4. STATE-SPONSORED TERRORISM, THE LAWS OF WAR, AND THE ROLE OF STORYTELLING AS A SELF-HELP REMEDY

Law, Literature, and Semiotics*

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

I. INTRODUCTION

A. Law is not Literature. . . . and Yet. . .

Lawyers are like writers and filmmakers because all are seriously engaged in the art of representation. Lawyers represent the interests of their clients; they aim to defend their clients zealously through the art of persuasion and ethically in accordance with the Rules of Professional Responsibility.1 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

* A shorter version of this chapter 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. An article entitled The Failure of the International Laws of War and the Role of Art and Story-Telling as a Self-Help Remedy for Restorative Justice was published in 12 Tex. Wesleyan L. Rev. 91–129 (2005). That article has been completely revised and adapted to the themes of this book. I wish to thank my research assistants, Mr. Chris Ramey and Miss Michelle Hoskinson, for their invaluable assistance with the research for this chapter. I also wish to thank Professor Jordan Paust, Justice Richard Goldstone (formerly of the Supreme Court of South Africa), and Judge Theodor Meron (formerly president of the International Criminal Tribunal for Crimes against the Former Yugoslavia) for their comments on earlier drafts of this chapter. Special thanks to Alex Petrushka, a pianist and my piano teacher, whose survival story during the Holocaust helped to inspire this chapter.

1. See Model Rules of Professional Conduct R.1. 3 cmt 1 (2005), reprinted in Professional Responsibility Standards, Rules & Statutes: 2005–06 Abridged Edition 13 (John S. Dzienkowsky 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.
with persuasion. Like novelists and filmmakers, lawyers must communicate information clearly and persuasively, and they must defend their own interpretation of the meaning of a specific passage in a legal text.

Whether they are primarily legal or artistic in nature, messages are carried by different media such as legal opinions, laws, cases, contracts, books, and movies. Writers and filmmakers typically communicate messages via a literary or cinematographic discourse that contains a preponderance of rhetorical tropes and figures along with other types of stylistic devices and visual effects. These various modes of concretization transmit meaning indirectly through an emphasis on style rather than content. Literary discourse produces in the reader’s mind a heightened awareness of an author working behind the scenes to create and convey meaning artfully through a skillful manipulation of form and subtle delivery of content. Thus, artistic discourse is dominated by form rather than content in the constant interplay of style and meaning.

In contrast, legislators and lawyers typically try to keep legal discourse in the realm of content, shunning style and literary intrusions that bring vagueness and multiplicity of meaning to a legal document. Thus, legal discourse is dominated by content rather than form. Lawyers are taught to avoid metaphor and other rhetorical devices in their legal writing to achieve clarity and reduce ambiguity. In other words, lawyers are taught to remain on the solid ground of scientific language, which is purportedly more quantitative, direct, clear, and precise while being less encumbered by indeterminacy and the multiplicity of meaning created by the use of tropes, symbols, rhetorical figures, and stylistic devices.

This simplified and admittedly reductionist dichotomy between literary and legal language is misguided because it focuses only on the differences between the two disciplines of law and literature without recognizing their similarities. Literary discourse is not strictly artistic, and legal discourse is not strictly scientific.
Although some judges enjoy using metaphor and literary or rhetorical flourishes to persuade readers of the validity of their legal opinions, others actually deny the benefits of looking at law through the lens of literature because of their belief in the essentially different natures of literary and legal discourse. Law is not literature, they say with conviction! Nevertheless, as do readers of books and viewers of film, lawyers too must interpret, and they do so by means of theories of interpretation often borrowed from literature (e.g., historical analysis, structuralism, post-structuralism, deconstructionism, linguistics, semiotics, stylistics, narrativity, and postmodernism, to name but a few). Messages in books are hidden in the interstices of literary discourse. Their underlying meanings are conveyed indirectly to the reader through the reader’s own perception of the interplay of signifiers and signifieds, style and content, form and meaning. Thus, lawyers, readers of literature, and viewers of film are all deeply involved in the semiotic process as they engage actively in interpretation and in the unraveling of a tightly knit relationship between style and content. This is the semiotic experience par excellence. According to Saussure, linguistics, stylistics, hermeneutics, and the study of culture are all subsets of the vast branch of scientific investigation known as semiotics. Similarly, law and literature are also subsumed under the umbrella of semiotics.

Hidden meanings are uncovered by a process of decoding. Meanings may be intentional or unintentional, and they are usually embedded in the deep, narrative structures of the artistic discourse. Even though legal discourse is supposed to be direct, clear, and unambiguous, it, too, requires interpretation, especially when the words used to convey the legal messages have more than one meaning. Lawyers and judges often resort to various interpretive theories known as hermeneutics, original intent, textualism, and many others (also used by literary scholars) to clarify the meaning of ambiguous constructions in legal

7. See Julie Stone Peters, Review Essay, 9 Cardozo Stud. L. & Literature 259, 264 (1997): “Storytelling and rhetoric are central to law practice and study . . . 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.”

8. 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 7, at 264.

9. Jackson, supra note 4, at 19–21 (distinguishing between decoding and interpretation).

10. See Tiefenbrun, supra note 2, at 92.

texts. Because the processes of persuasive representation and interpretation are the essence of lawyer’s work as well as the work of literary writers and filmmakers, it is no wonder the market is glutted with novels about the law and with films about trials or hot legal topics. The relationship of law and the humanities is an international and interdisciplinary movement called law and literature.\textsuperscript{12}

Proponents of the law and literature movement look at law through the lens of the humanities with an aim toward humanizing the judicial system. The laudable aims of the law and literature movement happen to coincide with a similar trend in public international law designed to humanize the laws and customs of war.\textsuperscript{13} International humanitarian law,\textsuperscript{14} also known as the laws of armed conflict\textsuperscript{15} or the laws of war,\textsuperscript{16} is evolving and “acquiring a more humane face.”\textsuperscript{17} After 1945 and the aftermath of the Holocaust, a global and unsettling awareness arose of the atrocities that a world war could wreak upon humanity. Hitler violated every law of war in the book—and civilians no longer were protected by the long-standing military codes! At that horrifying moment of awareness in

\textsuperscript{12} See Posner, supra note 8, at 4, for a history of the law and literature movement beginning with the publication of James Boyd White, The Legal Imagination (1973) and continuing with Richard Weisberg, The Failure of the Word (1984) and the establishment of the Law and Humanities’ Institute (LHI) in 1979 devoted to research and writing in the area of law and the humanities. I was the President of LHI for more than eight years and have served on its Board of Directors for decades.


