust representation, a pressure amounting almost to an interdiction . . ." THE LONGEST SHADOW, *supra* note 61, at 8; Claude Lanzmann, the famous film maker of the now classical movie, Shoah, "believe[s] that there are some things that cannot and should not be represented." *Id.* at 84.

While I appreciate deeply the uniqueness of the Holocaust, I disagree with the view that limits the role that art and films should play in representing the Holocaust. Pre-

600,000 Jews being persecuted, segregated into a ghetto where they are beaten, defamed, humiliated, starved, and subjected to patently discriminatory laws¹³⁷ that denied Jews the right to work, the right to walk on the street as other citizens, or the right to protection under the law. Patently racist laws deprived Jews of the right to earn and save money and required them to wear a blue star of David visibly on their arm in order to distinguish the Jews from the Aryans or Polish non-Jews. The blue star enabled the occupying power to identify the Jews as a group more easily. The Jews were then violated, de-humanized, and killed in a concerted plan to exterminate the entire Jewish population.

4. Illustration of Basic Principles of Military Necessity, Humanity, Distinction, and Proportionality

The book and the film also provide vivid examples of the systematic violation of basic principles of the laws of armed conflict¹³⁸ including military necessity,¹³⁹ humanity,¹⁴⁰ dis-

ferring silence to artistic representation of the Holocaust is not a viable choice. The need to validate the historic event and to memorialize it outweighs the elements of inauthenticity lurking in all forms of representation. To reject films of the Holocaust is to reject the power of art itself. Nevertheless, it is important to recognize that art has the power to disseminate information widely and to enable the information to enter the popular culture, which can have the negative effect of trivializing the very subject of the representation that art seeks to memorialize.

137. See generally WEISBERG, *supra* note 33 (analyzing the discriminatory laws passed in Vichy, France and elsewhere under the supervision of lawyers who justified these laws by pure casuistry).

138. See generally UK MINISTRY OF DEFENCE, *supra* note 74, at 21–27 (discussing the basic principles of armed conflict).

139. See *id.* at 21–22.

Military necessity permits a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.

Id.

“Military necessity was defined as long ago as 1863 in the Lieber Code as ‘those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.’” *Id.* at 22 (quoting The Lieber Code, *supra* note 71, art. 14 at 3–4). The general principle of military necessity is firmly rooted in the law of armed conflict. See Hague Convention of 1907, *supra* note 76, art. 22; Protocol I, *supra* note 99, art. 35(1).

140. See UK MINISTRY OF DEFENCE, *supra* note 74, at 23.

Humanity forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes [T]he principle of humanity confirms the basic immunity of civilian populations and civilian objects from attack because civilians and civilian objects make no contribution to military action.

Id.

The principle of humanity can be found in the Martens Clause in the Preamble to Hague Convention IV 1907 “[I]n cases not included in the Regulations . . . the inhabitants and the belligerents remain under the protection

inction,¹⁴¹ and proportionality.¹⁴²

a. *The Principle of Military Necessity*

Military necessity requires the state engaged in war to use only enough force to achieve the legitimate aims of the war. But military necessity is not an excuse for violations of other law of war prohibitions. Germany, Hitler, and his officers violated the principle of the laws of armed conflict when they went beyond military necessity¹⁴³ by

and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.'

Id. at 23–24 & n.9. A more recent version of the Martens clause can be found in the Geneva Convention Additional Protocols of 1977. See Protocols I, *supra* note 99, art. 1(2); Protocol II, *supra* note 99, Preamble. See also MERON, HAGUE ACADEMY, *supra* note 14, at 41–47 (discussing the principle of humanity and the dictates of public conscience in the Martens Clause and its significance today).

