

FOREWORD: WAR TALES AND WAR TRIALS

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INTRODUCTION

In 1999, after more than twenty years as a federal judge, I became a trial judge at the International Criminal Tribunal for the former Yugoslavia. Up to that time, my knowledge of war had been derived from the dozens of books and movies I had read and watched as I lived through World War II, the Korean War, Vietnam, and the two Gulf Wars. Every day for the next two years, I listened to the heart-wrenching stories of Balkan survivors of genocide, massacres, prison camps, and planned executions. I remember particularly one compelling woman who testified that in a single fateful week she had lost a husband, son, father, brother, and twenty-six male relatives in the genocide at Srebrenica. She announced to the court: “We wish him [the defendant general] a death penalty, for him to disappear from the face of the earth.”¹ An Egyptian judge serving alongside me described the evidence in that case as

scenes of unimaginable savagery: thousands of men executed and buried in mass graves, hundreds of men buried alive, men and women mutilated and slaughtered, children killed before their mothers’ eyes, a grandfather forced to eat the liver of his own grandson. These are truly scenes from hell, written on the darkest pages of human history.²

In this foreword, I will compare my experiences as a judge on the International Criminal Tribunal for the former Yugoslavia, and the work of war crimes tribunals generally, with a few of the recurrent themes in epic tales of war. Books and trials strive to educate and to persuade their audiences of the barbarity of war and its antipathy to the most fundamental norms of a humane society.³ War crimes tribunals began with Nuremberg and have proliferated in the past fifteen years. These tribunals were established to try and to punish individuals for violations of international humanitarian law (“IHL”)—the so-called “law of war,” itself only a century old, which sets out “rules of engagement” for belligerent states and internal warring groups.

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1. *Bosnian Serb accused of genocide*, BBC NEWS ONLINE, Mar. 13, 2000, <http://news.bbc.co.uk/2/hi/europe/676297.stm> (last visited Dec. 12, 2007).

2. Press Release, Int’l Criminal Tribunal for the Former Yugo., Radovan Karadzic and Ratko Mladic Accused of Genocide Following the Take-Over of Srebrenica (Nov. 16, 1995), <http://www.un.org/icty/pressreal/p026-e.htm> (last visited Dec. 12, 2007).

3. Pierre Hazan, *Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice*, 88 INT’L REV. RED CROSS 19, 32 (2006).

I. WAR NOVELS

But do war crimes tribunals in any meaningful way address the profound message of cynicism and rage at the futility, brutality, and arbitrariness of war that permeates most enduring novels of the genre?

There is no question but that the war writers are the pessimists in the equation: they see little merit in trying to salvage justice, honor, closure, or reconciliation from mindless conflict. The tribunalists, however, while sharing the writers' views on the inevitability of war, move cautiously and haltingly to alleviate some of its most abhorrent practices in the persistent hope that the introduction of a semblance of rules and order can help alleviate the futility and fury that scorch the novelists' prose.

For example, Joseph Heller's soldier protagonist, Yossarian, a combat bomber during World War II, thought it a "vile and muddy war Just about all he could find in its favor was that it paid well and liberated children from the pernicious influence of their parents."⁴ Heller's characters express their rage at the random carnage of a war which seemed to draw no distinction between enemy and friend, guilty and innocent. After being ordered to bomb a road full of friendly villagers, the soldiers plead:

"Can't we even tip them off so they'll get out of the way?"

. . . .

"They won't even take shelter They'll pour out into the streets to wave when they see our planes coming, all the children and dogs and old people. Jesus Christ! Why can't we leave them alone?"

"I don't know," Major Danby answered unhappily. "I don't know. Look, fellows, we've got to have some confidence in the people above us who issue our orders. They know what they're doing."

"The hell they do," said Dunbar.⁵

Articulating a similar cynicism, Vonnegut described his own experiences with wartime justice during the Allied fire bombing of Dresden: "The irony is *so* great. A whole city gets burned down, and thousands and thousands of people are killed. And then this one American foot soldier is arrested in the ruins for taking a teapot. And he's given a regular trial, and then he's shot by a firing squad."⁶

Running through all of the classics is anger at the brutality and futility of war and at war's disproportionate toll on the soldiers and civilians at the bottom of the heap. Hemingway's *Farewell to Arms* is typical:

I was always embarrassed by the words sacred, glorious, and sacrifice and the expression in vain. We had heard them, sometimes standing in the rain almost out of earshot, so that only the shouted words came through, and

4. JOSEPH HELLER, *CATCH-22* 69 (1955).

5. *Id.* at 319–20.

6. KURT VONNEGUT, *SLAUGHTERHOUSE FIVE* 4 (1969).

had read them, on proclamations that were slapped up by billposters over other proclamations, now for a long time, and I had seen nothing sacred, and the things that were glorious had no glory and the sacrifices were like the stockyards at Chicago if nothing was done with the meat except to bury it. . . . Abstract words such as glory, honor, courage, or hallow were obscene beside the concrete names of villages, the numbers of roads, the names of rivers, the numbers of regiments and the dates.⁷

The sentiment is not peculiarly American. The French writer Sebastien Japrisot laments in *A Very Long Engagement*:

I can wait. I'll keep waiting, for as long as it takes, for this war to be seen in everyone's eyes for what it always was, the most filthy, savage, useless obscenity that ever there was. I'll wait until the flags stop flying in November in front of the monuments to the dead, I'll wait until the Poor Bastards at the Front stop gathering, wearing their damned berets and missing an arm or a leg, to celebrate what?⁸

And Nobel Prize winner Ivo Andrić, in *The Bridge on the River Drina*, chronicles centuries of Balkan wars against the backdrop of a solitary bridge in one small town, and identifies the terrible undoing of human intercourse that civil war typically brings:

[T]hen began the real persecution of the Serbs and all those connected with them. The people were divided into the persecuted and those who persecuted them. That wild beast, which lives in man and does not dare to show itself until the barriers of law and custom have been removed, was now set free. . . . As has so often happened in the history of man, permission was tacitly granted for acts of violence and plunder, even for murder, if they were carried out in the name of higher interests, according to established rules, and against a limited number of men of a particular type and belief.⁹

The mood in these novels is fatalistic about the inevitability of war and its profound yet haphazard insults to the human condition. "So it goes,"¹⁰ Vonnegut famously punctuated death in war. In contrast, the purpose of the war crimes tribunals and IHL has been to inject into the real-life killing fields some elements of restraint, some limits on whom, how, and where the human assaults can take place. Is that a fool's errand, a cynical façade to give cover to the true immorality of war?

I don't think so. War is not waged by born criminals but by ambitious and ruthless leaders and by ordinary men and women executing their orders, or themselves caught up in the emotional rush of nationalistic or factional dogma. The injection of a realistic threat of personal punishment for known violations of a code of wartime behavior does have potential for curbing

7. ERNEST HEMINGWAY, *A FAREWELL TO ARMS* 191 (1929).

8. SÉBASTIEN JAPRISOT, *A VERY LONG ENGAGEMENT* 308 (1991).

9. IVO ANDRIĆ, *THE BRIDGE ON THE DRINA* 282–83 (Lovett F. Edwards trans., Univ. of Chi. Press ed. 1977) (1945).

10. VONNEGUT, *supra* note 6, at 268.

atrocities. The tribunals are still young and that potential has not been fully realized, but for us to abandon the cause so early makes little sense to me.