\textsuperscript{15} See generally The Handbook of Humanitarian Law in Armed Conflicts (Dieter Fleck et al. eds., 1995).


\textsuperscript{17} Meron, supra note 13, at 24.
history, the international legal community felt compelled to adopt and apply human rights law\textsuperscript{18} and the general principles of humanity.\textsuperscript{19}

\textbf{B. Law and Literature and Semiotics}

This chapter analyzes the principles of international humanitarian law as exemplified in the book and film called \textit{The Pianist}. This method of analysis relating international law and literature is a variant form of semiotic analysis focusing on the signifier (the film and the novel) and on how the texts illustrate the signified (the international laws of war). In other words, the movie and the book are signifiers (like the letters of a word that are the outward representation of messages or signifieds). Within the texts there are many levels of relationships between the signifier and the signified that the reader and the movie viewer must work hard to identify in order to perceive the meanings of the texts. Thus, the reader and the movie viewer are creatively and actively involved in producing meaning. The international laws of war are the signifieds that can be perceived in many different variant art forms. The law and literature approach considers the artistic text as an illustration of legal principles according to basic semiotic principles.

The book and movie \textit{The Pianist} dramatically represent the life of one special man, Władysław Szpilman, a famous pianist from Warsaw, Poland and 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 directed by Roman Polanski and starring Adrien Brody, who won an Oscar for his performance in that spellbinding movie.

The book and the film represent more than just the story of one survivor of a devastating world war. These two art forms reflect in different ways the failure of

\textsuperscript{18} See generally Jordan J. Paust, \textit{International Law as Law of the United States} (2d ed. 2003) (discussing the human rights movement said to have been born in 1945 out of the disasters of World War II, although human rights laws had a rich history prior to the war). \textit{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, \textit{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).

\textsuperscript{19} See Meron, \textit{supra} note 13, at 24. See \textit{infra} text accompanying notes 142–43 for a discussion of the principle of humanity.
nations to enforce international humanitarian laws. The Nazis, under orders from Hitler and his henchmen, systematically and ruthlessly violated the laws of war during the Warsaw occupation, the Warsaw Ghetto uprising, and the Warsaw rising. In the movie the unforgettable scene of Warsaw after the Germans bombed and razed this once-elegant city is a picture that tells more than a thousand words about the total destruction and inhumanity of war.

The book and the film also reveal and represent the power of art, the therapeutic and curative effect that music can have on a victim's life during war, and the beneficial role literature and film can play as self-help remedies in a system of restorative rather than retributive justice. We have all heard stories about the Nazis listening to and appreciating great classical music as they coldly and inhumanly exterminated the Jews. Nevertheless, I will try to show that art can arguably serve as a preventive measure to deter the commission of atrocities in the future by educating society about history and moral values.

This chapter poses several questions that seem particularly relevant in view of the current state of war in which our peace-loving society is engaged today. What is the role of the laws and customs of war if the warriors do not 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 such as a declaratory judgment that offers nonmonetary compensation and restorative justice to the victim, as well as moral education to society, with 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 inhumane acts.

This chapter 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. In this chapter I argue that storytelling through art is a form of self-help remedy provided 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.

II. THE LEGITIMACY OF AN INTERDISCIPLINARY METHOD

A. The Law and Literature Movement

This book, and in particular this chapter uses an interdisciplinary method (semiotics and the law, law and literature) that looks at law through the point of view of another discipline (the humanities) in the hopes of humanizing the law and uncovering some of its complex hidden meanings. The law and literature movement has been adopted by some of the most highly respected legal scholars and judges. I adopt this approach here 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. The story was 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. Both Szpilman and Polanski were eyewitnesses to the horrors of war and the failure to enforce international laws of war.


Law and literature is an interdisciplinary field of investigative research that has been 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. 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


22. See generally Gary Minda, Law and Literature at Century’s End, 9 Cardozo Stud. L. & Literature 245 (Fall 1997) (discussing the three analytical approaches to law and literature).
of view of the legal system or to decipher the role that lawyers play in society.\textsuperscript{23}

This book is primarily in the tradition of the law-in-literature approach. However, several chapters of this book do address the impact of law on literature, and one chapter looks specifically at legal documents (i.e., the Berne Convention) through the point of view of hermeneutics and culture.

Other scholars in the law and literature movement choose to examine and interpret legal texts such as legislative enactments, cases, contracts, or judicial opinions as if they were literary texts (i.e., the law-as-literature approach). In other words, 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 such as 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 intellectual property law, copyright regulations (including 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 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 chapter 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 \textit{The Pianist}.

\textbf{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, as it began as recently as 1973. However, the law and literature movement is actually a complex field that has developed over the years into an intellectually diverse\textsuperscript{24} hydra with its tentacles firmly planted in antiquity. Seeing the obvious interconnection between law and literature, classical poets, playwrights, novelists such as 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.\textsuperscript{25} As 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.\textsuperscript{26} John Donne, Henry Fielding, Sir Walter Scott, Honore de

\begin{footnotesize}
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\item \textsuperscript{23} See generally Richard H. Weisberg, \textit{Failure of the Word: The Protagonist as Lawyer in Modern Fiction} (1984) (analyzing the lawyer’s role in society).
\item \textsuperscript{24} See Minda, \textit{supra} note 22, at 245.
\item \textsuperscript{25} Posner, \textit{supra} note 8, at 5.
\item \textsuperscript{26} See Daniel Kornstein, \textit{the Music of the Laws} 107–10 (1982), with forward by Hon. Robert H. Bork (discussing why legal interpretation is like musical interpretation).
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Balzac, James Fenimore Cooper, Gustave Flaubert, Leo Tolstoy, Franz Kafka, John Galsworthy, Wallace Stevens, Peter Tchaikovsky, Robert Schumann, Hoagy Carmichael, and Cole Porter are just a few of the many artists, musicians, and writers who were either practicing lawyers or had legal training.

