

# SEX-BASED VIOLENCE AND THE HOLOCAUST— A REEVALUATION OF HARMS AND RIGHTS IN INTERNATIONAL LAW

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*By trying to make everything too nice, incorporationism represses contradictions. It usurps women's language in order to further define the world in the male image; it thus deprives women of the power of naming. Incorporationism means to give over the world, because it means to say to those in power: "We will use your language and will let you interpret it."*<sup>1</sup>

*[Women's history has] disabused us of the notion that the history of women is the same as the history of men, and that the significant turning points in history have the same impact for one sex as for another.*<sup>2</sup>

*Sexual violence was a step in the process of destruction of the [T]utsi group—destruction of the spirit, of the will to live, and of life itself.*<sup>3</sup>

International law has historically avoided regulating sex-based violence directed toward women in times of war. States saw little strategic interest in addressing such "private" concerns in the public arena of treaties or international courts. As armed confrontation between and within states was generally carried out by male combatants, the laws of war were generally constructed from the vista of a soldier's need for ordered rules within which to wage war on behalf of the state. Consequently, women's interests fared notoriously badly when accountability was sought for the behavior of combatants. In particular, sex-based violence was spectacularly unregulated

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1. Ann. C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1383-84 (1986) (citation omitted).

2. Joan Kelly, *The Social Relations of the Sexes: Methodological Implications of Women's History*, 1 SIGNS 812 (1976).

3. *Prosecutor v. Akayesu*, Judgment, No. ICTR 96 -4 -T (Sept. 2, 1998) ¶ 734.

by international law. By sex-based violence I mean a wide variety of violent and victimizing acts directed at women because of their gender.<sup>4</sup>

Despite augmented accountability for acts of violence directed at women during armed conflict, problems persist. The reason for this is two-fold. First, despite much recent legal and sociological writing, there remains a limited understanding of the functionality of sex-based violence during war. There is ongoing intellectual and legal resistance to accepting the extensive empirical evidence that women's bodies have been targeted as a method and means of war, not ancillary to military objectives, but innately linked to them.<sup>5</sup> For law to be effective it must co-relate sanction to the experience of the victim. Exploring the military functions served by sexual violence makes evident that there is a pressing need to rethink traditional legal conceptualizations of and sanction related to acts of violence directed at women in situations of conflict. Only by fully comprehending and naming the intentions that underlie the prevalent attacks on women's bodies can we put in place a scheme of legal sanctions that would name and place the harms caused—relative to the victim's experience and the perpetrator's intentions. This article seeks to encourage legal scholars and law-makers to look again at legal categorizations and to ask whether they are effective and adequate in facilitating accountability for sex-based violence during conflict.

Sex-based violence serves multiple functions in war. It conflates the achievement of broader military objectives with acts that are aimed at women precisely because of their gender. Identifying both causes is critical to putting in place legal structures that are sufficient to remedy the harms experienced by women. Acknowledging multiple causality for gendered violation, however, does not mean that there is an equality of causes, or that causality makes no difference to the forms of sanction which ought to be put in place to prevent the recurrence of such acts. To start, this article identifies that there is a general underdevelopment of sanctions pertaining to sexual violation during situations of conflict. The article further explores the extent to which there are particular aspects of gendered violence during war which are entirely absented from legal scrutiny.

This lacunae of scrutiny is explored by analysis of and reflection upon new empirical research of sexual violation which occurred during the Holocaust. Thus, the article has a specific empirical basis, an assessment of the lived experiences of sexual violation by women during the Holocaust—

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4. I use the term sex-based violence in conscious contradistinction to the phrase sexual violence. While many commentators use the term sexual violence in contexts that I discuss in this article, I am persuaded that it focuses attention on penetrative sexual acts, rather than on a wider variety of violent acts that are causally linked to the gender of the victim.

5. What is also significantly underestimated is the extent to which violence against women increases dramatically during times of civil stress and tension. For example, it is reported that in the violence that preempted the fall from power of the Indonesian President Suharto, significant numbers of ethnic Chinese women were sexually assaulted and raped in Jakarta. Aid-workers reported that up to 100 women were targeted in Jakarta in this manner. See Seth Mydans, *Jakarta Groups Document Mass Rapes of Chinese*, INT'L HERALD TRIB., June 10, 1998 at A1.

predominantly of Jewish women—based upon archival research of the period.<sup>6</sup> While it is inappropriate to describe the Holocaust experience itself as war, its horrors occurred in the context of war, and thus *post facto* legal accountability came under the legal rubric of international humanitarian law. While the Holocaust is testament to violation in extremity, it serves as a unique prism from which to draw wider conclusions. By looking at the Holocaust, we gain an understanding of a variety of experiences, violations and harms that women endure in numerous armed conflict situations (albeit in varying and less institutionally structured ways), precisely because of their gender.

Dealing with the unparalleled violence perpetrated upon men and women during the Holocaust is beyond the scope of any one article. Nor is a concentration upon the specific experiences of women during the Holocaust intended to diminish the horrors and indignities suffered by men during the same period. I concur fully with the approach of Weitzman and Ofer in their seminal study, entitled *Women in the Holocaust*, when they say:

We are not asserting that women's experiences during the Holocaust were totally different from those of men. That would be as false and misleading as to argue that their experiences were identical to men's . . . . Nevertheless, scholars . . . must be attentive to the differences between men and women just as we must be attentive to other social differences among Jews, such as those between religious and secular Jews, or those among Jews of different social classes.<sup>7</sup>

The article starts from the simple proposition that many women experienced different forms of violation because of their gender during the Holocaust. Nonetheless, while I focus on violations, I also acknowledge that gender difference does not always imply greater victimization, and that some research has indicated that gender differences functioned to protect women in contradistinction to men in similar positions during the Holocaust. Ringelheim notes that when one examines the social history of women during the period, "... such as the different roles and functions of Jewish women and men in the ghettos with respect to work, housing, and food; the differences in the male and female death rates in the ghettos; the differences in the structure of the women's and men's camp in Auschwitz-Birkenau . . .", one identifies a more detailed and complex story about the experiences of both genders during the

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6. The archival research was undertaken at Yad Vashem Holocaust Museum and is based on access to individual files, of which 23 individual testimonies form the basis for the narratives quoted in section B. Further empirical details are drawn from another 23 published personal narratives. Clearly, a gendered perspective on the experiences of the Holocaust could also usefully examine the unique experiences of men during the same time, including such matters as circumcision and the inability to provide for family sustenance, as pivotal to traditional male roles. Such investigation was outside the scope of the present study, but the author acknowledges that a gendered experience of the Holocaust is not exclusively female.

7. Lenore J. Weitzman & Dalia Ofer, *The Role of Gender in the Holocaust*, WOMEN IN THE HOLOCAUST 2 (Lenore J. Weitzman & Dalia Ofer eds., 1998).

Holocaust.<sup>8</sup> I therefore concede from the beginning that gendered violation does not necessarily imply more victimization for women or the potential overlap of violations for women and men during this time.

Empirical assessment is particularly important as we reassess the adequacy of international legal responses to sexual violation. Taking a close look at women's experiences during the Holocaust is critical, because violations of human rights during the Holocaust formed the bedrock upon which post-war international legal structures of accountability were assembled. Human rights and humanitarian law standards have a direct genealogy derived from the horrifying experience of the Holocaust. The post-war augmentation of the laws of war found in the Geneva Conventions of 1949 and the international consensus on the articulation of the Universal Declaration of Human Rights in 1948 are both early manifestations of this lineage. The validation and creation of collective memory, both in the immediate aftermath of the Holocaust and since then, have indelibly affected the legal mechanisms that have sprung from that time.<sup>9</sup> If we explore the possibility that certain discussions and certain violations were silenced or erased during that creation process, we also acknowledge that the legal mechanisms of accountability may be inadequate in certain respects. In reassessing the nature and form of the harms experienced during the Holocaust, we may also come to have a deeper awareness of the concept of harm itself. This allows a potentially greater flexibility in marrying a notion of harm with an appropriate legal sanction. In acknowledging the limitations of the legal pedigree, I suggest that we can create an alternative prism from which to rethink existing models of entitlement, rights, and accountability.