II. WAR CRIMES TRIBUNALS: A HISTORY

War does, as novelists like Andrić recount, too often rip the thin veneer off civilization and convert ordinary, law-abiding people into rampaging killers.¹¹ Some legal commentators have suggested that for that reason, crimes committed in the vortex of war should not be tried and punished like ordinary crimes at all. In war, they say, an entire nation may turn criminal:

How can anyone start to assign a specific amount of responsibility to each one of the hundreds of thousands—probably *millions*—of people who took part in [the Rwandan massacres] . . . ? How, in short, can one apply conventional methods of legal judgment to the giant mass of the Hutu people who were caught up in a profoundly abnormal reality? . . . Millions of men and women [lose], for some period of time, all recognition of the humanity of their victims, and even of their own self-respect and humanity.¹²

This fatalism, however, has not sufficed for a majority of international law experts or humanitarians. Hannah Arendt sums up their determination to put boundaries on human predation even in time of war: “[I]t seems to me . . . we have no tools to hand except legal ones with which we have to judge and pass sentence on something that cannot even be adequately represented either in legal terms or in political terms.”¹³

My own impression while serving as a judge at the Yugoslav Tribunal was that the most serious war crimes committed by the middle- and upper-level defendants were done with aforethought and for strategic reasons, not in the heat of battle. The same is true for the terrible outrages perpetrated by prison camp personnel on prisoners. In one of the camp trials detainees testified that they had to pass through a gauntlet of guards who beat them on their way into and out of the eating area:

The bread would fly out of their hands. They had very little time to come in, get their food, eat it, and go out, and all this would be accompanied by blows. Everyone tried to hold on to his eighth of a loaf of bread. . . . [W]hen the blows fell, they would open their hands and the bread would fall out of their hands.¹⁴

This kind of callous cruelty far from the battlefield cannot or should not in my view be readily discounted by group hysteria.

11. ANDRIĆ, *supra* note 9, at 233.

12. Helena Cobban, *The Legacies of Collective Violence*, BOSTON REV., Apr./May 2002, available at <http://bostonreview.net/BR27.2/cobban.html> (last visited Dec. 12, 2007); see also David Ignatius, *Casualties of War*, WASH. POST, Sept. 16, 2007, at BW03 (reviewing DENIS JOHNSON, *TREE OF SMOKE* (2007)), and describing “damaged” American soldiers in Iraq who were “addicted to war, feeding on it in a frenzy, being made crazy by it”).

13. Cobban, *supra* note 12.

14. Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 54 (Nov. 2, 2001).

But, as the war novelists illuminate, war crimes can range from the triviality of Vonnegut's pillaged teapot to the cluster bombing of 139,000 Dresden residents, the cold-blooded execution of 8,000 young men from Srebrenica in a single week in 1995, and the genocidal murders of nearly one million Tutsis in 1994.

In fact, the earliest attempts at a code of behavior for combatants were more adept at dealing with the kind of teapot pillaging and one-on-one assaults than with the most notorious and blameworthy war crimes such as massacres, deportation, and other crimes against humanity perpetrated by those who may never set foot on the battlefield, who in their far-off headquarters order, plan, incite, or instigate widespread campaigns of murder, rape, and torture.¹⁵

There were no codified laws of war well into the nineteenth century, and they first appeared primarily in army manuals, enforced by military discipline. In the twentieth century, multinational conventions were negotiated dealing with the behavior of warring nations and proscribing certain practices—bombing hospitals, using poisonous weapons—as outside the boundaries of civilized norms. In brief, only “military objectives” should be attacked, and then only by means that permit targeting rather than “indiscriminate” raids; and there should be a “proportionality” principle that collateral damage to innocent civilians must not be disproportionate to the value of the military objective. The Conventions—particularly the Geneva Conventions—also laid down rules for the humane treatment of noncombatants, prisoners of war, and civilians in occupied territories.¹⁶

None of the early Conventions dealing with the laws of war, however, contained provisions for holding individuals liable for their violation. They contemplated diplomatic negotiations, peace treaties, and possibly state-to-state compensation as remedies. It was assumed that heads of state were immune from liability for official acts, and it was accepted that prosecutions

15. See, e.g., DALAI LAMA, *ETHICS FOR THE NEW MILLENNIUM* 204 (1999). He notes that

in modern warfare the role of those who instigate it are [sic] often far removed from the conflict on the ground. . . . Those who suffer most in today's armed conflicts are the innocent—not only the families of those fighting but, in far greater numbers, civilians who often do not even play a direct role. . . . [M]ore and more, women, children, and the elderly are among its prime victims.

Id.

16. For discussion of these principles, see Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551 (2006), reprinted in AMERICAN SOC'Y OF INT'L LAW, *A CENTURY OF INTERNATIONAL LAW* 215; GERHARD WERLE, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 267–76 (2005); and A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 1–46 (1996). The Rome Statute of 1998, codifying the jurisdiction of the International Criminal Court, contains over thirty prohibited actions which constitute war crimes including willful killing, torture, abuse of prisoners of war, hostage taking, unlawful confinement, intentional attacks on the civilian population, interfering with humanitarian assistance, bombarding undefended towns, improperly using a flag of truce or a UN emblem, forcing enemy nationals to participate in a war against their native country, rape, sexual slavery, intentional starving of civilians, and conscripting of child soldiers. Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

by states of their own malefactors would be rare to nonexistent.¹⁷ After World War I the World Court, a predecessor to the current International Court of Justice (“ICJ”), provided an international forum for one state to obtain a declaration or civil judgment against another for violation of international law, as well as a mediation and arbitration process. The operations of the ICJ to this day, like those of the World Court before it, proceed at a glacial pace,¹⁸ and its judgments are limited to the state parties involved who must consent to the Court’s jurisdiction in the first instance.¹⁹ As a practical matter, its judgments are unenforceable except by international peer pressure.

After World War I, the Paris Peace Conference compiled a list of thirty-two war crimes and recommended individual trials for offenders, including the Kaiser, before an international court. The United States, however, opted out and the other Allies cooled for fear the renewed focus on German atrocities would weaken the failing Weimar Republic and encourage a Bolshevik revolution. An original list of near 20,000 suspected war criminals prepared by the Allies was ultimately pared down to 13 who were tried before a Reich Supreme Court in Leipzig; 6 were convicted.²⁰ “[T]he Allies’ experiment in retributive justice following the First World War” was declared “a dismal failure.”²¹

By the middle of World War II, plans were afoot to set up an international military tribunal to try Nazi and Japanese leaders for war crimes based on the Hague and Geneva Conventions and Protocols, the League of Nations Covenant, and the Kellogg-Briand Pact of 1928.²² At war’s end, nonetheless, Churchill privately advocated for major Nazi war criminals to be hauled before execution squads and shot, but U.S. leaders like President Harry Truman, Secretary of War Henry Stimson, and former Attorney General and Supreme Court Justice Robert Jackson pressed for public trials to educate not only the German people but the world about what had happened under the Nazis so that “never again” would it be repeated. For this purpose,

17. Meron, *supra* note 16, at 218.

18. Just last year, in 2007, the ICJ rendered a limited judgment against Serbia for failing to prevent the genocide at Srebrenica as part of a broader genocide accusation initiated in 1993 by Bosnia. Press Release, Int’l Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Feb. 26, 2007), <http://www.icj-cij.org/presscom/index.php?pr=1897&pt=1&p1=6&p2=1> (last visited Dec. 12, 2007).