The law and literature movement began as an interdisciplinary field of organized scholarship with the publication in 1973 of James Boyd White’s book, *The Legal Imagination*, 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 an art, White views the law as an art and the lawyer as an artist. He sees the value of constructing a conception of the law and of the “good lawyer” as reflections of a humanistic and literary tradition.

In contrast to White’s optimistic view of the legal profession, Richard Weisberg’s groundbreaking work in law-in-literature, *The Failure of the Word*, 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.” Weisberg’s view of lawyers and the law is also expressed in his book *Vichy Laws and the Holocaust*, which exposes the casuistic legal reasoning and justification that lawyers found for drafting patently discriminatory laws denying 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 that views literary texts as embodiments of the law and began instead to study legal texts as a unique genre of literature. 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 structured like a succession of arguments for the defense followed by arguments for the prosecution. Corneille, as with most French writers before the eighteenth century, had a typically classical education, which amounted to an education in the law and in legal reasoning. This legal education is reflected in Corneille’s writing style. See Susan Tiefenbrun, *The Big Switch: A Study of (Corneille) Cinna’s Reversals*, in Susan Tiefenbrun, *Signs of the Hidden: Semiotic Studies* (1980) (examining Corneille’s tragedy Cinna). See also Christien Biet, *Droit et Litterature Sous L’Ancien Regime: Le Jeu de la Valeur et de la Loi* (2002).


29. *Id.*


borrowed from literature, such as structuralism, deconstruction, linguistics, semiotics, stylistics, and postmodernism. It is my contention, however, that all these approaches are subsets of semiotics.

The legitimacy of the law-as-literature approach has been the subject of much debate. Although 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.

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 nontraditional cultures. Adoption of a more interdisciplinary approach to the analysis of the law, such as the law-as-literature method, may have the beneficial effect of humanizing the law by focusing lawyers’ attention on cultural differences. 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. Those who reject the study of law-as-literature claim that

34. See generally Jonathan Culler, Structuralist Poetics: Structuralism, Linguistics, and the Study of Literature (1975) (discussing structuralism in linguistics and literature); Frederic Jameson, The Prison House of Language; A Critical Account of Structuralism and Russian Formalism (1972) (illustrating the application of structuralism).


36. See generally Jackson, supra note 4; see generally Tiefenbrun, supra note 2 (discussing the use of semiotics in legal analysis).


38. Minda, supra note 22, at 248.

39. See id. at 251.

40. 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).
law must aim at clarity, persuasion through precision, and determinacy. Richard Weisberg, who pioneered the law and literature movement, holds a more balanced view, arguing this movement is sufficiently broad to encompass all these different theoretical perspectives.

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” or “Law and Film” in which students were asked to read literature and view films to discover the legal principles embedded in the 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 movement have embraced these diverse theories of literary interpretation, applied them to the law, and adopted an interdisciplinary approach to the study of the law.

In 1979 during the heyday of the law and literature movement, the Law and Humanities Institute (LHI) was formed to support the law and literature movement, encourage interdisciplinary research and writing in this burgeoning field, hold literary and law salons, and organize national and international conferences devoted to the study of law and the humanities in general. The pioneers of the law and literature movement were 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 attributable to the efforts of LHI and its expanding membership. LHI has now become an international institution that holds conferences on the East and West Coasts of the United States, Europe, and Asia; it also fosters interdisciplinary

41. See Posner, supra note 8, 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. Minda, supra note 22, at 245.


45. See Tiefenbrun, supra note 2, at 153–55 (discussing the critical legal studies movement and its use of literary theories for legal interpretation).

46. I was president of LHI from 1998–2005 and was a long-standing member of LHI’s Board of Governors for decades.
research, focusing particular attention on human rights issues represented in the arts.

This chapter will look at the international laws and customs of war as represented in the literary and cinematographic narratives of Władysław Szpilman and Roman Polanski in the tradition of law-in-literature and film. I will examine some of the causes of the failure of the enforcement 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. Semiotics, which is the 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 (re-present) 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 depend upon many variables, including the mode and effectiveness of the connection between the sender and the receiver and the type of communication medium chosen by the sender.

Representation is a re-presentation of reality, a step removed from the thing itself (re-present (res in Latin meaning “thing”); therefore, the representation of an event or an idea is always partially fictional and never totally factual. This gap between truth and fiction is referred to in semiotic theory as the referential fallacy. 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 reenactment of resentment (re-present), the expression of deep-seated and hidden emotions (ressentiment in French) that can surface after the bitter experience of a catastrophe. The book and film The Pianist are literary and cinematic representations of Szpilman’s secret thoughts and emotions, which the author expresses in a coded language in the book and which the filmmaker expresses somewhat differently in the movie (despite attempts by Polanski to remain close to Szpilman’s original depiction in the book). During the processes of reading the book and viewing the film, both the reader and the viewer are naturally induced to decode or interpret the

47. See Tiefenbrun, supra note 2, at 89–156 (discussing semiotics and a bibliography related to semiotics and the law); see also Umberto Eco, A Theory of Semiotics 3–31 (1979) (offering an informed overview of the field of semiotics).

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

49. See Eco, supra note 47, at 58 for a discussion of the referential fallacy and the role of the “representamen” in Pierce’s semiotic theory.
representations of these hidden emotions 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 movie viewer can unravel these secrets by studying the language of the narratives, including 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.