141. See UK MINISTRY OF DEFENCE, *supra* note 74, at 24 (“The principle of distinction, sometimes referred to as the principle of discrimination or identification, separates combatants from non-combatants and legitimate military targets from civilian objects.”). Protocol I, *supra* note 99, arts. 48, 49(3). The principle of discrimination is inherent in customary law. See UK MINISTRY OF DEFENCE, *supra* note 74, at 24. “Since military operations are to be conducted only against the enemy’s armed forces and military objectives, there must be a clear distinction between the armed forces and civilians, or between combatants and non-combatants, and between objects that might legitimately be attacked and those that are protected from attack.” *Id.*

142. See *id.* at 25 (“The principle of proportionality requires that the losses resulting from military actions should not be excessive in relation to the expected military advantage.”). “The principle of proportionality is a link between the principles of military necessity and humanity. It is most evident in connection with the reduction of incidental damage caused by military operations.” *Id.* The principle of proportionality is set forth for the first time in a treaty in Additional Protocol I. Protocol I, *supra* note 99, art. 51(5)(b). “[A]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” UK MINISTRY OF DEFENCE, *supra* note 74, at 25 n.15. Cf. PAUST ET AL., INTERNATIONAL CRIMINAL DOCUMENTS SUPPLEMENT, *supra* note 71, at 837. See generally Jordan J. Paust, *Weapons Regulation, Military Necessity and Legal Standards: Are Contemporary Department of Defense “Practices” Inconsistent with Legal Norms?*, 4 DENV. J. INT’L L. & POL’Y 229 (1974) (discussing proportionality as a basic principle of the laws of armed conflict).

143. BLOODY CONSTRAINT, *supra* note 122, at 13. Military necessity is clearly defined in The Lieber Code:

Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy . . .

The Lieber Code, *supra* note 71, art. 16, at 4.

See also, *id.* art. *supra* note 71, art. 44, at 9 (discussing what acts of war are punishable by death):

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death.

burning up and totally destroying Warsaw. In the film, the scene of Warsaw was reduced to flames and the once glorious city now in ruins is an image that Roman Polanski captures by filming a real city in East Berlin that was recently totally destroyed with the intention of rebuilding it. Polanski communicates the unforgettable image of the power of war to cause unnecessary massive destruction of a once beautiful city. The horrific effect of Germany's failure to obey the principle of military necessity is memorialized in the film and communicated persuasively to vast numbers of people through the ages in an attempt to prevent such a disaster in the future.

b. The Principle of Humanity

The principle of humanity prohibits the infliction of suffering, injury, or destruction that is not actually necessary for the accomplishment of a legitimate military purpose and immunizes the civilian population and civilian objects from attack.¹⁴⁴ In the film viewers can observe countless examples of the flagrant violation of the principle of humanity when SS guards inflict excessive injury and suffering upon civilians who are viciously beaten to death and executed collectively without trial, for no reason, perhaps for unjustified and utilitarian reasons of old age, but more likely as a policy of terror inflicted intentionally by the German occupying power. One of the most vivid examples of the violation of the principle of humanity is the scene in which an old man in a wheel chair is thrown out of the window by the Nazi guards who are terrorizing his family in their apartment. The Nazis looted apartments, destroyed personal property, and stole valuable objects like one man's precious violin just before he is herded into the train to the infamous concentration camp in Treblinka. During World War II civilians were very much at the center of the eye of the storm because of the systematic violation of the principle of humanity.

c. The Principle of Distinction

The principle of distinction is related to the principle of humanity in that both require the state to recognize a distinction between the civilian and the military population. The principle of distinction requires military operations to be conducted only against the enemy's armed forces and against military objectives, and there must be a clear distinction between the armed forces and the civilians.¹⁴⁵ Szpilman's suffering represented so vividly on screen is actually the suffering of all civilians during the siege of Warsaw by the unrelenting military might of the Third Reich.

Id.

144. UK MINISTRY OF DEFENCE, *supra* note 74, at 23.

145. *Id.* at 24.

d. *The Principle of Proportionality*

The principle of proportionality requires that losses resulting from a military action should not be excessive in relation to the expected military goal. The principle of proportionality also requires the reduction of incidental damage caused by military operations.¹⁴⁶ The violation of the principle of proportionality is illustrated dramatically in the film when more than 600,000 people, forced into the Warsaw Ghetto, are reduced slowly and systematically to a mere 60,000 and then to one sole survivor. The annihilation of the population of a vibrant city is achieved by starvation, unnecessary force, cruelty to women and children, and the overwhelming might of the German army that resulted in extensive destruction to the city in accordance with a planned policy of scorched earth.¹⁴⁷ During the German occupation of Poland, people in Warsaw were illegally deprived of basic necessities like food and drinking water, which are indispensable to the survival of the civilian population.¹⁴⁸ The violation of this principle of proportionality is illustrated in the tragic scene where the once elegant, and almost aristocratic, Szpilman is reduced to groveling for food, drinking dirty water full of flies and mouse droppings, and trying desperately to open a can of cucumbers to avoid death from starvation.