19. See Karen J. Alter, *Private Litigants and the New International Courts*, 39 COMP. POL. STUD. 22, 25 (2006). The ICJ also gives nonbinding advisory opinions on legal questions submitted by authorized international organs and agencies. *Id.* at 26.

20. WERLE, *supra* note 16, ¶¶ 6–14.

21. Meron, *supra* note 16, at 223 (quoting M. Cherif Bassiouni, *World War I: “The War to End All Wars” and the Birth of a Handicapped International Criminal Justice System*, 30 DENV. J. INT’L L. & POL’Y 244, 290 (2002)).

22. *Id.* The Kellogg-Briand Pact condemned “war as an instrument of national policy” and emphasized states’ duties to resort to war only as a last resort for self-defense or when backed by collective approval from the international community. Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

the Allies agreed that twenty-four top leaders of the Hitler regime would be tried in one nine-month trial before an International Military Tribunal (“IMT”) in Nuremberg for war crimes and crimes against humanity. (Twenty-two were tried; twelve were hanged; seven went to prison; and three were acquitted.) This main trial was followed by the trials of 177 second-tier leaders—in German industry, the medical profession, and the judiciary—for their complicity in the Nazi outrages.²³ Across the world in Japan, twenty-five top Japanese leaders and military officers were tried before another international tribunal set up by General MacArthur which received less publicity, and, justifiably, less plaudits than the IMT in Nuremberg.²⁴

Nuremberg set the basic pattern for war crimes trials—the kinds of crimes that would be prosecuted and the presumption that even alleged war criminals have due process rights. Over the next half century, the list of crimes grew incrementally, and the procedural rights were greatly enhanced, with advances in human rights laws and the rule of law. Yet post-Nuremberg there were no new international war crimes tribunals until the early nineties when the ethnic wars that accompanied the breakup of Yugoslavia produced the most extensive and horrifying accounts of executions, widespread rapes, and concentration-like camps to emerge since World War II. The United Nations Security Council in 1993, drawing on the precedent of Nuremberg, set up a tribunal at the Hague in the Netherlands that would select judges from the ranks of all UN members. Its mandate was to prosecute and try war crimes, crimes against humanity, and the newly identified crime of genocide committed during the Balkan conflict.²⁵ The International Criminal Tribunal for the former Yugoslavia (“ICTY”) was slow to get up to speed; suspects were indicted, but predictably, for several years few surrendered voluntarily or were turned over by the warring factions or their state sponsors. The pace quickened somewhat after the Dayton Accords of 1995 provided authority for NATO peacekeepers to arrest indictees, but until the latter part of the decade business at the international court continued to lag.²⁶

In 1994, the United Nations set up a parallel tribunal, the International Criminal Tribunal for Rwanda (“ICTR”), in Arusha, Tanzania, to prosecute and try genocide, crimes against humanity, and war crimes committed during the apocalyptic assaults by the Hutus upon the Tutsis and moderate

23. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 23, 33, chap. 22 (1992); WERLE, *supra* note 16, ¶¶ 22–24; Meron, *supra* note 16, at 226.

24. WERLE, *supra* note 16, ¶¶ 30–33; Meron, *supra* note 16, at 226, 235.

25. See S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993); S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

26. See PIERRE HAZAN, *JUSTICE IN A TIME OF WAR* chaps. 4–5 (James Thomas Snyder trans., 2004).

Hutus in one year.²⁷ A reported more than 800,000 Rwandans were killed and an estimated 500,000 Rwandans took part in their killing.²⁸

A succession of war crimes courts have followed in the fifteen years since (some national, some international): a Special Court for Sierra Leone following the brutal civil war in that impoverished country;²⁹ a UN-backed Special Panel in East Timor to try the perpetrators of the massacres that followed the referendum on separation from Indonesia in 2000;³⁰ and a belated hybrid court (part national, part international) to try the Khmer Rouge leaders in the 1975–79 cataclysmic convulsion that killed 1.6 million Cambodians.³¹ Iraq chose to try its leaders in national courts; Bosnia and even Serbia have followed suit in the wake of imminent shutdowns of the ICTY national courts; and there have been a few, largely abortive, tries at invoking universal jurisdiction by one country to try the war criminals of another country.³²

The prime development of the new century has been the establishment of the International Criminal Court (“ICC”) in 2002 over strong U.S. opposition. It was joined by more than 100 other nations and currently is investigating or trying referrals involving “situations” in four African countries: the Democratic Republic of Congo, Uganda, Central African Republic, and the Darfur region of Northern Sudan, the last by referral from the Security Council without a U.S. veto.³³ It has issued ten warrants of arrest and is proceeding with the trials of three defendants in custody.³⁴ The ICC’s care-

27. S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

28. ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* 15 (1999).

29. Agreement Between the United Nations and the Government of Sierra Leone on Establishing a Special Court for Sierra Leone (with Statute), U.N.-Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137 [hereinafter Agreement Establishing Special Court for Sierra Leone].

30. U.N. Transitional Admin. in E. Timor Regulation 2000/15: On the Establishment of Panels With Exclusive Jurisdiction Over Serious Criminal Offences, ¶ 22-1, U.N.T.A.E.T. Doc. No. UNTAET/REG/2000/15 (June 6, 2000), available at <http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf>.

31. Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

32. Coalition Provisional Authority (CPA): The Statute of the Iraqi Special Tribunal, Dec. 10, 2003, 43 I.L.M. 231 (2004). For an evaluation of the successes and failures of these later tribunals, see UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (S. Macedo ed., 2004); WERLE, *supra* note 16, ¶¶ 171–76; Meron, *supra* note 16, at 563; and Symposium, *International Criminal Tribunals in the 21st Century*, 21 AM. U. INT’L L. REV. 487 (2006).

33. Rome Statute, *supra* note 16; S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (Darfur referral); Int’l Criminal Court, Situations and cases, <http://www.icc-cpi.int/cases.html> (last visited Dec. 12, 2007).

34. OPEN SOCIETY JUSTICE INITIATIVE, INTERNATIONAL CRIMINAL COURT SUPPORT PROJECT 2008, at 3 (on file with author); Three New ICC Judges Sworn in, Hironelle News Agency, Jan. 17, 2008; Press Release, International Criminal Court, Third detainee for the International Criminal Court: Mathieu Ngudjolo Chui (Feb. 7, 2008), available at <http://www.icc-cpi.int/press/pressreleases/329.html>; Luis Moreno-Ocampo, Prosecutor of the International Criminal

fully defined list of seventy war crimes, crimes against humanity, and genocide is the most refined to date, benefiting by the jurisprudence of the earlier war crimes courts. The Court's reach is global though limited by a requirement that a case or "situation" be referred by (1) a State party that has ratified the Rome Statute or a consenting participant in the case, (2) the Prosecutor, or (3) the Security Council. The case or situation under investigation must also involve a state party or consenting state whose national is a suspect or on whose territory the alleged crime has been committed.³⁵ A further complementarity limit exists if a state which would normally have jurisdiction over the alleged case demonstrates to the prosecutor or the court that it is able and willing to try or to investigate the case itself. The prosecutor must then refrain, subject to periodic review, to allow the intervening state a chance to do so.³⁶ The ICC, unlike earlier war crimes courts, is a permanent institution.