The craftsman, writer, and filmmaker 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. Understanding the relationships among these segments, the placement of the chapters in the whole book, or the arrangement of the scenes in the movie constitute 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 he 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. His identity and personhood are systematically removed during his dehumanizing and humiliating life in occupied Poland especially in the Warsaw Ghetto. He is just one of many victims wearing a blue armband, like the nameless prisoners in Nazi concentration camps who wore tattooed numbers on their forearms to identify themselves. 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 and nonverbal, and therefore more open to interpretation than written language; nevertheless, as with literature or law, the interpretation of music is not indeterminate, but limited by the confines of musical notation, historical context, culture and tradition. Music for Szpilman is a form of representation

50. See Tiefenbrun, supra note 2, at 125–29 (discussing structuralism and its application to the law and legal discourse).
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 Territories The central figure in the book and film is Władysław Szpilman, who recounts his horrifying experiences in and out of the Warsaw Ghetto in memoirs he wrote shortly after the war. The fact that Szpilman wrote these memoirs so soon after he experienced and witnessed these actual events increases the authenticity of his representation of reality. Szpilman published his memoirs under a different title in Poland in 1946, with these memoirs becoming a book subsequently called The Pianist. Years later in 2003, Roman Polanski, also a Polish survivor, used a more visual medium of communication to retell Szpilman’s story (but anew) in the film The Pianist.

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

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 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 rising in the city of Warsaw by the Polish underground resistance. Because 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.

51. Norman Davies, Rising ‘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, principally to Treblinka. After an armed uprising in April and May 1943, it became a silent, smouldering (sic) 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.

52. Władysław Szpilman, The Pianist (Anthea Bell trans., 1999), originally published in Poland in 1946 under the title Death of a City.

53. Davies, supra note 51, at 75.

54. See generally id, (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).
3. Differences between the Representation in the Book and in the Film

In interviews⁵⁵ about the making of the film, Roman Polanski claims that he tried to be as faithful as possible to the original book. Nevertheless, every artist, writer, and filmmaker 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 the travails he has had to endure for years, he chooses unrealistically to play for this German officer the technically demanding Chopin Ballade in G Minor. He plays this piece flawlessly on a miraculously clean and perfectly tuned piano that suddenly appears in the midst of the rubble and chaos around him. Conversely in the book, Szpilman more realistically plays on “the glassy, tinkling sound of the untuned strings”⁵⁶ of a piano whose “action was swollen by the damp and resisted the pressure of the keys.”⁵⁷ Szpilman tells us that he actually played the Chopin C-sharp Minor Posthumous Nocturne, which is much shorter and less technically challenging than the Ballade. However, both the Nocturne and Ballade are brooding and dark. Moreover, in the book Szpilman admits that in this very exceptional moment of survival, he played the Nocturne with difficulty after not touching the piano for two-and-a-half years and not having cut his nails for a long time.⁵⁸

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 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. Music enables him to escape or at least minimize the pain by remaining somewhat removed from the slaughter of the Poles and the absurdist nihilism surrounding him in his beloved Warsaw, reduced to ruins by the excesses of war.

⁵⁵ The DVD version of the film, The Pianist, is followed by an interesting interview with Roman Polanski who explains how he made the film, including his intentions to remain as close to the original book as possible, and his credentials as a filmmaker of this particular subject because of his personal experience as a Holocaust survivor in Poland. DVD: The Pianist (Universal 2002).
⁵⁶ Szpilman, supra note 52, at 178.
⁵⁷ Id.
⁵⁸ Id.
Polanski’s film, which he produced more than fifty years after publication of the book, is a more visual representation of reality that the filmmaker 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 secondhand that his mother had died in a Nazi concentration camp, and he wandered among supporters in Catholic homes for years seeking shelter and protection until the ghetto was ultimately destroyed. Polanski reports being used by German soldiers as target practice. Thus, Polanski the filmmaker 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 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, and with both authenticity and poignancy in the form of memoirs that serve an important purpose for the victim, for other victims in the same situation as 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 even 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

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the Holocaust, with authors such as Primo Levi and Elie Wiesel being 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 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.

But memoirs do more than assuage the pain of the victim: they help to establish a historic record, induce empathy for the victim from the readers, and raise the consciousness of society about the atrocities that ordinary people can perpetrate on other ordinary people during wartime, especially if the laws of war are neither enforced nor obeyed. Memoirs and other similar literary works may have inspired the collective conscience of the perpetrators and their families to feel shame and guilt that 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 intent 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 there or to give directions as to its 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.


61. See generally Hoffman, supra note 60 (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) (giving 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). Schlink's superb book has been made into a 2008 award-winning film.

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, numerous attempts were made 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. For example, in the sixth century B.C., Chinese warrior Sun Tzu suggested regulating the way wars are conducted. The notion of war crimes appeared as early as 200 B.C. in the Hindu code of Manu. The ancient Greeks fought many wars in which they observed rules of battle prohibiting summary execution of prisoners, attacks on noncombatants, pursuit of defeated opponents beyond a limited duration, and many other forms of warfare that are also condemned and codified today.

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. In 1625, Hugo Grotius wrote On the Law of War and Peace, focusing on the humanitarian treatment of civilians. In the eighteenth and nineteenth centuries, scholars such as De Vattel in France created rules regulating the conduct of armed conflict. The most important early codification of the customs and usages of war was the Lieber Code issued by President Lincoln to the Union forces in the American Civil War.

63. For a time line covering the history of the laws of war, see Society of Professional Journalists, supra note 13.
64. Id.
65. Id.
War in 1863. The first Geneva Convention (which was inspired by Henri Dunant, the founder of the Red Cross) was signed in 1864\textsuperscript{71} to protect the sick and wounded in wartime. Ever since, the Red Cross has played an integral part in the drafting and enforcement of the Geneva Conventions.\textsuperscript{72} The St. Petersburg Declaration Renouncing the Use, In Time of War, of Explosive Projectiles Under 400 Grammes Weight\textsuperscript{73} was enacted in 1868.