IV. RETRIBUTIVE JUSTICE AFTER WORLD WAR II AND THE NUREMBERG TRIALS

After World War II, the victors and victims expressed an urgent and human need to redress their grievances, to deter future acts of massive war crimes, and to punish the perpetrators in the traditional form of retributive justice that would hopefully not perpetuate cycles of more violence and revenge.¹⁴⁹ It was understood that the State “must do something in response to wrongs against its people,”¹⁵⁰ and that peace without justice is no peace at all.¹⁵¹ Crimes of massive violence must

146. *Id.* at 25.

147. *See id.* at 305.

148. *See* The Geneva Conventions of 1949, *supra* note 98, art. 147 (codifying the illegality of general devastation or the “scorched earth policy” in occupied territory); *see also* UK MINISTRY OF DEFENCE, *supra* note 74, at 305 (discussing the destruction of basic necessity by military that was not justified).

149. *See generally* TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992) (depicting the personal memoirs of Telford Taylor, the chief prosecutor of the Nuremberg Trials). *See generally* TERESA GODWIN PHELPS, *SHATTERED VOICES: LANGUAGE, VIOLENCE, AND THE WORK OF TRUTH COMMISSIONS* (2004) (discussing the difference between traditional justice, which is achieved through trials and punishment, and restorative justice, which is achieved through language and truth commissions, and questioning the legitimacy of the claim that language or narrative stories can substitute for the violence associated with traditional justice).

150. PHELPS, *supra* note 149, at 7.

151. *See Peace with Justice, in WAR CRIMES AND WAR CRIMES TRIBUNALS: PAST, PRESENT, AND FUTURE, THE HOFSTRA LAW & POLICY SYMPOSIUM 1-8* (Leon Fried-

not go unpunished, and the culture of impunity for perpetrators of high rank and office must be eradicated. If one ignores the need of victims to seek revenge and retribution, which is a “deeply-rooted human need that cannot be moralized away,”¹⁵² the failure to provide retributive justice will only perpetuate more violence.¹⁵³ Thus, soon after World War II, the London Agreement, establishing the Nuremberg Charter,¹⁵⁴ codified and compiled existing customary laws, rules, regulations, and treaties on the laws of armed conflict that were applicable to the defendants at the Nuremberg Trials. The Nuremberg Charter also defined crimes against the peace (aggression),¹⁵⁵ war crimes,¹⁵⁶ and crimes against humanity,¹⁵⁷ which were committed by the vanquished enemy.

Some argue that the Nuremberg Trials are an example of “Victor’s Justice” and are flawed by retroactivity problems. We have tried to show that norms relating to conduct during war were clearly in place before World War II but systematically violated and poorly enforced during the war. However, Justice Jackson himself claimed that some of the norms guiding the prosecution were not explicitly or specifically in place at the time of the offenses. Nevertheless, the framers of the Nuremberg Charter stated that they were committed to apply only preexisting laws to particular cases.¹⁵⁸ For example, The Kellogg-Briand Pact,¹⁵⁹ a treaty providing for the renunciation of war as an instrument of national policy, gave some context to the principles of crimes against peace, but the Kellogg-Briand Pact did not fully articulate these crimes.¹⁶⁰ Crimes against humanity had other historic bases, such as in the 1919 Report of the Responsibilities Commission of the Paris Peace Conference.¹⁶¹ The German defense lawyers at the Nuremberg Trials made a strong case for the illegality of the application of the Nuremberg Charter because of retroactivity or *ex post facto* laws; however, the defense lost its case in Nuremberg. The Nuremberg Court held that the more compelling argument of the failure by

man and Susan Tiefenbrun eds., 1999).

152. PHELPS, *supra* note 149, at 6.

153. *See id.* at 7.