III. WAR CRIMES TRIBUNALS: AN ASSESSMENT ON THEIR OWN TERMS

We may ask: What did the war crimes tribunals aim to do? How well have they done it? And is their activity directed at the same horrors of war that the novels have highlighted?

The tribunals have, as we will see, extraordinarily ambitious goals and if judged by their attainment often fall short. The mere articulation of the goals may create expectations which cannot be met. The novelists by and large do not invite any such hopefulness about deterrence, reconciliation, punishment of wrongdoers, or a more just conduct of war. Like Vonnegut's *Slaughterhouse Five* or Japrisot's *Long Engagement*, they expect the wartime killers to escape punishment or, more likely, to be rewarded and promoted.

War crimes tribunals aim to, among other things, end the "culture of impunity" for the perpetrators of wartime atrocities. This culture has for centuries effectively eliminated risk of punishment when war ended.³⁷ Until the advent of tribunals, the higher up the war crimes perpetrators were in the hierarchy of national power and the more expansive or extensive their crimes were, the less likely it was that they would ever be punished. Amnesty, a key element of most peace processes, ensured their immunity. The tribunals brought hope that the specter of a probing inquiry into the legality of wartime actions and the possibility of heavy penalties for perpetrators might be a deterrent to war crimes. Most international commentators agree

Court, Address to the Assembly of States Parties (Nov. 30, 2007), http://www.icc-cpi.int/library/asp/Statement_Prosecutor_en_30Nov2007.pdf.

35. Rome Statute, *supra* note 16, arts. 5–8, 11–14.

36. *Id.* art. 18; *id.* art. 16 (allowing the Security Council to defer an investigation or prosecution for twelve months). For a comprehensive survey of the ICC's jurisdiction and operations, see LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW* (2002), and WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* (2001).

37. Hazan, *supra* note 3, at 39–40.

the jury is still out on any substantial relationship between the threat of war crimes prosecutions and deterrence of war crimes.³⁸

I tend to believe that over the longer haul, if the tribunals survive and compile a strong record of prosecutions, they will have a deterrent effect. The defendants I saw in the dock during my tenure at the ICTY seemed at times perplexed, even incredulous, that what they had thought of as part of the ambiance of war now had catapulted them into an international tribunal and the risk of prison in a faraway country.

A second aim of these tribunals is to diffuse the outrage of war crimes victims and their kin by personalizing the worst crimes of benighted individuals, not simply of groups, so as to avoid lasting enmities between the warring factions. Again, we have no compelling data yet that the tribunals have succeeded in this goal either. My own experience traveling through the ruins of old wars and talking to survivors suggests strongly that group tensions have a long shelf life, particularly in civil wars where members of the groups must go back to living side by side. This is exemplified by post-war Bosnia, where ethnic fissures continue to thwart creation of a multinational police force for the Dayton Federation,³⁹ where many schools are segregated between Bosnian Serbs and Muslims,⁴⁰ and where even a superhighway essential to the country's economic future cannot surmount factional dissension.⁴¹ Indeed, years after the fighting has ended, hostilities still run high toward witnesses who testified against accused perpetrators in the tribunals. Nearly one-half of all victim-witnesses before the ICTY demand and get special protective measures to shield their identities.⁴² In the case of the Rwandan domestic trials and even *gacacas*—community-based forums to attempt conciliation or impose lesser prosecutions than the regular courts for war-based crimes—brutal killings and harassment of witnesses and court personnel have proliferated during the post-war years.⁴³

The war novels I have talked about do not focus mainly on the traumas of the wars' aftermath. A few do—a lonely survivor in Louis de Bernières's *Birds Without Wings* records the decades of Muslim-Turkish-Western campaigns in the Mideast, concluding:

38. *Id.* at 34–35 (presenting some evidence of war crimes deterrence as a short-term personal threat if tribunals are perceived as capable of prompt indictments and arrests).

39. Jonathan Finer, *Fractured Bosnia Struggles to Form Police Force For All*, WASH. POST, Sept. 16, 2007, at A14.

40. See Nicholas Wood, *Mostar Journal; An Effort to Unify a Bosnian City Multiplies Frictions*, N.Y. TIMES, Mar. 15, 2004, at A4.

41. Jonathan Finer, *New Highway Bogs Down in Bitterly Divided Bosnia*, WASH. POST, Sept. 1, 2007, at A1.

42. Patricia M. Wald, *Dealing With Witnesses in War Crime Trials: Lessons from the Yugoslavia Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 223–24 (2002); see also Shankar Vedantam, *Wariness, Not Hatred, Keeps Civil Wars Raging*, WASH. POST, May 7, 2007, at A3; Nicholas Wood, *Kosovo War-Crimes Trial Splits West and Prosecutors*, N.Y. TIMES INT'L, April 5, 2007, at A12 (noting that more than a third of prosecution witnesses in Kosovo leaders ICTY trials are allowed to conceal their identities).

43. Christopher J. Le Mon, *Rwanda's Troubled Gacaca Courts*, 14 HUM. RTS. BRIEF 16, 17–18 (2007).

I blame potentates and pashas whose names I will probably never know, and I blame men of God of both faiths, and I blame all those who gave their soldiers permission to behave like wolves and told them that it was necessary and noble. . . . In the long years of those wars here were too many who learned how to make their hearts boil with hatred, how to betray their neighbors, how to violate women, how to steal and dispossess, how to call upon God when they did the Devil's work, how to enrage and embitter themselves, and how to commit outrages even against children. . . . I tell you now that even if guilt were a coat of sable, and the ground were deep in snow, I would rather freeze than wear it.⁴⁴

The “closure” that tribunal supporters speak of may be as simple as kin-folk learning where their loved ones are buried, and it may well be a source of succor to survivors that individual perpetrators of atrocities are tried and punished. But there is conflicting evidence as well that the individual prosecutions do not diffuse the enmity toward the group to which the individual perpetrator belonged and that the victims seek some group chastisement as well. The “bad egg” theory may not carry the day. This was demonstrated recently when Bosnian survivors registered deep disappointment at the ICJ verdict that Serbia was not itself guilty of genocide,⁴⁵ and again in the bitter debate over whether the U.S. Congress, a century later, should label the Armenian massacre a genocide.⁴⁶

A third aspiration of these courts is to record for history an accurate account of war crimes as a hedge against future disclaimers that they never happened at all. Experts differ here, too, on the efficacy of the courts for this objective, for example, whether judges and adversary proceedings are indeed the best way to ferret out historical truth (if such a thing can be determined). But insofar as history is itself composed of a compilation and distillation of many views of the same events, there can be little question that the exquisitely detailed accounts of wartime atrocities, elicited in month- and year-long trials, contribute mightily to the process. They may in many cases tip the balance of historical judgment regarding factual controversies.