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\textsuperscript{74} and the Hague Convention of 1907,\textsuperscript{75} along with their implementing regulations. These treaties are commonly referred to as the Hague Regulations\textsuperscript{76} that 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 Act\textsuperscript{77} concerning, among other issues, the use of asphyxiating

\begin{itemize}
\item \textsuperscript{72} Society of Professional Journalists, \textit{supra} note 13.
\item \textsuperscript{73} See generally UK Ministry of Defence, \textit{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:
\begin{itemize}
\item That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;
\item That the only legitimate object which States should endeavour (sic) to accomplish during war is to weaken the military forces of the enemy;
\item That for this purpose it is sufficient to disable the greatest possible number of men;
\item That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
\item That the employment of such arms would, therefore, be contrary to the laws of humanity.
\end{itemize}
\textit{Id.} at 8.
\item \textsuperscript{74} 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, http://www.yale.edu/lawweb/avalon/lawofwar/hague02.htm.
\item \textsuperscript{75} Convention Respecting the Laws and Customs of War on Land, 36 Stat. 2277, Oct. 18, 1907, 1 Bevans 631 [hereinafter Hague Convention of 1907 or Hague Regulations].
\item \textsuperscript{76} See \textit{id}.
\item \textsuperscript{77} Hague Convention of 1899, \textit{supra} note 74, It consists of four Rules and three Declarations, and regulates the following issues of wartime conduct: Hague I: Pacific
gases and expanding bullets and a general prohibition on weapons that cause “unnecessary suffering.” The Second Peace Conference at The Hague occurred on October 18, 1907 where thirteen treaties and one declaration regulating the laws of war were signed and entered into force on January 26, 1910.

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, wounded, and prisoners of war, but training, supervision, and enforcement of the laws were inadequate. The laws of armed conflict were inadequate especially for the protection of civilians and as regards to the widespread use of aerial bombardment and gas. 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. Nevertheless, in World War I bombarding the enemy on his own territory became the strategy of all States capable of undertaking it. Even though belligerents in World War I claimed they were obeying the principles of the laws of war by restricting air bombardment to military objectives, the techniques available to them at that time prevented accurate bombing. This resulted in the loss of

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82. See UK Manual of the Law of Armed Conflict, supra note 73, at 10.
civilian life and damage to civilian objects that were disproportionate to the military advantage gained\(^{84}\) and a serious violation of the principles of military necessity, humanity, distinction and proportionality.\(^{85}\)

Accordingly, many treaties were enacted after World War I to provide more protection to the sick and wounded prisoners of war, to regulate the use of gas, and to prohibit slave labor. The Treaty of Versailles,\(^{86}\) 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,\(^{87}\) which reflect general principles and customary rules regarding aerial bombardment, was published in December 1922–February 1923 but never adopted by States.\(^{88}\) In 1925, the Geneva Gas Protocol\(^{89}\) was signed prohibiting the use of poison gas and the practice of bacteriological warfare.\(^{90}\) The Slavery Convention\(^{91}\) 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: (1) the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armies in the Field, and (2) 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

\(^{84}\) Id.

\(^{85}\) See infra text accompanying footnotes 137–48 for a discussion of the principles of military necessity, humanity, distinction, and proportionality.


\(^{88}\) UK Manual of the Law of Armed Conflict, supra note 73, at 10.

\(^{89}\) 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.

\(^{90}\) Society of Professional Journalists, supra note 13, at 1.


and Historic Monuments (Roerich Pact)\textsuperscript{93} was enacted on April 15, 1935. Rules against perfidy were also recognized before 1939 and reflect “chivalric values” that date back to medieval times.\textsuperscript{94} 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, noncombatants, and property outside military targets. Thus, after World War II, the Nuremberg Charter,\textsuperscript{95} the Genocide Convention,\textsuperscript{96} four 1949 Geneva Conventions\textsuperscript{97} and two 1977 Protocols,\textsuperscript{98} 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 we know of today.

\section*{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

\textsuperscript{93} Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), done April 15, 1935, 167 L.N.T.S. 289.


\textsuperscript{95} Charter of the International Military Tribunal, Annexed to the London Agreement of Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 279 [hereinafter the Nuremberg Charter].


laws,\textsuperscript{99} and in other international instruments,\textsuperscript{100} 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.\textsuperscript{101} Some attribute the cause of this conduct on the inadequacies of the existing laws of war\textsuperscript{102} while others claim the technology of the period was insufficient to protect civilians, especially with regard to aerial bombardment.\textsuperscript{103} Furthermore, not all belligerents in World War II were parties to the Hague Convention of 1907 and its Regulations,\textsuperscript{104} nor were all of them parties to the existing Geneva Conventions of 1864 and 1929.

\textsuperscript{99} H. Victor Conde, \textit{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, Conde 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.” \textit{Id.} See \textit{UK Manual of the Law of Armed Conflict, supra} note 73, 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 \textit{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.

\textit{Id. See also} Jordan J. Paust, \textit{International Law as Law of the United States}, 3–16 (2nd ed. 2003) for an in-depth discussion of “customary international law.” \textit{Opinio juris} involves expectations that something is legally appropriate or required. See Hague Conventions of 1907, \textit{supra} note 75, at n. 106.

\textsuperscript{100} See \textit{United Nations, Historical Review of Developments Relating to Aggression} 29 (2003).


\textsuperscript{102} \textit{UK Manual of the Law of Armed Conflict, supra} note 73, at 12.

\textsuperscript{103} See \textit{id.} at 10.

\textsuperscript{104} See Meron, \textit{Hague Academy, supra} note 13, at 34: “The Fourth Hague Conventions’ \textit{si omnes clause} threatened the integrity of Nuremberg prosecutions. In the \textit{Trial of German Major War Criminals} (Nuremberg 1946), the defence raised the argument that the [Hague] Convention and its Regulations did not apply because several of the belligerents were not parties to it.” \textit{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.” \textit{Id.}, n. 28, citing \textit{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, any limitations in the treaty (such as the general participation clause that provided the treaty as such only applied among signatories and their nationals) became irrelevant. \textit{Id.}
that dealt with the treatment of the sick and wounded and prisoners of war.\textsuperscript{105} The Hague Regulations were arguably insufficient to guide the conduct of authorities in control of vast areas of occupied territory, and they were systematically violated during World War II.\textsuperscript{106} Moreover, the Hague Regulations were frequently ignored with excessively harsh measures being adopted by the occupying powers to counter activities of partisans.\textsuperscript{107} Treatment accorded to prisoners of war during World War II was far below acceptable international standards.\textsuperscript{108} 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 that resulted in extremely heavy civilian casualties.\textsuperscript{109} Furthermore, between 1930 and 1945 there were few treaty provisions to protect civilians subjected to deportation and extermination as part of a concerted policy of genocide.\textsuperscript{110} In World War II, extensive bombing offensives 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 this period.\textsuperscript{111} Moreover, customary prohibitions broke down as violations by different sides intensified and States engaged in reprisals (which are now impermissible). Arguably, air operations directed against ground targets were subject to the same general principles of customary international law and certain treaty obligations that bound armed forces on land.\textsuperscript{112}

In 1949, after great damage and destruction had been perpetrated in the face of existing law, the hope was that the Nuremberg Charter,\textsuperscript{113} the Genocide

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105. See Geneva Convention of 1929, supra note 92, 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 supra note 100.