154. The Nuremberg Charter, *supra* note 96, at art. 6(a)–(c), which defined three categories of crimes: “crimes against peace,” “war crimes,” “crimes against humanity”; *see also* UK MINISTRY OF DEFENCE, *supra* note 74, at 12 n.35 (citing *The Nuremberg Judgment* (1947) XXII International Military Tribunal 451–53).

155. The Nuremberg Charter, *supra* note 96, art. 6(a).

156. *Id.*

157. *Id.* art. 6(c).

158. MARTHA MINOW, *BETWEEN VIOLENCE AND FORGIVENESS* 32 (1998).

159. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact].

160. MINOW, *supra* note 158, at 32.

161. *See* PAUST ET AL., *INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT*, *supra* note 71, at 741–47, 857.

the defendants to properly execute their duty of fairness and obedience to customary laws prevailed in the end.

V. RESTORATIVE JUSTICE AND THE POWER OF ART AS A SELF-HELP REMEDY

Does art have any real power in society or any real place in the judicial system? History tells us that the Germans and National Socialism used the power of art and aesthetic pleasure to harness its political goals.¹⁶² Yet many claim that art has no power to stop the horrors of genocidal war. Ironically, many even celebrated Hitler, Mussolini, and other political leaders as “great poets.”¹⁶³ Films from the Nazi period often depict elegant, cultured people, both military and civilians, listening intently to Mozart and Bach at concerts, while they stood by as millions were slaughtered. No one expects art to prevent terror,¹⁶⁴ yet art does have a role in society and even in the legal process. Art is arguably a kind of self-help remedy for the victim and a form of restorative justice.

Many have noticed that Holocaust survivors rarely speak of their past experiences, as if they have literally lost their language. Many survivors of concentration camps rarely go to movies about the war because they do not dare relive the memory of such personal horrors. A representation of the atrocities of the past may actually offend the victims and appear as an attempt to trivialize the reality. With regard to the Holocaust, some writers refuse to give any role at all to the arts even in mourning the destruction because art might stylize the event too much and thereby distort its reality.¹⁶⁵ In this spirit, Adorno said “that it is a sign of the barbaric to write poetry after Auschwitz.”¹⁶⁶ Nevertheless, it is undeniable that art creates “an unreality effect in a way that is not alienating or desensitizing. At best, it also provides something of a safe-house for emotion and empathy. The tears we shed, like those of Aeneas when he sees the destruction of Troy depicted on the walls of Carthage, are an acknowledgment and not an exploitation of the past.”¹⁶⁷ Legal scholars and psychologists report the therapeutic benefits of retelling the story of violence and torture perpetrated on the victim.¹⁶⁸ Story-telling through art can restore the loss of language brought about by oppression and violence. Narration through art provides communication between victor and vanquished

162. See Geoffrey H. Hartman, *Is An Aesthetic Ethos Possible? Night Thoughts After Auschwitz*, 6 *CARDOZO STUD. L. & LITERATURE* 135, 138 (1994) (“The complaint, therefore, that art proved powerless is mistaken in so far as art was only too effective when harnessed to political ends.”).

163. *Id.*

164. *Id.* at 139.

165. See *THE LONGEST SHADOW*, *supra* note 61, at 157.

166. *Id.*

167. *Id.*

168. See *PHELTS*, *supra* note 149, at 8.

who would not normally be able to understand each other. Story-telling through art can reveal truth, can encourage empathy for the victim by the perpetrators and society at large, and can help to heal victims by liberating deeply repressed fears and traumas, and by offering what one scholar has referred to as a visible manifestation of the invisible.¹⁶⁹ Story-telling through artistic representation can make the victim whole again by helping her “to re-member that which is fragmentary”¹⁷⁰ in the mind of those who have experienced oppression, torture, dehumanization, and violence. Art disseminates the story to the public and thereby induces others to empathize with the victim. The production of art empowers the creative artist, and if the artist is a victim of oppression and atrocity, the art form enables the victim to identify with the aggressor by simulating his power.