Of course, good novelists thoroughly research their wars, and for the popular reader they are a main source of history and perception.⁴⁷ But a court-originated account subjected to opposing experts and even cross-examination will inevitably carry greater weight for future historians, readers, and policymakers. Both novelists and jurists aim at the same end—in Justice Jackson's words at Nuremberg—“to establish incredible events by credible evidence.” Even if establishing those events does not surely deter, it

44. LOUIS DE BERNIÈRES, *BIRDS WITHOUT WINGS* 4–5 (2004).

45. Nicholas Wood, *Bosnian Muslims View Ruling as Another Defeat*, N.Y. TIMES, Feb. 27, 2007, at A6.

46. Molly Moore, *Turkey Requests Authority to Attack*, WASH. POST, Oct. 16, 2007, at A12.

47. E.g., ANDRIĆ, *supra* note 9; LEO TOLSTOY, *WAR AND PEACE* (Nathan Haskell Dole trans., 1889).

provides the indispensable foundation for the legitimacy of sanctions, legal and literary, for those criminally involved.

The fourth justification for tribunals—instilling accepted rules of law to govern international and even internal conflicts—rates higher marks in practice. This is an area where tribunals by consensus have done their best work, building a formidable body of precedents for IHL as to what constitutes specific war crimes, crimes against humanity, and genocide.⁴⁸ Violators can no longer claim that they did not know certain acts were outlawed or that they thought they had a good defense in “just following orders.”⁴⁹

The final aim of the tribunals—to do justice—ultimately stands or falls on the same intuitive evaluation that we bring to our domestic criminal justice systems. Witnesses at the ICTY trials repeatedly cried out at the end of their torturous recountings that “someone must pay.” Justice is the ideal, but retribution or even revenge is also a primordial instinct that cannot be altogether discounted in defining what justice consists of. On the whole, however, the ad hoc tribunals (ICTY and ICTR) have been seen as fair and dispassionate in their judgments,⁵⁰ as has the Sierra Leone court. Other hybrids have either been denied the resources to do their job properly (East Timor) or are still too young to evaluate (Cambodia).

IV. WAR CRIMES TRIBUNALS: AN ASSESSMENT BASED ON THE NOVELISTS’ GOALS

Do these goals of war crimes tribunals differ markedly from the wrenching pleas of war novelists for far-reaching change—in short, an end to war itself? Do the novelists implicitly disagree with tribunals’ pragmatic choices to go after the leading war criminals—the “big fish”—leaving the petty misfeasors free to roam in society alongside their former victims? The novel gives voice to the victims’ pain and outrage. But do the tribunals—hemmed in by legal niceties—leave those same victims frustrated and not satisfied that they have been truly listened to?

A. *War as a Crime*

In *Slaughter House Five* the wife of a war buddy erupts when the author tells her he is writing a book about the war:

“You’ll pretend you were men instead of babies, and you’ll be played in the movies by Frank Sinatra and John Wayne or some of those other glamorous, war-loving, dirty old men. And war will look just wonderful, so

48. See, e.g., Kelly D. Askin, *Reflections on Some of the Most Significant Achievements of the ICTY*, 37 NEW ENG. L. REV. 903, 907–11 (2003).

49. Some theorize that international norms act as external constraints on countries and on individuals and eventually become internalized. See Hazan, *supra* note 3, at 25.

50. This is not to say the ICTY and ICTR have not been criticized in some quarters for their selection of defendants and exclusion of judges from certain countries. See *id.* at 30–34 (discussing failure to allow Serbian, Croatian or Bosnian judges (ICTY) and failure to prosecute Tutsis for war crimes (ICTR)).

we'll have a lot more of them. And they'll be fought by babies like the babies upstairs."⁵¹

Nuremberg and Tokyo were the only tribunals to prosecute separately the waging of war itself as a crime against peace or a crime of aggression. Indeed the crime of aggressive war was Chief Prosecutor Robert Jackson's central focus at Nuremberg. Despite its inclusion within the Nuremberg Principles adopted by the United Nations, later tribunals did not prosecute aggression as a war crime. Although Nuremberg convicted twelve on that count (Hess was the only Nuremberg defendant convicted solely of crimes against peace), and Tokyo convicted fourteen, the notion of waging war as a crime per se was controversial among the other Allies.⁵² Telford Taylor, Jackson's successor at Nuremberg, later wrote he thought it unfair to convict the German leaders solely on the basis of waging war. Before Nuremberg, he said, few if any would have concluded waging even an aggressive war was by itself an international crime for which individuals could be held liable; although the principle was fine, its application at Nuremberg was questionable.⁵³

Fifty years later, the drafters of the Rome Statute included aggression as a crime within ICC jurisdiction, but deferred exercise of such jurisdiction until a Special Working Group could report back in 2009 on how to define the crime and the conditions of its prosecution. The main points of contention include: whether labeling a conflict an act of aggression inevitably calls for a political judgment on complex facts, so that no state leader should be individually sanctioned by a court on the basis of initiating such an act, unless the UN Security Council itself has made the assessment; and whether the threshold for the crime should be a war or any aggressive act in manifest violation of the charter.⁵⁴

Thus while many novelists long for a universal condemnation of all or at least most wars on humanitarian grounds, most, like Vonnegut, realize sadly they can't have it.⁵⁵ Even under the most optimistic scenario, we will continue to have "good" and "bad," "just" and "unjust" wars in the international legal sphere for the indefinite future.⁵⁶ Several of the novelists in fact concede the validity of some wars. Tolstoy in *War and Peace* considers it

51. VONNEGUT, *supra* note 6, at 13.

52. TAYLOR, *supra* note 23, at 635–36.

53. *Id.*

54. Rome Statute, *supra* note 16, art. 5. For the ad hoc courts that rely mainly on customary law as the basis for their legitimacy and authority to find individuals criminally responsible, the status of aggression or crimes against peace as international violations susceptible to individual prosecutions is still debatable. See Meron, *supra* note 16, at 229. *But see* SCHABAS, *supra* note 36, at 26–28, 66; WERLE, *supra* note 16, ¶¶ 1151–1189; *cf.* U.N. Charter arts. 2, para. 4; *id.* arts. 39, 51. See generally Garth Schofield, *The Empty U.S. Chair: United States Nonparticipation in the Negotiations on the Definition of Aggression*, 15 HUM. RTS. BRIEF 20 (2007).

55. VONNEGUT, *supra* note 6, at 4 (“[T]here would always be wars . . . they were as easy to stop as glaciers.”).

56. See, e.g., JEANE J. KIRKPATRICK, *MAKING WAR TO KEEP PEACE* (2007) (noting appeasement may be a worse alternative to war in some cases).

legitimate to defend the homeland, and even Hemingway in *For Whom the Bell Tolls* admits through Robert Jordan that fighting Fascism is worth dying for: “The first theory was to win the war. If we did not win the war everything was lost.” But, his old comrade adds ruefully, “All that I am sorry for is the killing. . . . It must really be a great sin.”⁵⁷ It is hard to believe the novelists would disdain the search—elusive though it may be—for some workable concept of when war is justifiable.