Section A of the article starts by exploring the limitations of modern legal language in defining and particularizing the experiences of women during the Holocaust. It points to the dangers for reader and writer alike in assuming the capacity of legal language to reduce the experience of violation to a form which conveys the experience sufficient to punish or to remedy it. Section B presents the empirical information that forms the backdrop to this analysis. This section highlights the two facets of women's Holocaust experience; first, narratives and stories of the ghettos and second, the extremity of violations suffered by women in the concentration camps. Following this, section C analyzes the concept of harm. In particular, I assess the harms of maternal separation and sexual erasure, demonstrating the inability of international law to articulate these acts as sexual harms, and illustrating the limited attention and imagination directed towards accounting for the specific harms that women suffer during war. This section highlights the extent to which

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8. Joan Ringelheim, *The Split between Gender and the Holocaust*, in *WOMEN IN THE HOLOCAUST*, *supra* note 7, at 346.

9. For a thoughtful and provoking account of the extent to which criminal trials have functioned to shape questions of collective memory and national identity in societies which have experienced large-scale brutality, see MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY AND THE LAW* (1996).

particular indignities were not only aimed at women's sexual identity, but were intended to achieve broader military objectives. Section D confronts the manner in which international humanitarian law has historically excluded women from its ambit of protection. Moreover, it sets out the extent to which only certain privileged aspects of women's sexual and personal identity are awarded legal status, confirming a pattern of exclusion. Subsequently, Section E examines the interface between the post-war human rights regime and the legal protections developed for women who experience sexual violation. The conclusions markedly illustrate the extent to which the central paradigm of autonomy, upon which modern human rights discourse is founded, may be inadequate to encompass the nature of the harm experienced, not only by individual women, but by their wider communities. The article concludes by reflecting on where international standards of protection may progress to and what may be learnt, by lawmakers and others, from historical reflection.

## I. CONFRONTING THE LANGUAGE OF VIOLATION

Given the extensive corpus of literature devoted to the Holocaust, it may be surprising to note that there is a distinct gap of reflection, analysis, and qualification in the area of sexual violence.<sup>10</sup> The augmented literature that has emerged in recent years on sexual violence during war, has confirmed that women do in fact experience particular kinds of indignities and violations during war, and are vulnerable in unique ways because of their gender. Could it be that such particularities did not occur during the Holocaust? Was there such an array of brutal and dehumanizing activities occurring during the time that sexual violation paled in comparison to the other dehumanizing crimes being committed? Were women not asked or did they not report such experiences when and after they occurred? All of these questions are obvious given the lacunae in the existing literature.

Archival accounts of the Holocaust make it quite clear that women experienced unique forms of indignity and violation during the war.<sup>11</sup> But such indignity is only part of a much more complicated story for the legal analyst. The first caution to the reader and researcher is that coming to primary accounts of the Holocaust requires a reassessment of the analytical and intellectual tools taken for granted in other endeavors. In a parallel context, Aharon Applefeld describes the process of engagement with representations of the Holocaust:

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10. Moreover, as Joan Ringelheim notes, "Literature on the Holocaust has been apparently gender neutral, thereby disguising the fact that women, until very recently have been ignored." Joan M. Ringelheim, *THE ETHICAL AND THE UNSPEAKABLE: WOMEN AND THE HOLOCAUST 1* (1993). The first conference on women and the Holocaust took place in March 1983 at Stern College. See *WOMEN SURVIVING: THE HOLOCAUST — PROCEEDING OF THE CONFERENCE* (Esther Katz & Joan Miriam Ringelheim eds., 1983).

11. Some historical accounts in tandem with individual narratives suggest that women encountered more difficult conditions than men. See, e.g., RUBEN AINSZTEIN, *JEWISH RESISTANCE IN NAZI-OCCUPIED EUROPE: WITH A HISTORICAL SURVEY OF THE JEW AS FIGHTER AND SOLDIER IN DIASPORA 788-89* (1974); CHARLOTTE DELBO, *NONE OF US WILL RETURN* (1968).

By its very nature, when it comes to describing reality, art always demands a certain intensification, for many and various reasons. However, that is not the case with the Holocaust. Everything in it already seems so thoroughly unreal, as if it no longer belonged to the experience of our generation, but to mythology. Thence comes the need to bring it down to the human realm. This is not a mechanical problem, but an essential one. When I say, "to bring it down," I do not mean to simplify, to attenuate, or even to sweeten the horror, but to attempt to make the events speak through the individual and in his language, to rescue the suffering from huge numbers, from dreadful anonymity, and to restore the person's given and family name, to give the tortured person back his human form, which was snatched away from him.<sup>12</sup>

It is not only the scale and distance of the primary research sources that poses the challenge of extreme encounter for the academic, but also the nature of the sources themselves. As Laurence Langer, one of the foremost researchers on narrative and the Holocaust documents argues, the expression of what happened may be simultaneously fragmented, disrupted, and engaged in a constant inner struggle to do justice to the wholeness of the experience and its fit with the present of survival.<sup>13</sup> As such, narratives are intricate presentations of filtered memories providing complex clues to the nature the Holocaust experience.

In this intellectual encounter, one must also be willing to abandon comfortable ethical ideals and accept that they may not "fit" the world of Holocaust experience. The encounter with Holocaust narrative may result in a desire to wrap the horrific in a cloak of therapeutic closure, redemption, and heroic survival. To do so gives meaning to the analyst but not the storyteller, who more often than not is saying that none of those psychological mechanisms have meaning in the world she inhabits. As legal scholars, we must correspondingly remain wary of the temptation to liberate the narrative by offering "made to measure" definitions and thereafter sanctions as full solutions to the harms experienced.

For lawyers, any contemporary research of the wartime period comes with the legal vocabulary of the late twentieth century. International law now articulates in law and politics a terminology for sexual violation. We use the words rape, sexual assault, prostitution, and sexual violation with the sense of a distinct reference model within which the acts are understood and the harms take place. Self-evidently, this reference model was not in place either during or immediately following the Second World War. This is not the vocabulary of women describing the violence done to themselves or others. To make sense

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12. LAURENCE L. LANGER, *HOLOCAUST TESTIMONIES: THE RUINS OF MEMORY* i (1980) (quoting Appelfeld).

13. See *id.* at ix-xvii.

of women's description of what happened to them (as women) during the Holocaust we must discard the perceived totality and completeness of the vocabulary we bring with us. Our vocabulary of violation is in large part the product of the post-war international legal regime reacting to its antecedent history. As Lawrence Langer forcibly recognizes when reflecting on the inadequacy of language to confront the dilemma of choice in the Holocaust period: "The real challenge before us is to invent a vocabulary of annihilation appropriate to the deathcamp experience; in its absence, we should at least be prepared to redefine the terminology of transcendence—'dignity', 'choice', 'suffering' and 'spirit' . . . ."<sup>14</sup>

The same challenge is presented to legal vocabulary of violation. Our vocabulary may be excess intellectual baggage preventing the observer from fully understanding the voices of the women who articulate their stories of survival and victimization. So, the first caution for the reader and the writer alike lies in pinning our understanding of the period on the chassis of existing linguistic categorizations.

What I hope to demonstrate is that the post-war terrain of understanding does not sufficiently describe the complexity or the reception of dehumanizing acts perpetrated upon women during the wartime period. The inappropriateness of legal definitions does not lie solely in the fact that the women who reported sexual crimes did so in a world which failed to categorize their experiences as crimes, but that post-war legal terminology is inadequate to describe some of their experiences. Thus, if the legal language given birth to by the Holocaust experience was inadequate then, it may also have served since to perpetuate the exclusion of certain violations from the arena of legal accountability altogether. In acknowledging the limits of existing legal frameworks and descriptive terms we may then try to augment our conceptual analysis to assess both the kinds of "harms" experienced and the ability of legal mechanisms to assure accountability for their perpetration.

In many domestic legal systems the inadequacy of legal language to confront and sanction the myriad practices forced upon the female person during acts of sexual violation has been acknowledged.<sup>15</sup> Contemporary legal writing in the liberal vein acknowledges the veracity of some feminist claims on the structural limits of sanctions against male sexual violence, and goes some way towards agitating positively for reform.<sup>16</sup> Thus, as some domestic

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14. See Lawrence L. Langer, *The Dilemma of Choice in the Death Camps*, in 4 CENTERPOINT: THE HOLOCAUST 54, 58 (1980).

15. For example, in the United States many states have considered or passed some form of rape reform legislation. See Leigh Bienen, *Rape III – National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170, 171 (1980).