Art therapy and music therapy exist as healing or remedial professions today because the acts of writing, telling stories, playing or listening to music, and shooting or seeing films are part of a restorative process. Remedies¹⁷¹ in the judicial system are not only designed to rectify the wrong done to a victim and to correct injustice,¹⁷² but they are also designed to place an aggrieved party in the same position as he or she would have been had no injury occurred. Remedies in law are thus classifiable as either retributive or restorative, and they are otherwise referred to as legal or equitable remedies. Thus, remedies reflect two different kinds of justice: retributive and restorative. “Central to both retributive and restorative justice is a concern with righting wrongs and restoring equilibrium to a moral order upturned by criminal wrongdoing.”¹⁷³ Restorative justice emphasizes “the communication process in which the victim tells her story and the offender acknowledges wrongdoing, and makes amends.”¹⁷⁴ Restorativists are concerned with meeting the victim’s needs, rather than revenge and retaliation.¹⁷⁵

Legal remedies, which reflect both the retributive and restorative justice systems, consist of damages which can be compensatory damages, punitive (retributive) or exemplary damages, statutory damages, restitution, or specific relief (replevin or ejectment). Equitable, non-monetary remedies may take the form of an injunction, specific performance of contracts, declaratory judgments, constructive trusts, equitable liens, or subrogation. Rehabilitation, truth-telling, truth and

169. *See id.* at 70, 72.

170. *Id.* at 71.

171. *See generally* DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (2d ed. 2005) (examining the breadth and depth of remedies available under national and international law).

172. *See id.* at 38.

173. Ellen A. Waldman, *Healing Hearts or Rights Wrongs?: A Mediation on the Goals of “Restorative Justice,”* 25 *HAMLIN J. PUB. L. & POL’Y* 355, 356 (2004).

174. *Id.*

175. *Id.* at 359.

reconciliation commissions, and international investigations can also provide restorative justice to the victim. Self-help is also a kind of remedy in which the plaintiff or injured party takes steps to stop the harm from happening or to reduce the effects of bad behavior.

The International Criminal Court (ICC) at the Hague is currently investigating atrocities committed in Uganda. The ICC is close to issuing warrants for rebel leaders. But some war victims in Uganda are urging the ICC to turn a blind eye to the perpetrators in order to avoid reprisals against the local people. The Ugandan victims argue in favor of local solutions and “foregiveness”¹⁷⁶ in a kind of restorative justice that may or may not legitimize a culture of impunity that can only invite more atrocities. Uganda has had three decades of massive crimes of violence, despite frequent attempts to bring an end to the fighting. Uganda’s first truth commission was established in 1974, and a second one issued a report in 1994. Uganda issued an amnesty in 2000 and merely exiled Ugandan leaders rather than punish them. This form of transitional justice did not bring about peace or reconciliation in Uganda. In contrast to Uganda, the South African Truth and Reconciliation Commission was a success. There is no doubt that restorative justice has a place in society and a value in the legal system, but it cannot replace the traditional form of retributive justice which satisfies the victim’s need for revenge.

Art therapy is a form of self-help remedy by which the victim relives a horrific experience and empowers herself through the healing properties of artistic representation. It is well-known that calamity inspires art, and art heals suffering. The book and the film, *The Pianist*, are works of art, fictional representations of reality, infused with enough fantasy to distance the writer and the film maker from the painful realities of the ghetto and the war that both Szpilman and Polanski may unconsciously have wanted to forget. Nevertheless, writing the memoirs and making this film had beneficial and liberating effects on both Szpilman and Polanski who personally chose this form of self-help remedy. But art helps restore more than just the artist. Readers and viewers of works of art also experience a kind of liberation that comes from the revelation of hidden truths about the horrors of war and about the human capability to achieve mass violence and destruction when unchecked by the rule of law.

In fact, Szpilman’s method of survival throughout the war is based on a very subtle psychological technique of approach and avoidance which writing and interpreting music necessarily involves. Throughout his ordeal, Szpilman relies on his instincts to “stay put” in Warsaw and thereby approach the enemy, even though others around him decide to flee. Szpilman also withdraws from the chaos of war and

176. Marc Lacey, *Atrocity Victims in Uganda Choose Forgiveness*, N.Y. TIMES, April 18, 2005, at A1.

avoids reality by remaining literally and figuratively *outside* the maelstrom, living both *inside* and *outside* the pain of the Warsaw Ghetto, of the war, and of his once beautiful and culturally alive city of Warsaw now in ruins. Thus, Szpilman avoids engagement and escapes the pain of reality literally by living in hiding on the Aryan side of the ghetto and, figuratively, by listening to familiar classical music that is playing in his head. This is Szpilman's form of self-help. For example, while watching out of his window from a room on the other side of the ghetto wall, Szpilman sees the Warsaw Ghetto burning; he sees the flames and the smoke; he hears the gunfire; he smells the smoke bombs; he hears the screams of burning bodies falling from windows with broken glass and debris flying everywhere; while he remains *outside* the ghetto, suffering silently, alone, and in hiding.