106. UK Manual of the Law of Armed Conflict, supra note 73, 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, but they were violated during World War II.


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


112. UK Manual of the Law of Armed Conflict, supra note 73, at 12. The Nuremberg Charter, supra note 98, declared indiscriminate bombardment to be a crime cognizable by the tribunal.

113. The Nuremberg Charter, supra note 95.
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Convention of 1948, the four Geneva Conventions of 1949, 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. Illustrations of the Inadequate Implementation of Laws of War in the Book and the Film
The impact of the inadequate implementation 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 1939–45, 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 Obersalzburg on the event 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? (emphasis added)

This quote by Hitler reveals two important points: first, he intended to wipe out the Poles, whom he despised and classified in the Nazi handbooks as Untermenschen, or “subhumans” simply because the Polish people were not a pure race but rather a mixture of Slavs and Jews. 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 could have prevented the Holocaust. As Hitler launched a total war violating every existing custom, rule, and law of armed conflict, the victims did not realize that the arguable inadequacy of the laws of war and the general failure to enforce them would result in their destruction.

Viewers of the 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.

114. Genocide Convention, supra note 96.
118. Davies, supra note 51, at 84.
119. Id. at 83.
where they are mistreated and eventually exterminated in gas chambers. In this cinematic depiction of war, viewers see no justice, no honor, and no humanity, even though according to the existing laws of war (and especially the Lieber Code of 1863)\textsuperscript{120} “martial law” must be “strictly guided by the principles of justice, honor, and humanity.”\textsuperscript{121} The Lieber Code states clearly that “men 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.”\textsuperscript{122}

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 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:\textsuperscript{123}

\ldots violations 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 property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.\textsuperscript{124}

2. Illustration of Crimes against Humanity The Pianist illustrates the widespread commission of crimes against humanity\textsuperscript{125} as defined in the Nuremberg Charter:

\ldots murder, extermination, enslavement, deportation and other inhumane acts committed against civilian populations, before or during the war; or

\begin{itemize}
  \item \textsuperscript{120} See \textit{generally} the Lieber Code, \textit{supra} note 70 (referring to the existing policies set forth by the Instructions for the Government of Armies of the United States in the Field).
  \item \textsuperscript{121} \textsc{Theodor Meron}, \textit{Bloody Constraint: War and Chivalry in Shakespeare 13} (1998) (quoting the Lieber Code); \textit{see also} \textsc{Theodor Meron}, \textit{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). Meron’s books cited in this note are among the best examples of the study of international law through literature.
  \item \textsuperscript{122} The Lieber Code, \textit{supra} note 70, art. 15, at 4.
  \item \textsuperscript{123} See the Nuremberg Charter, \textit{supra} note 95, art. 6.
  \item \textsuperscript{124} \textit{Id.} art. 6(b). \textit{See infra} text accompanying note 142 for a discussion of military necessity.
  \item \textsuperscript{125} Crimes against humanity are listed in the Nuremberg Charter. \textit{See the Nuremberg Charter, supra} note 95, art 6(c); \textit{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”). \textit{See also Conde}, \textit{supra} note 99, 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. \textit{See, e.g.}, the International Military Tribunal at Nuremberg, which specifies that the crimes must be committed either “before or during the war.” \textit{Id.}
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. 

Crimes against humanity or inhumane acts committed in the context of a widespread or systematic attack against civilian populations are vividly 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, and Jews forced to do long hours of backbreaking manual labor in slave-like conditions where a small infraction of a person's unpaid forced labor would result in excessive punishment. Szpilman is beaten viciously until unconsciousness 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

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 were codified after World War II in the U.N. Charter (1945), the Universal Declaration of Human Rights (1948), the Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Elimination of Discrimination Against Women (1979), the Convention Against Torture

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126. The Nuremberg Charter, supra note 95, art. 6(c).
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In scene after scene of *The Pianist*, like stanzas of an epic poem, viewers observe collective executions and denial to the Jews of their fundamental rights to life, liberty, and fair trial along with their 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 Nazi power. With varying degrees of authenticity viewers of the film witness six hundred thousand Jews being persecuted and segregated into a ghetto where they are beaten, defamed, humiliated, starved, and subjected to patently discriminatory laws that denied them the right to work, the right to walk on the street as other citizens, and the right to protection under the law. These racist laws deprived Jews of the right to earn and save money and required them

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135. The question of the authenticity of representations of the Holocaust and other atrocities is a much-debated subject. Some famous writers of the Holocaust, such as Thane Rosenbaum, believe that film cannot and should not attempt to recreate the reality of the Holocaust because this reenactment cannot 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, http://pqasb.pqarchiver.com/newsday/search.html; see generally *Scars of the Spirit*, supra note 60 (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, recognizing that “art...is under heavy pressure when it comes to Holocaust representation, a pressure amounting almost to an interdiction...” Hartman, *supra* note 60, at 8; Claude Lanzmann, the famous filmmaker 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. Preferring 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 art seeks to memorialize.

136. *See generally* Weisberg, *supra* note 32 (analyzing the discriminatory laws passed in Vichy, France and elsewhere under the supervision of lawyers who justified these laws by pure casuistry).
to wear a blue star of David visibly on their arm to distinguish them from the Aryans or Polish non-Jews. This blue star enabled the occupying power to identify the Jews as a group more easily. The Jews were then violated, dehumanized, 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 conflict, including military necessity, humanity, distinction, and proportionality.

137. See generally UK Ministry of Defence, supra note 73, at 21–27 (discussing the basic principles of armed conflict).

138. See id. at 21 (“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.”).

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 70, 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 75, art. 22 and Protocol I, supra note 101, art. 35 (1).