B. *Big Fish and Little Fish*

The powerlessness of ordinary men and women caught in the grip of wars instigated and strategized by the generals and politicians is another familiar theme of modern war novels like *Catch-22* and *Slaughterhouse Five*. But in some of these books, both military and civilian victims suffer most directly and poignantly at the hands of middle- and low-level functionaries: prison camp guards, interrogators, out-of-control troops, and petty bureaucrats.⁵⁸ Wartime abuses depicted in the tribunal trials are not so different. Victim-witnesses testified at one ICTY trial as follows:

[W]hen I look back it seems to me that they [the guards] were absolutely out of control, that nobody obeyed anyone. . . . Anybody could kill anybody they liked at any time in any shift. It was sufficient for him to call him out, and very often certain personal accounts could be settled in that way⁵⁹

One of the chief dilemmas of the war crimes courts, however, has been where to concentrate limited resources for the greatest deterrent or closure effect. The principal Nuremberg trial featured twenty-two of the most prominent leaders of the Nazi hierarchy—preeminently Herman Goering, Rudolph Hess, Martin Bormann, Jules Streicher, and Admiral Karl Doenetz. The ICTY and ICTR were mandated by charter to prosecute only “serious” violations of international humanitarian law;⁶⁰ the Rome Statute limits jurisdiction of the ICC to “the most serious crimes of international concern” and permits the court to reject referrals as not of “sufficient gravity to justify further action by the Court.”⁶¹ The Sierra Leone Tribunal was designed originally to run for only three years and to prosecute only twenty or so leaders who “bear the greatest responsibility”⁶² for the commission of serious violations of international humanitarian law during that ten-year civil war. Except for the early years of the ICTY, when no “big fish” had been

57. ERNEST HEMINGWAY, *FOR WHOM THE BELL TOLLS* 136, 197 (Charles Scribner’s Sons 2003) (1940).

58. See, e.g., LOUIS BEGLEY, *WARTIME LIES* (1991).

59. Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 411 (Nov. 2, 2001).

60. S.C. Res. 955, at 1, U.N. Doc. S/Res/955 (Nov. 8, 1994); S.C. Res. 808, at 2, U.N. Doc. S/Res/808 (Feb. 22, 1993).

61. Rome Statute, *supra* note 16, arts. 1, 17.

62. Agreement Establishing Special Court for Sierra Leone, *supra* note 29, at 138; David M. Crane, *Terrorists, Warlords, and Thugs* 21 AM. U. INT’L L. REV. 505, 508 (2005).

apprehended, and the court indicted a series of middle- and lower-level violators to fill the void, the ad hoc tribunals have usually followed Nuremberg's lead in sticking to the upper-tier defendants.⁶³

The rationalization behind this top-down strategy is self-evident. If deterrence works at all, it is the top echelon that planned or knowingly permitted the crimes against humanity involving "widespread or systematic attack directed against any civilian population"⁶⁴ or the genocides involving "intent to destroy . . . a national, ethnical, religious or social group"⁶⁵ that need most to be deterred. It is their punishment the world will note. Even their indictments have political ramifications: former Serbian Autonomous Republican President Radovic Karadzic is now a politically impotent fugitive, unable since being indicted to hold public office or even to attend the Dayton Peace Accords; indicted and deposed Charles Taylor, former President of Liberia, was flushed out of his Nigerian asylum and turned over to the Sierra Leone tribunal; Slobodan Milosevic, who died during the fourth year of his trial at the ICTY, was turned out of office after indictment; the former prime minister of Rwanda is serving a life-long prison sentence after pleading guilty to genocide. Some of these men might have thought twice about their war actions had they believed that international law was more than a phantom.

In my own experience at the ICTY, I sometimes found it strange to be prosecuting middle- or lower-level defendants whose chief defense was that they had only been following orders from an uncaptured or unindicted superior. This was true in the genocide trial of General Krstic, who served under Serbian General Mladic. General Mladic was a true phantom in the dark: there is little doubt about his leadership of the Srebrenica genocide based on the evidence in his subordinate's trial, but he still remains free after fifteen years.⁶⁶ I do not question that the tribunal's first duty is to catch and try the foremost leaders, civilian and military. It simplifies trials down the line and eradicates the unease caused when courts bring the full force of international law down on some defendants but fail to try their more blameworthy superiors.

There are drawbacks to the "big fish" strategy. Too often it creates an "immunity gap" for those below the cut-off—victims see their personal persecutors return untouched to their villages, to resume local positions of power free of retribution. Even on those too-rare occasions when national governments move in to fill the gap and to prosecute lower-echelon war criminals, it does not always ease residual tensions or make reconciliation any easier if they lack the resources to do an adequate job. The discrepancy in treatment between international and national courts can exacerbate rather

63. Meron, *supra* note 16, at 224–28 (discussing the fact that the availability of high-profile defendants often depends on cooperation of national governments; ICTR tried higher-level defendants from the beginning due to cooperation from African governments).

64. Rome Statute, *supra* note 16, art. 7.

65. *Id.*, art. 6.

66. Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment (Aug. 2, 2001).

than relieve tensions by adding to the disgruntled groups. In Rwanda, 80,000–130,000 accused (the “little fish”) languished for up to ten years in local jails in deplorable conditions, some facing possible death penalties. Meanwhile, the “big fish” enjoyed the full panoply of international due process without fear of capital punishment and awaited trial in upscale ICRC detention facilities meeting UN standards.⁶⁷

I personally encountered the depth and intensity of survivors’ rage at these lowly functionaries during one of the trials I judged. The defendants were a Serb prison camp deputy commandant, a former small town policeman, three former waiters and taxi drivers promoted to shift commander guards, and an administrative aide at the camp who was a retired reserve police officer. The camp commandant and those who established the camp had not yet been apprehended or had died resisting arrest. Conditions at the camp were unimaginably bad for the over 1000 prisoners: they were starved, beaten, and deprived of rest or medical care; the women were sexually exploited. As one inmate among dozens testified, “When [the guards] were feeling bored, they would just lash out at you for no reason at all.”⁶⁸ Four defendants were convicted but received prison terms of five to seven years and most were released earlier than that, provoking outraged reactions from victims and their advocates: “‘What were they [the judges] thinking’ when they handed down these sentences for concentration camp shift commanders that would free them in 9 months . . . [i]s that what all this vast effort, skill, dedication, and funding went to accomplish?”⁶⁹

Some prosecutors and experts agree with the victims of the little fish: “Talk of big fish and little fish implies that unless you are high on the scale of authority you are not worth going after, and that’s an insult to the person whose family was blown away by a little fish.”⁷⁰

Yet the reality of sparse resources available to the international courts tilts heavily toward the “big fish” strategy. It is left to the stricken countries themselves to take up the slack. A few, such as Bosnia and Croatia, have only recently begun to do so.

The “big fish” strategy of war tribunals has another unintended consequence: it tends to concentrate indictments and trials on the novel legal theories that must underlie prosecutions of individuals who were remote

67. OPEN SOC’Y JUSTICE INITIATIVE, RWANDA JUSTICE SYSTEM AND 11 BIS TRANSFERS PROJECT (2007) (on file with author); Le Mon, *supra* note 43, at 16 n.2.

68. Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 43 (Nov. 2, 2001). For a full account of the case, see Patricia McGowan Wald, *The Omarska Trial—A War Crimes Tribunal Close-Up*, 57 SMU L. REV. 271 (2004).

69. Wald, *supra* note 68, at 285 (alteration and omission in original) (quoting posting of Michael Sells, msells@haverford.edu, to just-watch-1@listserve.acsu.buffalo.edu (July 31, 2002) (on file with author)).