16. In a provocative argument, Donald Dripps claims that to confront the problems of existing sanctions of rape in the United States, legal standards ought to conceive of sex as a commodity and rape as a theft of that commodity. See Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1786 (1992). Richard Posner for example, has advocated such reforms as the criminalization of marital rape. See RICHARD POSNER, SEX AND REASON 383-95 (1992). However, Posner also maintains a strong defense of much consensual sexual behavior that many feminists claim to be subordinating. This is also true of Duncan Kennedy, who explains

legal systems seek more sophisticated modalities of sanction and expression for the experiences of sexual violence, contemporary international law is not without resources or inspiration. The evolving standards in international law do not necessarily start from a blank canvas. An increasing number of progressive articulations define and remedy sex-based violence in expansive and imaginative ways. But there is the persistent tendency for the reform debate to be overshadowed by a limited vision of both the experience of violence itself and the possibilities of law to sanctioning in a holistic way. International law and the states who beget it, have some way to go in overcoming the ingrained inhibitions and biases that marginalize the regulation of women's experiences in the context of armed conflict.

## II. THE EXPERIENCE OF VIOLENCE DURING THE HOLOCAUST

Any attempt to document in a cursory manner the experience of Holocaust violence does little service to either the victims themselves or to the process of ascribing legal culpability. Hence what I seek to illustrate is limited. First, I aim to give an account of the lack of knowledge available about the unique experiences of gendered violence during the period. Second, I aim to outline the singular nature of sexual violation during the Holocaust.

Most individual female accounts forming the basis for this study do not at initial reading, sufficiently provide information about and detail to a gendered account of victimization.<sup>17</sup> Rather, the gender of the victim weaves into the narrative in ways that belie our categorization of both harms experienced and gender itself. Accounts of victimization are remarkable for their emphasis on the other and not the self. The other is both immediate family and community, but also (and particularly within the camp experiences) other women with whom the victims formed substitute families within the brutality of the Nazi regime. Throughout individual accounts there is a consistent emphasis on the deprivation of food and sanitary facilities. Striking in individual testimonies is the shame associated with hunger and the search for sustenance, and the will to continue to do so when all other vestiges of human dignity have been removed. Also conspicuous is the extent to which women themselves minimize the specifically female aspects of the Holocaust experience. One survivor recollecting a series of acts of sexual molestation as a child in hiding

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that all men benefit from rape, but constructs a strong defense of a broad range of consensual sexual practices. See Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination* 26 NEW ENG. L. REV. 1309 (1992).

17. See, e.g., JULIA BENDREMER, *WOMEN SURVIVING THE HOLOCAUST* (1997); ANNA EILENBERG, *SISTERS IN THE STORM* (1993); PENNEY FRANCES, *I WAS THERE* (1989); GLAS-LARSSON, *I WANT TO SPEAK* (1993); CECILE KLEIN, *SENTENCED TO LIFE* (1989); ROBIN RUTH LINDEN, *MAKING STORIES, MAKING SELVES: FEMINIST REFLECTIONS ON THE HOLOCAUST* (1995); SHELLY LOVE, *CRIMINAL EXPERIMENTS ON HUMAN BEINGS IN AUSCHWITZ* (1993); SONIA SCHREIBER, *FACING HISTORY AND OURSELVES: I PROMISED I WOULD TELL* (1993); GERTY SPIES, *MY YEARS IN THERESIENSTADT: HOW ONE WOMAN SURVIVED THE HOLOCAUST* (1997); FRANCES F. TRITT, *HOLOCAUST DIARY* (1982); RESKE WEISS, *JOURNEY THROUGH HELL* (1962); CHAYA ZISKIND, *THEY WATCHED OVER US*. (1998).



puts it this way:

In respect of what happened, [what we] suffered and saw—the humiliation in the ghetto, seeing our relatives dying and taken away [as well as] my friends, . . . then seeing the ghetto . . . burn and seeing people jumping out and burned—is this [molestation] important? It is only important to me at the moment.<sup>18</sup>

It is as if the stories tell us that at the narrow end of the dehumanizing process, what is left is only the most basic instinct of the person—that of physical survival. Endurance at its minimum is about sustenance and giving the physical shell of the person the means to live one more day. In such accounts, all other forms of brutality fade to secondary status. As long as there is some food, perhaps some sleep, one may live; other humiliations may not destroy you and in the story of survival they are lost or unaccounted for. In part, the cumulative narrative emphasizes the fundamentals of survival, and can detract emphasis from the explicit means undertaken to deprive women of their humanity, as well as the gendered component of that process. It also obscures the extent to which the targeting and humiliation of women was purposeful and designed to achieve particular military and political goals. For women, seeing what happened to family members and friends of both genders may prevent them from singling out the unique aspects of their own treatment. Up close it may all look the same. The function of the academic is to make those critical distinctions and to offer a rationale that explains them. At this point, I identify and discuss two kinds of the gendered experience of the Second World War<sup>19</sup>: first, the experiences of the ghettos and of civilians in occupied territory; second, the experiences of women in concentration camps.

#### A. *The Ghettos*

Daily life in Nazi Germany and German occupied territories irrevocably changed the lives of targeted groups and individuals. Throughout the 1930's, ordinary life for many continued, but always with the ever-increasing encroachment of the extra-ordinary. As Kaplan points out, "Lawlessness, ostracism, and a loss of rights took their toll on Jews of all sexes and ages."<sup>20</sup> As a constitutional dictatorship solidified itself, daily equilibrium was lost. Nowhere is this more true than in the ghetto experience. Despite the limited availability of information pertaining to gendered experiences in the ghettos, I

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18. See Ringelheim, *supra* note 8, at 343 (citing unnamed survivor's testimony).

19. It should be borne in mind that women were a majority of the Jewish population in German-occupied Europe. In Poland in 1931 they constituted 52.08% of the Jewish population; in Byelorussia they constituted 53.25% in 1939, and in Germany itself they were 52.24% of the population in 1933. See RAUL HILBERG, *PERPETRATORS, VICTIMS, BYSTANDERS: THE JEWISH CATASTROPHE 1933-1945* 127 (1993).

20. See Marian Kaplan, *Keeping Calm and Weathering the Storm Jewish Women's Responses to Daily Life in Nazi Germany, 1933-1939* in *WOMEN IN THE HOLOCAUST*, *supra* note 7, at 39.

can make some preliminary comments. For some families, only women, children and the old were left together through the ghetto experience when the male members of the family had departed from their homes assuming that women and children would be safe from violation by the Nazis.<sup>21</sup> Thus, anticipatory reaction to the Germans shielded some men, under the assumption that women and children left behind would not be targeted. Hence, the rounded-up population and the populations in the ghettos were disproportionately female. In this context women largely took on the distinctive burden of responsibility for children. They were subject to a brutal regime of wanton cruelty. In addition, they lived with the continued uncertainty of not knowing their ultimate fate. They were vulnerable to rape, to murder of themselves and their children, to the necessity of killing their own or other women's babies, to forced abortion and to a range of other forms of sex-based violation.<sup>22</sup>

Some women in the ghettos continued to have familial male protection, which limited to a degree their potential sexual vulnerability. Notwithstanding this protection, there was the constant fear and lived experience of conditions within the ghettos worsening for all. Survivors' stories of hiding in bunkers while Nazis liquidated the ghettos and their populations are rife with the enormous moral dilemmas which confronted them.<sup>23</sup> Could children be brought to the bunkers and saved, given the conditions of silence and stillness required for extended periods which might jeopardize the lives of others? Should families choose younger members over older kin if there was a shortage of space in a hiding place? Should those to whom one had a particular duty of care be shielded first, such as elderly or infirm parents? Women in the ghettos were especially vulnerable because of traditional attitudes towards them, their gender-defined conditions, and their unique maternal responsibilities. The key to understanding the experience of women in the ghettos and camps is to see maternity infected by atrocity, where the established conventions of motherhood are deliberately ravaged and assaulted. Placing women in the context of their maternal obligations is critical to understanding the harms perpetrated upon them and the intentions of the perpetrators in the ghetto context.

For Jewish women in the ghettos, there is clear evidence that their vulnerability to sexual exploitation was limited by the laws preventing inter-

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21. "Most Jews believed – at least in the beginning – that the Germans were 'civilized' and would honor traditional gender norms and would not harm women and children. Because the Jews believed that only men were in real danger, they responded with gender-specific plans to protect and save their men. Thus, in formulating their strategies for migration, hiding, and escape, they typically decided that men should leave first and have priority for exit visas." WEITZMAN & OFER, *supra* note 7, at 5.

22. Esther Kraine, born in Romania describes how in the Ghetto an order was given to collect all gold. A Christian mid-wife was ordered to search the women's vaginas for hidden gold. She says "At that time, I considered this action as an act of great violence against me." The procedure was performed on all the women in the Ghetto. Testimony # 03/1007 Yad Vashem Holocaust Museum archives.