139. See UK Manual of the Law of Armed Conflict, supra note 73, 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.”).

“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 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 Protocol I, see supra note 98, art. 1(2) and Protocol II, supra note 98, Preamble. See also Meron, supra note 13, at 41–47 (discussing the principle of humanity and the dictates of public conscience in the Martens Clause and its significance today).

140. See UK Manual of the Law of Armed Conflict, supra note 73, 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 98, arts. 48 and 49(3). The principle of discrimination is inherent in customary law. See Manual of the Law of Armed Conflict, supra note 73, 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”).

141. See id. at 25 (“The principle of proportionality requires that the losses resulting from a military action should not be excessive in relation to the expected military advantage.”)
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; it is not an excuse for violations of other laws of war prohibitions. Germany through Hitler and his officers violated the principle of the laws of armed conflict when the Nazis went beyond military necessity by burning up and totally destroying Warsaw. In the film, the scene of Warsaw reduced to flames by the Nazis who left the once-glorious city 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; it also immunizes the civilian population and civilian objects from attack. 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 (or perhaps

“The principle of proportionality is a link between the principles of military necessity and humanity, and 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 Protocol I, see supra note 98, 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 Manual of the Law of Armed Conflict, supra note 73, at 25. Cf. Paust et al., supra note 70, at 837. See generally 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).

142. Meron, supra note 121, at 13. Military necessity is clearly defined in the Lieber Code (Apr. 24, 1863). See supra note 70, art 16 (“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. . .”). See also, id. at supra note 70, 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.” Id.

143. UK Manual of the Law of Armed Conflict, supra note 73, at 23.
only for the unjustified and utilitarian reasons of old age, but more likely as a policy of terror intentionally inflicted). One of the most vivid examples of the violation of the principle of humanity is the scene in which an old man in a wheelchair is thrown out of the window by the Nazi guards who are terrorizing his family in their apartment. The Nazis looted homes, destroyed personal property, and stole valuable objects such as 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 eye of the storm because of the systematic violation of the principle of humanity in one of the most horrific examples of State-inflicted terrorism.

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 difference 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.\textsuperscript{144} Szpilman’s suffering on screen is actually the suffering of all civilians during the siege of Warsaw by the unrelenting military might of the Third Reich. The violation of the principle of distinction is another element of State-inflicted terrorism by Nazi Germany.

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.\textsuperscript{145} 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 infliction of fear, 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\textsuperscript{146} and State-sponsored terrorism. During the German occupation of Poland, people in Warsaw were illegally deprived of basic necessities such as food and drinking water that are indispensable to the survival of the civilian population.\textsuperscript{147} The violation of this principle of proportionality is illustrated in the tragic scene where the once-elegant and

\textsuperscript{144} Id. at 24.

\textsuperscript{145} See UK Manual of the Law of Armed Conflict, supra note 73, at 25.

\textsuperscript{146} See id. at 305.

\textsuperscript{147} See the Geneva Conventions of 1949, supra note 97, art 147 (codifying the illegality of general devastation or the “scorched earth policy” in occupied territory); see also UK Manual of the Law of Armed Conflict, supra note 73, at 305 (discussing the destruction of basic necessity by military that was not justified).
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.\(^{148}\) It was understood that the State “must do something in response to wrongs against its people,”\(^{149}\) and that peace without justice is no peace at all.\(^{150}\) Crimes of massive violence must not go unpunished, and the culture of impunity for perpetrators of high rank and office must be eradicated. If we ignore the need of victims to seek revenge and retribution, which is a “deeply-rooted human need that cannot be moralized away,”\(^{151}\) the failure to provide retributive justice will only perpetuate more violence.\(^{152}\) Thus, soon after World War II, the London Agreement was reached establishing the Nuremberg Charter,\(^{153}\) which codified and compiled existing customary laws, rules, regulations, and treaties on the laws of armed conflict applicable to the defendants at the Nuremberg Trials. The Nuremberg Charter also defined crimes against the peace (aggression),\(^{154}\) war crimes,\(^{155}\) and

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\(^{148}\) 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. This very important book questions the legitimacy of the claim that language or narrative stories can alone substitute for the violence associated with traditional justice).

\(^{149}\) Phelps, supra note 148, at 7.


\(^{151}\) Phelps, supra note 148, at 6.

\(^{152}\) Id. at 7.

\(^{153}\) The Nuremberg Charter, supra note 95, art. 6 (a)–(c) defined three categories of crimes: crimes against peace, war crimes, and crimes against humanity. See also UK Manual of the Law of Armed Conflict, supra note 73, at 12 n.35 (citing The Nuremberg Judgment (1947) XXII International Military Tribunal 451–53).

\(^{154}\) The Nuremberg Charter, supra note 95, art. 6(a).

\(^{155}\) Id.
crimes against humanity, all of 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. I have tried to show that norms relating to conduct during war were clearly in place before World War II; however, they were systematically violated and poorly enforced during the war. Nevertheless, Supreme Court Justice Robert H. Jackson, who served as the chief U.S. prosecutor at the Nuremberg trials, claimed that some of the norms guiding the prosecution were not explicitly or specifically in place at the time of the offenses. The framers of the Nuremberg Charter stated that they were committed to apply only preexisting laws to particular cases. For example, the Kellogg-Briand Pact, 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 did not fully articulate these crimes. Crimes against humanity had other historic bases, such as in the 1919 Report of the Responsibilities Commission of the Paris Peace Conference. 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 as the Nuremberg Court held that the more compelling argument prevailed in the end that the defendants had failed to properly execute their duty of fairness and obedience to customary laws.