70. Peter Ford, *How to Prosecute a War Crime*, CHRISTIAN SCI. MONITOR, Mar. 13, 2000, at 6 (quoting Brenda Hollis, former ICTY prosecutor); see also Kelly D. Askin, *Reflections on Some of the Most Significant Achievements of the ICTY*, 37 NEW ENG. L. REV. 903, 906 (2002–2003) (“Because it is typically the lower level persons who physically commit the murders, rapes, and other crimes, and the ones survivors tend to identify as their victimizers, it is important to get the physical perpetrators in the dock.”).

from the scene of the crimes and did not themselves kill, rape, or plunder. The lessons of Nuremberg have been well learned by those leaders. The document-rich troves of Nuremberg have not been replicated in modern-day trials; no current State leader is now likely to sign orders to execute POWs, tyrannize civilians, subject prisoners to inhumane conditions, or ethnically cleanse territories. Doctrines of command responsibility and common purpose or criminal enterprise have had to be developed and expanded to take individual criminal responsibility as high up the military and civilian hierarchy as possible in the absence of direct incriminating evidence as to their involvement in the crimes on the ground.⁷¹ As a consequence, many of the trials are consumed by legal arguments on the scope and necessary proof of these new legal doctrines. The viability of amnesties, the scope or continuing validity of head of state immunity doctrines, the intricacies of command responsibility, and the status of the obedience to orders (Nuremberg) defense take front and center place in the proceedings. Some tribunal proceedings have indeed come to resemble our RICO trials at home: who knew what and when? Explication of these theories of liability are necessary to the legitimacy of the trials as conducted under a rule of law. The devil is in the details of precisely what happened at every stage of momentous events; in the Krstic trial a controlling dispute arose over the exact moment at which command was handed over from one general to another. It consumed weeks of testimony but it was critical to the verdict.

Unlike war novels, however, it is not easy to make these trials a dramatic or transformative experience. Local people interviewed often do not understand why X was convicted and Y got off or even what their crimes consisted of. By focusing on the immediate effects of discrete atrocities committed against characters we have come to empathize with, war novels probably better reflect and satisfy the enduring sense of outrage and perplexity that haunts victims and survivors than do the trials of major war criminals.

One other aspect of the “big fish” strategy bears noting. There have been many more prosecutions of high-level military and civilian leaders based on Geneva Convention rules (for the humane treatment of civilians and prisoners) than on Hague Convention offenses involving the conduct of the war (such as strategic bombing or targeting of nonmilitary objectives or bombings with disproportionate civilian casualties), despite the greater potential of the latter for mass civilian deaths and injuries. For example, to the consternation of some, the ICTY prosecutor refused to open an investigation based on the NATO bombing of Belgrade radio stations, electricity grids, and civilian residences during the Kosovo conflict.⁷² The indiscriminate-type Dresden bombing condemned in *Slaughterhouse Five* has not featured prominently in war crimes tribunals for several reasons. Many of today’s civil wars use primitive weapons; the Rwanda genocide and Sierra Leone civil wars were

71. See HAZAN, *supra* note 26, at 127–28, 132–35.

72. William J. Fenrick, *Riding the Rhino: Attempting to Develop Usable Legal Standards for Combat Activities* 30 B.C. INT’L & COMP. L. REV. 111, 114, 137 (2007).

fought with machetes and rifles. But even in more technologically advanced wars, an ICTY prosecutor has written that war crimes involving strategic and tactical decisions on weapons and targets are “simply too difficult to prosecute.”⁷³ Only a handful of “unlawful attack” cases have been brought at the ICTY. One successfully challenged the reign of terror on Sarajevo civilians through sniping and shelling of the marketplaces and other places of public gathering; another successfully challenged the destruction of the Old Town cultural centers in Dubrovnik. But in practice this area of strategic military actions has turned out to be too “gray” for overworked prosecutors to spend time and resources on.⁷⁴ It is also politically the most hazardous, implicating the highest level of technical and political judgments made at the highest level of command. Ironically, it was the specter of foreign court surveillance over this kind of tactical and strategic decision making that Pentagon critics of the ICC found most threatening and that still motivates in large part their opposition to U.S. ratification of the Rome Treaty. While the tribunals may be limiting attention to the big fish, they have so far shied away from the biggest ponds in which they swim.

C. *The Role of the Victims*

War novels depict the insignificance of the individual soldier or civilian—a victim with little or no control over his or her fate. In the beginning, war crimes trials similarly made no attempt to involve victims except as traditional witnesses—take the stand, tell your story, go back to your home. Witnesses themselves, in my experience, often voiced frustration at their inability to take a more active part in the trials or to tell their stories in their own narrative style rather than respond to the ping-pong interrogations that characterize the adversary mode of trials. This is compounded when they are questioned in a language other than their own. They frequently complain, on the stand and off, of the court’s inability to compensate them for their sufferings or the hardships of testifying.⁷⁵ Recent war crimes courts—including the ICC—have made provision for more active participation of victims in the proceedings as well as the possibility of compensating at least some.⁷⁶ But it is a tremendously complicated business to bring victims into the criminal process. The Cambodian tribunal and the ICC are currently struggling with the accommodations of such a process. Although the ICC victims may be allowed to present their views “at stages of the proceedings deter-

73. *Id.* at 114.

74. *See id.*

75. All the tribunals have established victim-witness units to furnish advice and to provide escort services and medical or psychological help to victim-witnesses, particularly women who must testify on sexual abuse charges.

76. Rome Statute, *supra* note 16, art. 68 (permitting views of victims to be presented at “appropriate stages” of proceeding); *id.* art. 75 (allowing court to order reparations to victims); *id.* at art. 79 (creating trust fund for benefit of victims of crimes and their families).

mined to be appropriate by the Court,⁷⁷ several critical questions remain: how to ensure meaningful victim representation while proceedings are not unduly delayed or the defendants unduly prejudiced; how to select those who will participate in situations where victims of a defendant number in the thousands or even millions; and how to determine which stages are “appropriate” for victim representation. In the ICC, a Trust Fund for Victims is being established for voluntary contributions. But realistically it is difficult to see how the number of active victim participants in the proceedings can even begin to meet the hopes or diffuse the frustration of victims and their advocates.

Women especially have played predominantly the role of innocent victim and idealized but doomed soul mate in war novels—Maria in *For Whom the Bell Tolls*⁷⁸ and Catherine Barkley in *A Farewell to Arms*.⁷⁹ Sometimes an atypical female participant braves the fray and sets out to rescue her lost lover—Mathilde in *A Very Long Engagement*.⁸⁰ Women and children, it is now recognized, account for an overwhelming number of the victims of war and war crimes.⁸¹ And to their credit the tribunals have pioneered in bringing war crimes against women to the forefront in prosecutions for rape, sexual slavery, and other gender crimes that had historically been hidden under obfuscatory umbrella names such as crimes against honor—or not prosecuted at all.⁸² There has also been a healthy, albeit belated, infusion of women into key prosecutorial and judicial roles in the tribunals.⁸³

V. ARE THERE BETTER ALTERNATIVES TO WAR CRIMES TRIBUNALS?

The question inevitably arises: if the war crimes tribunals cannot fully accomplish their own goals or those established by war novels, are there other effective mechanisms that will do better as to either set? Several countries have experimented with alternatives to war crimes courts. A brief

77. *Id.* art. 68.