23. See generally MINA ROSNER, I AM A WITNESS (1994).

racial relations.<sup>24</sup> When those laws were violated by the Germans themselves, there is consistent evidence in the survivors testimonies that women who had been sexually violated were immediately murdered.<sup>25</sup> There is also evidence that in these circumstances non-attached women were prey to the Judenrat for sexual favors, a means to survive in protection bought by sexual exploitation.<sup>26</sup> It is important to note that this facet of female vulnerability during times of exigency escapes accountability under the formal rubric of international humanitarian law.<sup>27</sup> Evidently the Judenrat in some ghettos took administrative and social control of various aspects of women's lives. In some ghettos this included the intimate regulation of women's reproductive capacity and the fate of their newborn children. For example, in the Shavel ghetto, the Judenrat made and enforced a collective (male) decision to force abortion.<sup>28</sup> The consequences for women who refused abortions were both personal and familial. The response to women who refused is described by Eisenberg as follows:

Deprive them of food cards, transfer their working members to worse jobs, deprive them of medical assistance, of firewood. If that doesn't work, then the women must be called in and given an ultimatum—either an abortion or the Committee will have to inform the security police . . . . It was proposed that all physicians and midwives be forbidden to assist during childbirth.<sup>29</sup>

It would be misleading to suggest that in all the diverse situations concerning the fate of Jewish children, male leaders of the victim community were indifferent to the fate of children (unborn or otherwise) and their mothers. Once again it bears repeating—as we assess the actions of

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24. For example, Bella Katz, born in Boutrad in 1920, reports her assessment of the threat posed to Jewish women from German soldiers in particular: "German soldiers never raped Jewish women, I mean, from the Germans we were never afraid to be sexually humiliated, because they never treated us like objects...A German never lusted for a Jewish girl, because it was not allowed, he disgraced his race if he went with a Jewish girl." Testimony #03/8196. Yad Vashem Holocaust Museum archives.

25. Sabina Lustig, born in Warsaw, describes her experiences of working at an ammunition factory in Skarzysko-Kamienna during the war. Every Sunday night German officers came to the barracks and took away women with them. The girls never came back because it was forbidden to have sex with a Jewish woman. She says "We knew that they were killing them." Testimony # 03/8792 Yad Vashem Holocaust Museum archives.

26. See Ringelheim, *supra* note 10, at 5 ("In Poland, both in ghettos and camps, sexuality was a means of buying protection from the Jewish policemen and others who had means and power.") (quoting Karmel).

27. Though outside the scope of discussion of this essay, violations perpetrated against civilians by civilians pose particular difficulties of accountability in international humanitarian law, both then and now. The application of the laws of war suppose a situation of conflict where violence is perpetrated by one side against the other. The entire discourse presumes a dichotomized dialectic. Civilians who take advantage of a conflict situation to perpetrate crimes on fellow civilians generally fall outside the traditional categories of sanction, unless they can be deemed agents for one side of the conflict in the acts they undertake.

28. See AZRIEL EISENBERG, WITNESS TO THE HOLOCAUST 153-54 (1981). Ringelheim has criticized Eisenberg's account of these events in the ghettos, particularly the title. "The Agony of the Judenrat of Shavel: Murder of the Unborn." She argues that the title fails to recognize that the greater harm was caused to the women who were forced to undergo abortions, not by the men who made the decision to force them to do so. See Ringelheim, *supra* note 10, at 9.

29. EISENBERG, *supra* note 28, at 153-154.

community leaders, "choice" in such a situation is a restricted and inadequate concept. There is overwhelming evidence that children and their care remained the special concern of community leaders, primarily because women remained the biological guarantors of the community's future.<sup>30</sup> Nonetheless, women were effectively excluded from such decision-making processes and they bore the heaviest costs of decisions made in the area of reproduction and parenting.

Numerous individual testimonies attest to extensive sexual assaults upon women while they were being transported from ghettos to work and death camps.<sup>31</sup> Thus, transfer between locations were a particular source of vulnerability for women, presenting the possibility of group violation by numerous rather than individual men.<sup>32</sup> There is extensive archival information that suggests that such assaults were rife; the fact of their occurrence was recorded in the immediate aftermath of the Holocaust by survivors. It is also widely affirmed that following liberation, women survivors remained exposed to sexual assaults by Allied soldiers. For example, one survivor describes travelling on a train from Bratislava to Budapest at the end of 1944, when a group of Russian soldiers entered the train and commenced a series of sexual attacks on the women present, many of whom were work camp survivors.<sup>33</sup> She escaped by jumping out of the moving train with two other women.

### *B. The Camps*

The experiences in the camps are profoundly difficult to describe. The extensive academic treatment of the subject does not require me to review the scope and extremity of dehumanization experienced by both men and women. What I wish to do is to concentrate on what knowledge there exists about specifically sex-based violence suffered by women. On arrival to the concentration camps, both men's and women's initial experience was separation from their family groupings: men and boys from women and girls, parents from children, and relatives from one another. Thereafter, all personal effects were removed from individuals, both men and women. This included

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30. Raul Hilberg, for example, points out that "Jacob Gens in Vilnius would not surrender [children to the Nazi regime]. Wilhelm Filderman in Romania wrote letters to save orphans languishing across the Dnestr River. Raymond-Raoul Lambert, already awaiting his own deportation in an internment camp near Paris, urged that children be scattered while there was still time. When Adam Czerniakow in the Warsaw Ghetto could not obtain assurances from the German resettlement staff about the ghetto orphans, he took a poison pill."

HILBERG, *supra* note 19, at 147.

31. See Archival testimonies, Agnes Horwatt, born in Hungary; Lora Veron born in Rhodes Greece Testimony # 03/10423 Yad Vashem archives.

32. Shoshana Roshcovsky, born in Kavnik, gives an account of a transfer to Auschwitz in which a group of Hungarian soldiers mass raped a group of Jewish women. Testimony # 03/7065 Yad Vashem archives.

33. See Hedva Yerushalmi, born in Sub-Carpatic Russia. Testimony # 03/8805 Yad Vashem archives.

all baggage that came with the person, all personal clothing, jewelry, and other individualized items such as spectacles. Now in a single-sex environment, those women who were not immediately sent to the gas chambers were forced to remove their clothing, their bodies subject to the scrutiny and ridicule of the predominantly male camp guards and soldiers.<sup>34</sup> While forced nakedness was a common feature of the camp reception for both sexes, women's testimonies are consistent in identifying the removal of clothing not only as an act of gender-neutral humiliation, but as a form of sexual abasement. This experience was due not only to the fact that the onlookers were male and the subjects female, but equally to the internalization of the act itself. That is, women seemed to understand that non-consensual nudity was intended to harm them in a manner distinct from their male counterparts' sense of harm and humiliation. After the removal of clothing, women were shaved of all their bodily hair in a surgical fashion, part of the internal public spectacle that accompanied the selection process within the camps.<sup>35</sup> It is undisputed that at arrival, women with young children were predominantly picked for extermination. Testimonies suggest that many women, dimly aware of the fate ahead (and some being given a 'choice' to abandon their children), nevertheless chose to remain with their offspring. A woman's maternal status and a continued attachment to her children made her uniquely assailable and defenseless. Maternity in many cases simply constituted an unavoidable death sentence.

In certain death camps, medical experimentation carried out by the Nazi regime specifically targeted pregnant women and women's reproductive organs.<sup>36</sup> One woman survivor describes being pregnant and escaping selection on numerous occasions by stealth until she was noticed by Doctor Mengele.<sup>37</sup> He allowed her to give birth, but tied up her breasts after the delivery of her child so that she was unable to feed her newborn. Rather than

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34. One survivor, Reska Weiss, describes the process in her memoirs as follows:

Scarcely had we entered when there came a stentorian command for every body to strip to the skin. In our terror and humiliation we undressed and looked for places to hang our clothes. The S.S. men, noticing this shouted: 'Throw everything on the floor!' We obeyed, and stood completely naked among the guffawing guards, who milled around us bellowing obscene remarks. Never in our wildest dreams would we have imagined such degradation.

RESKA WEISS, *JOURNEY THROUGH HELL* 39 (1962).

35. Myra Goldenberg relates the story of four women survivors of Dachau: Again, the women were forced to undress in front of the SS, and "completely naked . . . were led to a different room, where female barbers shaved their entire body." They were "disinfected with a rag soaked in kerosene, which heavily irritated the freshly shaved skin. Finally, each was issued a "ragged dress without any regard paid to length or size." Beaten by gypsy prisoners if they asked to exchange their dresses for better fitting garments, they soon understood that the one rag they wore was their dress, underwear, towel, and handkerchief." Myra Goldenberg, *Testimony, Narrative, and Nightmare: The Experiences of Jewish Women in the Holocaust*, in *ACTIVE VOICES: WOMEN IN JEWISH CULTURE* 94, 96-97 (Maurie Sacks ed., (1997) (quoting MARTIN GILBERT, *THE HOLOCAUST* 706-08 (1985)).