Szpilman is always "outside" because he is different. Polanski, too, is outside, having been banished from movie-making in the United States for his admittedly illegal activities. Szpilman is different from the others around him because he is an artist, a pianist, a celebrity, a star, a survivor who remains outside looking in but agonizing, nevertheless, and heroically in his solitude, starvation, and utter desperation. Yet Szpilman does his part in the underground resistance—he risks his life daily by participating in a clandestine weapons collection operation to supply the resistance with ammunition for the Warsaw Ghetto uprising. Szpilman heroically tries to save a very young boy who is smuggling food into the ghetto. But when the boy is caught, he is savagely beaten to death while Szpilman, risking his own life, tries to drag the little boy out through a low hole in the ghetto wall; screaming in pain, the little boy dies in Szpilman's arms. The book describes this scene poignantly and effectively, and the film shows us an even more vivid picture of the flagrant violation of the principle of humanity that is worth a thousand words.

Art keeps Szpilman alive. Music and Szpilman's passion for artistry give him a reason for being. He hears music in his head throughout the film, and the viewer hears this music as the backdrop of the film. Szpilman hears the familiar and comforting music he once played. He feels the music in his fingers that keep moving throughout the film, as he plays an imaginary piano. Szpilman's salvation is the music of Chopin's¹⁷⁷ C-sharp minor Posthumous Nocturne, Chopin's Gb minor Ballade,¹⁷⁸ Beethoven's Moonlight Sonata in C-sharp Minor, Chopin's

177. Chopin was born on February 22, 1810 in Zelazowa Wola, Poland. His early development as a composer took place in Warsaw during the 1820s. See generally JEREMY SIEPMAN, *CHOPIN: THE RELUCTANT ROMANTIC* (1995); JIM SAMSON, *CHOPIN: THE FOUR BALLADES* (1992); *THE CHOPIN COMPANION: PROFILES OF THE MAN AND THE MUSICIAN* (Alan Walker, ed. 1973) (illustrating Chopin's life and work as a composer).

178. See generally JAMES PARAKILAS, *BALLADS WITHOUT WORDS; CHOPIN AND THE TRADITION OF THE INSTRUMENTAL BALLADE* (1992) (describing a ballade as a folk tale told in song, a narrative model based on songs and poetic forms, and a story

F Minor Concerto Opus 21, Bach's Suite #1 for solo cello, and other pieces all in the minor and very dark mode, except for Chopin's Grande Polonaise Brillante Opus 22 in Eb major, depicting in a very heroic fashion the glory of Polish nationalism and the hope for survival. The music is a metaphor for the war. Like the movie in general and the choice of music in particular, the war is overwhelmingly dark with only an occasional glimmer of hope. During the Warsaw Rising, Warsaw Radio played the Chopin Grande Polonaise Brillante in Eb major every thirty seconds to tell the world that the capital was still in Polish hands.¹⁷⁹ In his agonizing isolation in the Warsaw Ghetto, Szpilman longs for the kind of jubilant victory that is artistically expressed in Chopin's Grande Polonaise. Significantly, Polanski chose the uplifting Chopin Grande Polonaise to be the last piece Szpilman plays in the film. In the end Szpilman is victorious, no longer alone, and now surrounded by the harmonious Polish orchestra, where he distinguishes himself once again as the Pianist.