78. HEMINGWAY, *supra* note 57.

79. HEMINGWAY, *supra* note 7.

80. JAPRISOT, *supra* note 8.

81. Kelly D. Askin & Dorean M. Koenig, WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 213–15 (1999).

82. *See* Rome Statute, *supra* note 16, art. 8 (including a comprehensive list of gender offenses as war crimes); Askin, *supra* note 70, at 909–10; Meron, *supra* note 16, at 231 (describing a change since the Nuremberg tribunal: at recent ad hoc tribunals, rape is prosecuted as a crime against humanity, as torture, and as an instrument of genocide).

83. Two of the three prosecutors at the ICTY have been women. Article 36 of the Rome Statute requires countries nominating candidates for judges (and prosecutors) to seek “fair representation” of men and women and to give special consideration to legal expertise in the field of violence against women and children. Out of eighteen judges on the ICC, currently seven of them are women (eight until a recent resignation). *See generally* Judith Resnik, *Sisterhood, Slavery, and Sovereignty: Transnational Antislavery Work and Women’s Rights Movements in the United States During the Twentieth Century*, in *WOMEN’S RIGHTS AND TRANSATLANTIC ANTISLAVERY IN THE ERA OF EMANCIPATION* 19 (Kathryn Kish Sklar & James Brewer Stewart eds., 2007).

survey of their success in meeting the challenges of novelists and tribunal critics follows.

Truth and Reconciliation Commissions (“TRCs”) are the most frequent substitute or complement to the tribunals. Some, but not all, provide amnesty to participants. TRCs generally encourage war criminals to make full confessions and to accept communal penance in the form of restitution to victims or community service. South Africa’s is the best known; Bishop Desmond Tutu has publicly commented that the apartheid leaders would not have agreed to a peaceful transition to democratic rule if Nuremberg-type trials had been demanded. Yet, the South African TRC regime also intensively investigated confessing culprits who were suspected of not telling all. If it was discovered they had held back, the perpetrators were relegated to ordinary criminal prosecutions.⁸⁴ Other countries—Chile, Argentina, El Salvador, over twenty in all—have also adopted commission-style justice; even Bosnia and Serbia now have fledgling (and somewhat controversial) truth commissions. Sierra Leone’s TRC, with no amnesty, has operated alongside its Special Court documenting through 7,000 interviews in horrific detail the terrors of the civil war.⁸⁵

While acknowledging growing sentiment that trials should be melded with other mechanisms involving direct victim input, and that some international entity (e.g., the UN or the ICC) should coordinate these facilities, TRC advocates suggest that the Truth Commission format can more accurately discern truth. Unlike the courtroom exercise, TRCs are free from rigid relevance restraints on evidence and heightened stress on formal rules of fairness to individual defendants. TRCs, they say, are victim oriented; trials are defendant focused. Victims and witnesses can express their real feelings, even abusers can own up to past misdeeds and solicit forgiveness. Restitution can take the form of working for communal good, a recommendation espoused by one of the Hemingway partisans in *For Whom the Bell Tolls*.⁸⁶ So far, however, there is no consensus that TRCs alone can pacify the deep grievances of victims of atrocities as brutal and extensive as occurred in the Bosnian war. But they may provide a more intimate and flexible forum in which victims can express their deepest feelings about those who have wronged them⁸⁷—something the novelists would surely approve of.

Not all alternatives to the criminal process turn out to be preferable, however; many have their own shortcomings. An illustration is the operation of *gacacas* in Rwanda, which originated in tribal and village gatherings to arbitrate informally civil disputes and grievances. Originally, arbitrators

84. Cobban, *supra* note 12.

85. See William A. Schabas, *Truth Commissions and Courts Working in Parallel: The Sierra Leone Experience*, 98 AM. SOC’Y INT’L PROC. 189, 189 (2004) (“[P]ost-conflict justice requires a sometimes complex mix of synergistic therapies . . .”).

86. HEMINGWAY, *supra* note 57, at 196 (“I think that after the war there . . . must be some form of civic penance organized that all may be cleansed from the killing . . .”).

87. Donald L. Hafner & Elizabeth B.L. King, *Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability Can and Should Work Together*, 30 B.C. INT’L & COMP. L. REV. 91, 93, 103 (2007).

were chosen by the parties. But in 1994, following the national genocide, the Rwandan government formalized the *gacacas* by law, giving the new *gacaca* courts essentially the same mandate as war crimes tribunals except as to the most serious felonies. They were mandated to punish, reconcile, eliminate the “culture of impunity,” and establish a historical record of the role and extent of the genocide. *Gacaca* judges are chosen by community election, receive minimal training, and can impose prison sentences up to thirty years. Hailed originally as a “transformative democratic” change agent, concerns are now expressed that they devalue criminal defense rights. Up to six thousand Rwandans were convicted in the first year of their operation, several thousand more than in the country’s civilian courts; but it is reported that many pled guilty or fled in fear of police reprisals or unfair trials if brought before the *gacacas*. Unfortunately, a large number of incidents of bribery have surfaced and the integrity of some of the judges has been impugned. In some instances, the *gacacas* have refused to investigate crimes committed by members of the victorious Tutsi party in their war against the Hutus. *Gacaca* witnesses and court officials have too frequently been subjected to violence and intimidation, and entire communities have refused to participate in the *gacacas* for fear of retaliation. One surveyor reported that “the country seems close to a dangerous abandonment by would-be participants of the goals of the *gacaca* courts process.”⁸⁸ Human rights groups report political pressures not to criticize the *gacacas*.⁸⁹

The irony in all this of course is that the destructive acts committed in the workings of the *gacacas* are of the same genre as the war crimes that are their subject, reminding one of Yossarian’s cynical caution in *Catch-22*: “The enemy . . . is anybody who’s going to get you killed, no matter *which* side he’s on . . . And don’t you forget that, because the longer you remember it, the longer you might live.”⁹⁰

The search continues for a way to close the impunity gap, to “achieve reconciliation between perpetrators and victims who must live side by side in a densely-populated territory”⁹¹ against the backdrop of unspeakable happenings in the past. The war crimes tribunals are a beginning and—I personally think—a necessary step toward assuaging the demonic legacy of war. The writings of war novelists are invaluable in not letting us forget that the laws of war—even when enforced against individual perpetrators—are at best palliatives to the disease of war itself.

CONCLUSION

The best war novels challenge the concept of war itself: its futility, brutality, insanity, and arbitrariness; its victimization of the innocent. War crimes tribunals try to expose and punish the most extreme forms of human

88. Le Mon, *supra* note 43, at 18.

89. *Id.* at 19; *see also* Hafner & King, *supra* note 87.

90. HELLER, *supra* note 4, at 122.

91. Le Mon, *supra* note 43.

action in war by imposing an international code of humanitarian law. Many novelists seek to evoke revulsion to war by reducing its immensity and harm to the plight of individuals caught up in its throes. Similarly, the tribunals try to explicate for the public the terrible consequences of war to victims from the actions or inactions of political and military leaders who instigate and orchestrate war. But the tribunals have been imperfect forums for their purposes. Predictably they have not yet been able to approach full satisfaction for war's impotent victims or to inspire sufficiently widespread efforts to curb the terrifying revelations of the courtroom. It is probably unrealistic to think they can ever do so alone. But like the novelists, they try their best to reveal the dark underside of wars spawned by nationalistic, tyrannical leaders and to bring at least some of those leaders to account.