36. One survivor described the role of a Jewish female gynecologist, Gizela Perl, who was brought to the infirmary at Auschwitz. She was asked to bring pregnant women to the infirmary on the promise of additional food. The survivor, Lea Fridler, reported that Dr. Perl performed numerous abortions at night to save them from experimentation and inevitable death in the gas chambers because they were carrying children. All the abortions were performed without anesthetics. See Lea Fridler, *Testimony # 03/10484* Yad Vashem archives.

37. Ruth Aliaz, born in Ostrava Czechoslovakia, *Testimony # 03/8940* Yad Vashem archives.

watch the child starve to death she used morphine given to her by a Czech woman working in the Auschwitz infirmary to kill her newborn baby.

Notably, sexual experimentation on women was the only specifically gendered violation subjected to legal scrutiny during the Nuremberg Trials. The so-called "Doctors Trial" tried twenty-three defendants. The following experiments were examined as war crimes: high-altitude experiments, freezing experiments, malaria experiments, mustard gas experiments, sulfanilamide experiments, bone-muscle-nerve experiments and bone transplantation experiments, sea-water experiments, epidemic jaundice experiments, spotted fever experiments, experiments with poison, incendiary bomb experiments, and sterilization experiments.<sup>38</sup> Evidence at the trials demonstrated that thousands of victims, predominantly women, were subject to sterilization procedures. The experiments were conducted by means of x-ray, surgery and various drugs, primarily at Auschwitz, Ravensbruck and other concentration camps, with the cogent aim of developing medical science to plan and practice genocide.<sup>39</sup>

### III. ACCOUNTING FOR HARMS

The above is an empirical description that approximates the lived experience of both women who died and women who survived the camp experience. The question I now address is the legality and sanctioning of these experiences. In the terminology of law, we can state that these women were subject to unlawful detention, that their civilian status was violated, that they were subject to assaults on the person and even grievous bodily harm, and that those who did not survive were murdered. Under the formal legal rubric of modern humanitarian law, we ask whether the harms experienced are defined as crimes by the Geneva Conventions of 1977 and the supplementary Additional Protocols of 1977. In addition, following the jurisprudence of the Nuremberg Trials, we can assess whether such acts constitute crimes against humanity.<sup>40</sup> I suggest, however, that this legal catalogue of harm lacks breadth, encompassing only a fraction of what women actually experienced as sexual harm and which was intended as such by their captors.

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38. See *United States v. Karl Brandt*, in I TRIALS OF THE WAR CRIMINALS (1949).

39. See *id.* at 48, 694-702.

40. Crimes against Humanity were defined in the Tribunal's Charter as: murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial and 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.

Nuremberg Charter Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the Int'l Military Tribunal, 82 U.N.T.S. 280, entered into force Aug. 8, 1945.

### A. *The Harm of Separation*

A detailed analysis of all violations experienced by women during the Holocaust is well beyond the scope of this article. Thus, I wish to focus on two particular aspects of maltreatment, as a means of illustrating the broader themes: 1) that law fails to identify certain acts perpetrated upon women during war as harms and 2) that such acts are distinct, because not only are they experienced by women rather than men, but they are encoded with political/military purposes. First, I wish to explore the extent to which violent acts aimed collectively at women and children, and more particularly at women as mothers, can be defined and accounted for as explicitly sexual harms. Thus, when a woman as mother is forcibly separated from her dependant child, whose fate she cannot control and can only imagine as grim, I would suggest that another quantifiable harm has been caused. I would also suggest that the harm occurs in the realm of the sexual self—and not exclusively in the realm of familial or non-gendered unencumbered self.<sup>41</sup> This harm of separation that I identify is linked to the broader jurisprudential claim articulated so cogently by Robin West. She states:

Women are not essentially, necessarily, inevitably, invariably, always and forever separate from other human beings: women, distinctively, are quite clearly “connected” to another human life when pregnant . . . . Indeed, perhaps the central insight of feminist theory of the last decade has been that women are “essentially connected,” not “essentially separate,” from the rest of human life, both materially, through pregnancy, intercourse, and breast-feeding, and existentially, through the moral and practical life.<sup>42</sup>

Defining harms that categorically or even partially place the women in a maternal context is not without theoretical or practical complications. Feminist theory continues to struggle with and to rally against the essentializing of the female person to her unique biological capacities. Proponents of dominance feminism have stressed the pervasiveness of sexualized domination in many venues of women’s lives—not least in their reproductive lives—the actualization of which is shaped by patriarchal views of a woman’s appropriate social space, and thus her conception of herself.<sup>43</sup>

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41. The issue is all the more fraught when women had to make choices over which of their children would survive or to kill a newborn child in order to ensure the survival of other adults or herself. These choiceless choices are aptly summed up in one narrative of such acts: “rather that . . . we at least save the mothers (and kill the babies) . . . so, the Germans succeeded in making murderers of even us.” OLGA LENGYEL, *FIVE CHIMNEYS: THE STORY OF AUSCHWITZ* 99-100 (1947).

42. Robin West, *Jurisprudence and Gender*, in *FEMINIST LEGAL THEORY READINGS IN LAW AND GENDER* 201, 202 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

43. For a critical assessment of both dominance feminism and its counter-critiques. See Kathy Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory* 95 COLUM. LAW REV. 304 (1995). In this context, I use Abrams’ definition of dominance feminism which describes “ . . . [t]hat strand of feminist (legal) theory that locates gender oppression in the sexualized domination of women by men and the

Some feminist theory remains profoundly ambivalent about the choices of women to seek motherhood and to demand status for it. Thus, there is a reluctance to recognize and legitimate the act of mothering itself. In identifying a world where sexual coercion is an innate and pervasive element of societal construction,<sup>44</sup> the enterprise of mothering is neither neutral nor unproblematic. Feminists who have campaigned for and won legal reforms in "gender neutral" terms, viewing the only alternative to patriarchal constructions of sexuality as the elimination of sexual difference—making masculinity and femininity politically and legally irrelevant—would strongly resist the re-incorporation of gender specificity in any form.<sup>45</sup>

Nonetheless, a vigorous counter-debate has emerged in the feminist community aimed at the perceived totality of the dominance paradigm, which discounted the possibility of effective resistance to coercion, minimized the positive sexual construction of the female self, and obscured the possibility of meaningful choice and control for women in shaping their own lives and sexual identities.<sup>46</sup> In this context, Spinak's observation is apt, "[t]he legal, social and even biological definition of mother within the dominant culture has become a subject of increasing complexity and importance."<sup>47</sup> This debate remains live and unconcluded.

While there is certainly a greater acknowledgement that female sexuality is highly complex and individuated, maternal choice and status remain hotly contested ground. This remains true in large part because the status of mother is bound up with the concept of family. As Martha Fineman's groundbreaking work *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* points out,<sup>48</sup> mothers are usually defined in terms of their (sexual) relation to fathers. Thus, the rejection of patriarchal sexual pigeonholing makes it difficult to agitate positively for positioning women in terms of a sexual link with their children, when harm occurs to them as a result of or in connection with that relationship. Furthermore, while Fineman's scholarship has focused on the care aspect of child dependency which is potentially gender neutral<sup>49</sup>, in practice most societies and cultures are far removed from any such model. Many feminists remain wary of motherhood and the implications of 'woman as mother' for the broader agenda of gender

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eroticization of that domination through pornography and other elements of popular culture." *Id.* at 304.

44. See generally SUSAN BROWNMILLER, *AGAINST OUR WILLS: MEN, WOMEN AND RAPE* (1975); ANDREA DWORKIN, *PORNOGRAPHY, MEN POSSESSING WOMEN* (1981); CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

45. See, e.g., Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 *WOMEN'S RTS. L. REV.* 175 *passim* (1982).

46. See, e.g., *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* (Carole S. Vance ed., 2d ed. 1992). As Vance argues: "Initially useful as an ideological interpretation, [the dominance view] now shares the same undialectical and simplistic focus as [its patriarchal counterpart]. Women's actual sexual experience is more complicated, more difficult to grasp, more unsettling . . ." *Id.* at 5-6.