V. RESTORATIVE JUSTICE AND THE POWER OF ART AS 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 Nazis used the power of art and aesthetic pleasure to harness their political goals. 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.” Films from the Nazi period often depict elegant, cultured people (both military and civilians)

156. Id. at 6(c).
159. Minow, supra note 157, at 32.
160. See Paust et al., supra note 70, at 741–47, 857.
161. See Geoffrey 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.”).
162. Id.
listening intensely to Mozart and Bach at concerts, then standing by as millions are slaughtered. No one expects art to prevent terror,\textsuperscript{163} 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.\textsuperscript{164} In this spirit, Theodor Adorno said that it is a sign of the barbaric to write poetry after Auschwitz.\textsuperscript{165}

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.”\textsuperscript{166} Legal scholars and psychologists report the therapeutic benefits of retelling the story of violence and torture perpetrated on the victim.\textsuperscript{167} Storytelling through art can restore the loss of language brought about by oppression and violence. Narration through art provides communication between victor and vanquished who would not normally be able to understand each other. Storytelling through art can reveal truth, encourage empathy for the victim by the perpetrators and society at large, and 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.”\textsuperscript{168} Storytelling through artistic representation can make the victim whole again by helping her “to re-member that which is fragmentary”\textsuperscript{169} in the minds 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.

\textsuperscript{163} Id. at 139.
\textsuperscript{164} Hartman, supra note 161, at 157.
\textsuperscript{165} Id., citing Theodor Adorno, Commitment (1962), in The Essential Frankfurt School Reader (A. Arato & E. Gebhardt eds., 1982).
\textsuperscript{166} Id.
\textsuperscript{167} See Phelps, supra note 148, at 8.
\textsuperscript{168} Id. at 70, 72.
\textsuperscript{169} Id. at 71.
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 is part of a restorative process. Remedies in the judicial system are not designed to rectify the wrong done to a victim and to correct injustice, but to place an aggrieved party in the same position as she would have been had no injury occurred. Remedies in law are thus classifiable as either retributive or restorative (they are otherwise referred to as legal or equitable remedies). Thus, remedies reflect two different kinds of justice. “Central to both retributive and restorative justice is a concern with righting wrongs and restoring equilibrium to a moral order upturned by criminal wrongdoing.”

Restorative justice emphasizes “the communication process in which the victim tells her story and the offender acknowledges wrongdoing, and makes amends.” Restorativists are concerned with meeting the victim’s needs rather than engaging in revenge and retaliation.

Legal remedies, which reflect both the retributive and restorative justice systems, consist of damages that can be compensatory, punitive (retributive), exemplary, or statutory, or can take the form of restitution or specific relief (replevin or ejectment). Equitable, nonmonetary 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 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 has investigated atrocities committed in Uganda. The ICC was close to issuing warrants for rebel leaders, but some war victims in Uganda urged the ICC to turn a blind eye to the perpetrators to avoid reprisals against the local people. The Ugandan victims argued in favor of local solutions and “forgiveness”—thus, in a kind of restorative justice that may or may not legitimize a culture of impunity that can only invite more atrocities. Despite frequent attempts to bring an end to the fighting, Uganda has had three decades of massive crimes of violence. Its first

170. See generally, Dinah Shelton, Remedies in International Human Rights Law (2nd ed. 2005) (examining the breadth and depth of remedies available under national and international law).
171. Id. at 38.
173. Id. at 356.
174. Id. at 359.
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. However, 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 that 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 film of *The Pianist* are works of art, fictional representations of reality infused with enough fantasy to distance the writer and the filmmaker from the painful realities of the ghetto and 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 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 that 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 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 that is in the end 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 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; and 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 moviemaking in the United States for his admittedly illegal activities for which Polanski is now, in 2010, under house arrest in Switzerland and about to be tried in a U.S. Court. Szpilman is different from the others around him because he is an artist, a pianist, a celebrity, a star, and a
survivor who remains outside looking in but agonizing, and, nevertheless, heroic 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 weapon collection operation to supply the resistance with ammunition for the Warsaw Ghetto uprising. Szpilman even 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. In the book Szpilman describes this scene poignantly and effectively, and in the film Polanski shows us an even more vivid picture of the flagrant violation of the principle of humanity.

Art keeps Szpilman alive. Music and his passion for artistry give Szpilman 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. This is 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’s C-sharp minor Posthumous Nocturne, Chopin’s Gb minor Ballade, Beethoven’s Moonlight Sonata in C-sharp Minor, Chopin’s F Minor Concerto Opus 21, Bach’s Suite #1 for solo cello, and other pieces, which are all in the minor and very dark mode except for Chopin’s Grande Polonaise Brillante Opus 22 in Eb major, which depicts 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 Grande Polonaise Brillante every thirty seconds to tell the world that the capital was still in Polish hands. In his agonizing isolation in the Warsaw Ghetto, Szpilman longs for the kind of jubilant victory artistically expressed in the Grande Polonaise. It is that piece of uplifting music that is significantly chosen by Polanski to be the last piece Szpilman plays in the film. In the end, Szpilman is victorious and no longer alone, as he is now surrounded by the harmonious Polish orchestra where he distinguishes himself once again as “the Pianist.”


177. A ballade is a folktales told in song, a narrative model based on songs and poetic forms, a story in sound, such as Roman Polanski’s film The Pianist. See generally, James Parakilas, Ballads without Words; Chopin and the Tradition of the Instrumental Ballade (1992).

178. Davies, supra note 51, at 85.
Szpilman’s fame and artistry as a composer and pianist inspired both those 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.179 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. Szpilman’s deeply embedded message, which ends on a positive note, is not only about representing good and bad Germans or good and bad Poles or good and bad Jews. The film and the book do represent a balanced view of mankind. Szpilman’s message is about the futility of war, the unimaginable suffering war causes, and the unnecessary and irreparable destruction of life and physical beauty in a world at war without rules of law to guide the warriors and 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. This ironic duality is expressed linguistically in the Latin word bellum, which means “war,” and comes from the same root as bellus or beautiful.180 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 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 the musician’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 prewar 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 cause 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.

180. Hoffman, supra note 60, at 43.
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 reenactment 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 storytelling, can provide restorative justice to the victim without necessarily providing retribution to the perpetrators.

For example, the German officer who finds Szpilman hiding in the rubble of a bombed-out apartment asks him to play the piano. The officer is visibly moved by the music and shows his appreciation for Szpilman’s interpretation of the Chopin Ballade by offering him safe shelter and food that Szpilman eats ravenously with his long, slender 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 restorative 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 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. We have to read Szpilman’s book and then see it represented vividly and persuasively in the film The Pianist to actually believe it.