Szpilman's fame and artistry as a composer and pianist inspired others in the ghetto and on the Aryan side of Warsaw to keep Szpilman alive, in accordance with the laws of war that prohibit the destruction of national treasures and art.¹⁸⁰ Szpilman was a national treasure to Poland, and the Poles sought to protect him, even though one evil Polish woman in the film almost succeeds in betraying him when she suspects Szpilman is a Jew hiding in her building. But Szpilman's deeply embedded message, which ends on a positive note, is not about representing good and bad Germans or good and bad Poles or good and bad Jews, although the film and the book do represent a balanced view of humankind. Szpilman's message is about the futility of war, the unimaginable suffering that war causes, and the unnecessary and irreparable destruction of life and physical beauty in a world at war and without properly enforced rules of law to guide the warriors and to protect the civilians.

VI. CONCLUSION

The film, *The Pianist*, shall remain in the annals of cinematic history as one of the greats. The beauty of the film is in its depiction of the ugliness of war, and this ironic duality is expressed linguistically as we recall that the Latin word *bellum*, which means "war," comes from the same root as *bellus* or beautiful.¹⁸¹ The film is a representation of reality, but it is also an artful blend of fiction and fantasy, imbued with the rhetorical power of persuasion that only the immediacy of cinematic imagery can deliver. The film has a dual message. On the one

in sound).

179. DAVIES, *supra* note 52, at 85.

180. See Convention for the Protection of Cultural Property in the Event of Armed Conflict, *done* May 14, 1954, 249 U.N.T.S. 215.

181. HOFFMAN, *supra* note 61, at 43.

hand, the film reveals Szpilman's deep despair through the constant and almost relentless presentation of dark images that depict the evils of total war waged in violation of the laws of war. On the other hand, the film is about hope and the power of art, especially music, to transcend the ugliness of warfare and the extreme brutality that war provokes.

Music assuages Szpilman's pain and awakens the conscience of one German officer who ultimately saves Szpilman's life. The book and the film say nothing about the possibility of art preventing atrocity, which clearly cannot be claimed in the face of the generally high level of culture existing in pre-war Germany. Nevertheless, art is a form of restorative justice because it informs the public about the realities of war; art raises the collective conscience of the perpetrators to the purposelessness of the destruction they caused by their failure to obey existing laws of war; art creates a historic record that can educate society now and in the future about the horrors of war and the risk of a world that does not live by the rules of law.

Art is a self-help remedy that provides therapy for the victim as it soothes the victim's pain during the perpetration of unspeakable atrocities. But remedies typically involve retribution for the perpetrator in order to render justice to the victim. As art memorializes the catastrophic events of World War II and disseminates authentic facts to the public at large, art can pique the conscience of the perpetrators, inculcate moral values for society, and possibly prevent further atrocities. If the artist creates an authentic historic record of the wartime events, and disseminates this history through the transmission capabilities of media, then art can also possibly result in a deterrence of these war crimes in the future. The artistic and persuasive re-enactment of the crimes through narratives has the effect of educating society about the evils of war and the need to obey the laws of war that establish limits and protections for the combatants as well as the civilians. Thus art, through persuasive story-telling, can provide restorative justice to the victim without necessarily providing retribution to the perpetrators.

The German officer who finds Szpilman hiding in the rubble of a bombed out apartment asks Szpilman to play the piano. The German officer is visibly moved by the music and shows his appreciation for Szpilman's interpretation of the Chopin Ballade in G-flat minor by offering him safe shelter and food, which Szpilman eats with his fingers. The perpetrator as well as the victim crave the escape that art alone can provide. In this critical moment, after not practicing for two and a half years, the pianist manages to play perfectly and expressively a difficult ballade, a folk narrative told in song, on a perfectly tuned Steinway grand piano that miraculously appears at the end of the film and at the end of the Warsaw siege. This finale is an intentional fantasy that reflects Szpilman's never-ending hope, and the re-

storative value of artistic narration. In the very last triumphant scene of the movie, the pianist smiles to his friend and to the audience while playing the victorious, heroic, and joyous Grande Polonaise Brillante by Chopin, Poland's greatest composer.

In the end music saves Szpilman from the horrors of war and from life in a world without properly enforced rules or laws of war to guide the combatants or protect the civilians. Words alone cannot adequately express the horrors of such a world in utter chaos. One has to read Szpilman's book and then see it represented anew and persuasively in the film *The Pianist* to actually believe it.

The End.