47. Jane M. Spinak, *Reflections on a Case (of Motherhood)*, 95 *COLUM. L. REV.* 2048 (1995).

48. See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 5-6 (1995).

49. See *id.*



equality.<sup>50</sup>

Further conceptual bars to elaborating upon the sexual connection between mother and child relate to the extent to which the patriarchal family limits and controls sexuality. As Slaughter notes;

The sexual activity and reproductive capacity of the mother are constrained by the breadwinner's earning power. In many ways, the public images of mothers also denies them their sexuality and eroticism . . . . Rarely [are mothers] presented as real life women who are both nourishing and sexual beings.<sup>51</sup>

The woman as mother is sexless, and only deviant motherhood is expressly connected with the woman as sexual being and thus is in need of control and remaking.<sup>52</sup> Paradoxically, as woman's sexual identity is invariably connected to maternal functionalism, whether she chooses to have children or not, sexual identity is excluded from social identity as mother. All of this means that casting a legal framework that links specific forms of sex-based harm experienced by women in connection with their children, or their capacity to have children, will encounter sites of resistance that may not be immediately apparent at the outset.

In the realm of international law, the conversion is at a far more embryonic stage than with its domestic counterparts. Here, the suggestion that harms to the female person in the context of conflict should be viewed not only through the prism of individual harm but also through an additional layer of the maternal may raise other alarms. Not least of these is the fear that gaining consensus for the naming of individual harms is at its gestation point, a narrow ground that requires consolidation rather than expansion. A cautious view would suggest that radical shaping of the concept of sexual harm itself, would only marginalize the agenda of mainstreaming the feminist agenda in international criminal law. International feminist scholars may be reluctant to press such an expanded notion of sexual harm, being ambivalent about the relationships between autonomy, the maternal, and harm itself.

#### *B. Military Functionalism and Maternal Separation*

In the context of the Holocaust, the destruction of culture and a people was the primary function of the violence perpetrated on European Jewry. Targeting the family, destroying the relationships of dependency and nurture,

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50. See generally Herma Hill Kay, *Equality and Difference: A Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985) (arguing that sex differences should be ignored except during the time when the female is actually pregnant).

51. M.M. Slaughter, *Fantasies: Single Mothers and Welfare Reform*, 95 COLUM. L. REV. 2156, 2158 (1995).

52. See Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 12 (1993).

was a logical means to carry out this act of cultural annihilation. Social subsistence was at that time and remains a gendered institution at its core. Women carry children, and they remain the primary caretakers of their offspring until the child has reached adulthood. Mothering is a gendered undertaking and is understood as such by those seeking to destroy the fabric of social life in a community. Hence, the harm of separation must be understood in the terms under which the perpetrator carried out the act and its receipt by the victim. Both psychological studies and individual testimonies demonstrate to us that women experience forced separation from their children in profoundly different ways from men.<sup>53</sup> Many women articulate such separation as a physical assault on their own person, concentrated on their own experienced sense of being female, and aimed at undermining their sexual identity by taking away the expression of that reproductive self—the child. There is an undisputed communication between the perpetrator and the victim in this context. Both profoundly understand the nature of the harm that is being caused by one and experienced by the other. There is no ambiguity between them. Rather, any ambiguity lies outside, in the categorization and naming of the deed rather than in its actual and understood context.

Does this harm have a name in international law? In the post-Holocaust world of human rights and humanitarian law, there are some categories that may fit. In the context of familial separation, the legal regime of human rights specifically recognizes a right to family life.<sup>54</sup> Some of the case law which has emerged from the regional human rights systems is striking in its determination to guard the right of family integrity and the centrality of due process in any legal proceeding which would seek to deprive parents and their children of one another's support.<sup>55</sup> The Laws of War also place a high rhetorical premium on the protection of children and their caretakers. Both regulatory mechanisms in this arena derive their protective scope from notions of the value of family and parenting as separate social goods, tied to a conception of the child's integrity being furthered by a cohesive family unit. However, neither system nor, more crucially, the humanitarian law prohibitions applied in war situations, recognizes any harm of separation that is tied to a sexual harm experienced by the mother as a result of enforced severing. In short, the act of separation itself is not viewed as a sex-based harm. Nor is the act of separation identified as functioning to facilitate

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53. An early starting point for the significance of connectedness in women's lives is found in Carol Gilligan's work. According to Gilligan, women view themselves as fundamentally connected to, and not separate from, the rest of life. Thus the "moral imperative" for women revolves around caring and connection, and not, as for men, around rights and non-interference. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* 6-8 (1982).

54. For example Article 17 of the International Covenant on Civil and Political states: "No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation." See 999 U.N.T.S. 171, 6 I.L.M. 368 (1967).

55. See, e.g., *Kroon v. The Netherlands*, Eur. Ct. H. R., Judgement of the 27 October 1994, *Marckx v. Belgium*, Y.B. Eur. Conv. H. R. (1975), *Hoffman*, Judgement of the 23 June 1993, *W, B & R v. The United Kingdom*, Report of the 15 October, 1985.

genocide, ethnic cleansing, or the destruction of social and cultural communities.

Separation is a specific example of my earlier general contention that the object of attack is the woman's body, both in its actual and symbolic manifestations. It is a categorical assault on female sexuality because it targets the product of that sexuality—the child. It also functions as symbolic aggression to a broader ethnic or cultural group because as “carriers of the nation,” mother and child destruction marks out the realization of broader military objectives, by destroying the future of a people and hence the people themselves. If we are truly to “name” harms and to make those who perpetrate them accountable, then it is imperative that we identify the intent that underlies the action in the first place and factor it into the identification of the harm itself, the sanction that applies to it, and the remedy that is offered to the victim.

Why then, given the extensive evidence of separation during the Holocaust, has the perpetration of such acts been deemed to fall outside the scope of legal regulation, and more specifically, not considered to fall, as I suggest, into the realm of sex-based harm? First, as I outline in detail above, there is a general reluctance to fully engage with the contradictions and complexities of the sexual dimensions of mothering. On the one hand, the act of reproduction is infinitely sexual. On the other hand, there have been (with good reason) ongoing critical assessments by feminists of the essentialism that lies in reducing or linking the female person's value and status to the act of reproduction. However, conversations concentrated upon the relationship between greater gender equality and reproduction that insist on decoupling sexuality and its offspring can serve to starve the conceptualization of legal accountability for sexual harms associated with the status of mother in situations of war.

If we accept that the sexual violation of women during war is intimately linked with their reproductive capacity, we run up against an “is” and “ought” discussion. The dilemma might be articulated as follows—do we accept that reproduction and the child are linked by social and cultural practices as a sexual link with the mother, thus potentially essentializing the female as mother and carer? Or rather, should we dismiss these practices of culture and focus instead on a desired situation in which the woman as mother is not self or other identified in such a way? One dilemma for the jurist is whether legal sanction should reflect the actuality of practices, but in identifying them as harms, serve to bolster their embeddedness as social norm. Or should the legal sanction conform to the ideal type unencumbered by social context that may be correctly identified as unsophisticated? Some might argue that if I am content to acquiesce in the linkage between sexuality and offspring, a greater disservice is done to a broader project of equality. Let me suggest that this need not be the case. At the core of my position is the belief that existing prohibitions on enforced and non-consensual familial separation are

insufficient to encompass any individual harm experienced by the mother. To create totalizing theories of harm that fail to account for the specific and lived experiences of the victim is to undertake what can only be described as "incorporationism," shunning the concrete in pursuit of universal truth.<sup>56</sup> This is also to subvert feminist sensibilities to the methodology of dominant legal discourse, the cost of which is counted beyond the realm of the conceptual.<sup>57</sup> In this context, we must be attuned to the tendency to allow the question of equality to be defined in purely Anglo-American terms. By contrast, we turn to the theoretical possibilities explored by continental feminists such as Helena Cixous. Cixous writes about equality not in terms of uniformity but rather in terms of difference.<sup>58</sup> Her writing is a theoretical engagement with the representation of difference as process, as structure, and as a constitutive of social and sexual identities.<sup>59</sup> In short, asserting that harm and sexual identity as mother are linked invokes a complicated conversation in law and theory that we should not seek to avoid.

At the core of my position is the belief that existing prohibitions on enforced and non-consensual familial separation in war are insufficient to encompass any individual harm experienced by the mother. Moreover, unless international legal prohibitions engage with the totality of harm experienced by the victim, prohibitions will remain sterile ground, lacking the depth of confrontation with the experience of those violated to make meaningful any form of accountability for sexual violations.

The example of maternal separation demonstrates to us that the vocabulary of acts that constitute harms in the legal sense requires enlargement. The experience of gendered violence during the Holocaust has components that do not "fit" then or presently existing legal categories. As the female survivors themselves relate, a variety of their experiences did not count as legal harms then or now in international law—including separation from their children, sexual obliteration, forms of assault on their person that do not reach the required legal standard for rape, and until recently, rape and direct sexual violation itself. It confirms that existing categories are limited and exclude acts that are infinitely gendered and in need of a legal and definitional home. It also raises profound questions about the post-war enterprise of naming harms and the exclusion of gendered violations from the framework of accountability.

### C. *The Harm of Sexual Erasure.*

A second illustration of both the limits of legal accountability and the

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56. See Scales, *supra* note 1, at 1383-84.

57. See Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 30 (1990).

58. See generally HELENE CIXIOUS & CATHERINE CLEMENT, *THE NEWLY BORN WOMAN* (Betsy Wing trans., 1986).

59. *Id.*

underlying intentions that provoke sexual violation deals with what I term deliberate sexual erasure. As outlined above, one of the most acutely invasive acts experienced by all women in the camps was that of forced nakedness in during selection into the camp system. This was invariably accompanied by the shaving of all hair from intimate parts of the body, often by male guards (who were generally connected to the Nazi regime) to the amusement or ridicule of other viewing soldiers. The forced removal of clothing and the public viewing of the private physical self are inherently sexual acts. Their intent was to demonstrate the woman's sexual vulnerability and, to her community, the complete absence of guardianship for her honor. Moreover, the particular act of removing bodily hair was a far more encoded communication of control. It proclaimed a stripping of sexuality from the female person. In short, it was a message of sexual obliteration.

Both men and women experienced together many of these dehumanizing acts.<sup>60</sup> Viewing the experience through the prism of women's assigned social and familiar roles in Europe of the 1930s and 40s, there can be no doubt that there would have been no confusion between victim and perpetrator over the content of the message.<sup>61</sup> Taking away a woman's clothing and exposing her person to the gaze of men with whom she had no familial or sexual relationship was a crude and effective act of sexual violation. Nudity in a public context was an abnormal and grotesque experience for these women, and the perpetrators understood that it would be experienced as such by them. Moreover, we should remember that many of these women were religiously observant, which would have augmented the shame and humiliation of the acts they experienced.<sup>62</sup> Shaving women thus had a communicative value, intimately tied to their sexual personality. Shaving these women was a sexual defilement—but it was organically linked to the enterprise of cultural eradication in which destruction of the carriers of the community was a central plank of policy.<sup>63</sup>

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60. For example, for religious men, the shaving of facial hair was also encoded with a clear personal, religious, and cultural message of obliteration, and no comparisons on comparative dehumanization are appropriate. However, it remains important to assert that the shaving of female bodily hair was a victimization that was predominantly sexual.

61. Furthermore, Nazi views on the role and status of women under the regime of National Socialism were well defined. As Gisela Bock points out: "... Nazi antifeminism tended to promote, protect, and even finance women as childbearers, housewives and mothers." See Gisela Bock, *Racism and Sexism in Nazi Germany: Motherhood, Compulsory Sterilization, and the State* 8 SIGNS 400, 402 (1983). Parallel to this, of course, was the exclusion of certain women from bearing and rearing children, and all the attendant social status and respect that accompanied that position. Thus, the treatment of women came out of a clearly articulated policy which encouraged and elevated the exclusion of some women and not others from public and social space. There can be little doubt that those undertaking the micro tasks understood the ideology.

62. Particularly in Eastern Europe where economic development was slower than in the West and where there was disproportionately great examination relative to population, religious observance was more entrenched. As Hyman notes, "Although secularization touched a substantial minority of Eastern European Jews by the beginning of the twentieth century, the institutions and leadership of traditional religious culture remained relatively vigorous." See Paula E. Hyman, *Gender and the Jewish Family in Modern Europe*, in *WOMEN IN THE HOLOCAUST* 2, *supra* note 7, at 25.

63. The act of shaving facilitated visually what Anna Pawelczynska describes as: "Sexual distinctions . . . were totally eliminated in camps; traces of these distinctions were reflected solely in the extra possibilities for tormenting and humiliating the prisoners." ANNA PAWELCZYNKA, *VALUES AND VIOLENCE IN AUSCHWITZ*:

Once the initial abominations had taken place the women who survived were handed clothing, generally of inadequate and ill-fitting form. In such shapeless and monochrome coverings, body and femininity were discarded and displaced. Inadequate food and the complete absence of sustenance for extended intervals meant that bodies became skeletal and dehumanized. Most women in the camps ceased to menstruate. There was a general consensus among women survivors that chemical substances were added to the meager food rations to achieve this end, though doubtlessly the lack of food, excessive hard labor and the horror of surrounding circumstances might also have been causally responsible for collective amenorrhea. Thus, the camp experience had an unparalleled impact on the physicality of its female victims. Survival meant the erasure of many of the physical connections with one's own sense of female sense. The female body was deliberately obscured through the capillaries of refined social and sexual obliteration.

Sexual violence in war is not a translucent occurrence. It has highly complex characteristics manifested in a variety of compelled social practices forced by the combatant on the female subject. Some of these practices are arguably heightened manifestations of a culturally rooted contempt for women that is elevated in times of crisis. But to fully understand the manner in which sexual violence is experienced we need to finely examine the variety of social practices that come to the fore in times of conflict. To reduce examination of these acts to a shallow litany of narrow deeds upon the physical person of the woman impoverishes our understanding of the functionality and experience of sexual violence during war for women. Moreover, to see these acts as separate from the methods and means of warfare is to assume incorrectly that they are ancillary to military objectives, not a central element of them.

The reflection of such limited thinking is to be found in the conceptualization of acts that interfere with the woman's bodily integrity. Both international human rights conventions and humanitarian law confirm, in general and specific terms, rights to bodily integrity.<sup>64</sup> Currently, the legal regime of humanitarian law prohibits certain specific sexual acts with criminal sanction. They include rape, enforced prostitution, and acts preventing birth with a social or cultural group. There is no dispute that the articulation of these acts as crimes in the context of war is an immense leap of accountability for violations committed against women during war. Nonetheless, there is a danger that the focus on articulating a catalogue of acts may detract attention from the myriad of ways sexual based violence manifests itself during conflict. This subsequently creates an interpretative task, where one is forced to ask whether a certain acts fits within the definition and if it does not, it is

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64. For example, Article 7 of the International Covenant on Civil and Political Rights bars any person from being subject "to torture or to cruel, inhuman or degrading treatment." International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 7, 999 U.N.T.S. 171.

excluded as a harm, or its specifically sexual nature is unacknowledged.<sup>65</sup> Thus, the shaving women's bodies is precisely illustrative of an invasive sexual act, which (amongst others) has never been specifically defined as constituting a sexual offence nor as falling within the understood class of unacceptable sexual acts. More particularly, the catalogue violations specifically excludes a concept of sexual erasure, where the violation specifically aims at depriving a woman of her sexual identity. Such harms are subterranean and currently invisible.

#### IV. THE LAWS OF WAR AND SEXUAL VIOLATION.

Clearly, during the Second World War the laws of war were ill-equipped and ill-fitted to respond as a legal matter (leaving aside the question of will to enforcement) to these forms of violation. They were simply not sufficiently articulated by states as matters of legality and conformity between them. They were, in short, invisible. Since then, the laws of war have been substantially augmented with a heavy emphasis on civilian protection. But who is the civilian and what harms are imagined as potentially befalling him? Two short points will be elucidated here. First, that the actor as civilian is imagined primarily as male and not female, despite the overwhelming evidence that by and large the civilian casualties of war, displacement and conquest are females and their dependent offspring. Second, despite the substantive recent augmentation of humanitarian law in respect of sexual crimes through the statutes and jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda,<sup>66</sup> in tandem with progress towards the creation of an International Criminal Court,<sup>67</sup> the female focused history of the laws of war has been predominantly focused on the pregnant woman and a certain form of protection for the woman as mother. Despite recent movement, accountability has a thin history, lacking depth and imagination on the forms of violation that women experience even in these selected privileged arenas.

There is no doubt that by the time the Second World War started there was

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65. See generally Deborah Blatt, *Recognizing Rape as Method of Torture*, 19 N.Y.U. REV. L. & SOC. CHANGE 821 (1992).

66. The Statute of the ICTY has gone some considerable means to ameliorate the status of crimes committed against women during war. For example, Article 4 of the Statute concerning genocide reaffirms in a concrete and meaningful fashion the relationship between violent sexual acts directed at the women of a national, ethnic, racial or religious group and the destruction of that entity. Article 5 of the statute endorses the position that rape constitutes a crime against humanity. This is the first primary recognition given to the crime of rape by an international tribunal. What will be crucial here is as I have pointed out elsewhere, is what practical definition is given to the crime of rape, which acts will be interpreted to constitute rape and whether penetration alone be conclusive. See Fionnuala Ni Aolain, *Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Slavery in War*, 60 ALB. L. REV. 883, 891 (1997).

67. Article 7(1)(g)(j), of the Rome Statute of the International Criminal Court explicitly defines "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity", as both crimes against humanity and war crimes provided that these acts are committed as part of a widespread attack directed against any civilian population. United Nations: Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999.

a minimal rhetorical consensus between states on the principle that women constituted a protected class of person during war, though the terminology of protection was not utilized nor the extent of deference legally defined. This was reflected in the humanitarian law prohibition contained in the Hague Convention Respecting the Laws and Customs of War on Land (Hague Convention VI) which states in part: "Family honor and rights, the lives of persons, and private property, as well as religious convictions and practices must be respected." The notion of family honor was indivisible from the honor of the woman—one was indivisible from the other, a characterization which still remains true in part today. Thus, the parturient relationship between family, demos and the female body is more than simply metaphorical but writ large on the laws of protection themselves.

Following the First World War there were embryonic attempts to develop the laws of war further. In January 1919, the Preliminary Peace Conference of Paris decided to create a Commission for the purpose of "inquiring into the responsibilities relating to the war."<sup>68</sup> This Commission issued its report in March 1919, confirming the widespread violations of rights of combatants and civilians.<sup>69</sup> It further compiled a formal list of acts which constituted breaches of the laws and customs of war. These explicitly included rape and the abduction of girls and women for the purpose of enforced prostitution. Interestingly, when the United Nations Commission for the Investigation of War Crimes (1943) was formed, it adopted the list of war crimes enumerated by the Paris Commission as its immediate and practical working basis.<sup>70</sup> It is also noteworthy that between 1939 and 1943, statesmen and governments aware of the nature and extent of the warfare being waged by Germany, issued various public declarations enumerating the German actions as contrary to accepted rules of warfare. While sexual violence is not a preoccupation of such pronouncements, it was not entirely absent. For example, the infamous Molotov Notes of November 1941, in which the Russian Commissar for Foreign Affairs circulated a diplomatic note to all Governments with which the U.S.S.R. had diplomatic ties outlining the extent of the atrocities committed against Red Army soldiers.<sup>71</sup> The Note also contained details of attacks on female nurses and women medical assistants. A further diplomatic note of January 1942 detailed the deliberate targeting of civilian populations in the territories conquered by the German army. It included details of widespread rape and the use of women as screens in front of advancing

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68. THE UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 32 (1948).

69. See COMMISSION ON THE RESPONSIBILITIES OF THE AUTHORS OF THE WAR AND ON ENFORCEMENT OF PENALTIES, REPORT PRESENTED TO THE PRELIMINARY PEACE CONFERENCE (1919), *reprinted in* 14 AM. J. INT'L L. 95 (1920).

70. THE UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 68, at 477.

71. The Molotov Notes on German Atrocities. Notes sent by V.M. Molotov, Peoples Commissar for Foreign Affairs, to all Governments with which the U.S.S.R. has diplomatic relations. (H.M. Stationery Office).



troops.<sup>72</sup> Also during the wartime period some unofficial work was carried out by academic bodies with a view to re-establishing the rule of law in Europe after the war. Thus, for example, an influential conference was convened at Cambridge in November 1941 to form a committee to augment the legal understanding of war crimes and the kinds of courts which would adjudicate their violation.<sup>73</sup> A sub-committee of the Cambridge Conference examining War Crimes drew up a substantive report dividing war crimes into three main categories:

- (2) Acts connected with warfare and contrary to the laws of war, e.g. use of poison gas, attacks on hospital ships, etc.
  - (One) *without authority, e.g. rape, murder, etc.*
  - (Two) with the approval of or at the order of authority, e.g., mass murder, murder of hostages, deportation, etc.
- (3) Serious crimes committed against property
  - (One) without authority, e.g. looting
  - (Two) with the approval of or at the order of authority, e.g. wanton destruction, plundering of art treasures, etc.

Clearly there were a host of official pronouncements, authoritative Committees and unofficial bodies which failed to acknowledge on any level the particularity of a female experience during the war.<sup>74</sup> Nonetheless the foregoing should illustrate that by the end of the Second World War, there was not a complete absence of legal vocabulary or political recognition with which to confront and legally sanction the actions of soldiers and others which infringed upon the sexual integrity of female civilians they encountered or exercised control over.

Despite this, the post-war accountability mechanisms were remarkably silent on the experiences of women during the war. At the Tokyo Trials,<sup>75</sup> evidence of 'violence against women' was considered as one of the factors to support convictions of war criminals.<sup>76</sup> Sexual violence against women was not, however, considered in its own right nor tried as a separate offence. The Nuremberg Trials did not examine any specific questions of gendered violation, though the destruction of female reproductive capacity was tangential to the trial of the offences related to medical experimentation as outlined above. The Nuremberg Tribunal was a forum in which the experiences of gendered and systematic violence, characterized by sexual

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72. *See id.*

73. THE UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 68, at 95-99.

74. *See, e.g.*, the Declarations of the Polish and Czech Governments November 1941; the Roosevelt-Churchill Statements of 25th October 1941; the Inter-Allied Commission and the Declaration of St. James's of 13th January 1942; *See generally* Collective Notes presented to the Governments of Great Britain, the U.S.S.R. and the USA and relative correspondence.

75. The trials were based on the Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, amended Apr. 26, 1946, T.I.A.S. No. 1589.

76. John Pritchard & Sonia M. Zaide, *The Tokyo War Crimes Trials* (1987) (judgment).

indignity was not heard.<sup>77</sup> This occurred notwithstanding the prevalent knowledge of Nazi and Japanese practices of forced prostitution and rape during the war. Thus, the Nuremberg and Tokyo Trials followed an age old pattern that silenced the experience of women in war and communicated that sexual violence was not an aberration, but rather a vocabulary of communication between combatants which was safe from external examination. The sole exception in the culpability silence around sexual violence was Control Council Law No.10 promulgated in December 1945.

After the Second World War, recognizing the inadequacy of the existing legal standards to confront and name the kinds of acts experienced by civilians, states sought to categorize and regulate certain prohibitions on behavior by combatants during war. These were to be embodied in the Geneva Conventions of 1949. Despite the particularity of violence and violations experienced by women in the war, there was little reflection of that distinctiveness in the agreed treaty standards. Rape was included in the litany of prohibited acts against civilians, but it did not fall into the category of 'grave breach' under the Geneva Conventions themselves.<sup>78</sup> Therefore it remained a crime of lesser consequence, subject only to domestic jurisdiction which did not trigger international penal consequences. At the time of drafting, women's honor remained the primary focus of concern.<sup>79</sup> Thus, the limited prohibition of rape was defined solely in terms of a breach of the honor of the woman. By the time of the next significant revision of the Laws of War thirty years later (the 1977 Additional Protocols to the Geneva Conventions) concern for the protection of women in war was still far from center-stage.

A preoccupation with the fertile and expectant woman was the most evident augmentation of interest to be seen at the 1977 Diplomatic Conference which expanded the protections of the laws of war to enumerated internal conflicts. Again, the Diplomatic conference gave little of its attention to the physical violence experienced by women in war. Nonetheless, there was a notable preoccupation with the woman as mother. The Conference acknowledged that women because of their "special situation" had to be given

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77. Article VI of the Nuremberg Charter could have provided the basis for legal sanction of sexual crimes. Article VI (b) defines war crimes as including, "violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, *ill-treatment* or deportation. . . ." Article VI(c) defines crimes against humanity to include " . . . murder, extermination, enslavement, deportation, and *other inhumane acts* committed against any civilian population." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 82 U.N.T.S. 280. Aug. 8, 1945.

78. See Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. INT'L L. 783, 820 (1995) (noting that the crime of rape is not explicitly included in common Articles 50/51/130/147 of the Conventions).

79. Article 27 states, "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, para 2, 6 U.S.T. 3516, 75 U.N.T.S. 287. See generally YOUNGINDRA KHUSHALANI, DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS (1982).

“special protection.”<sup>80</sup> Such women in a special situation were described as those who, “were pregnant women, maternity cases and women who were in charge of children of less than seven years of age or who accompanied them.”<sup>81</sup> Though the diplomatic conversation is limited, I submit that its initiation sprung from an implicit recognition by state parties of the link between maternity and the survival of the demos. War, by definition, threatens the existence of the state. To protect the maternal is to protect the biological survival of the body politic. The same inverted logic applies to the destruction of the maternal.

In addition, the Conference had virtual consensus on the appropriate manner to deal with pregnant women who were subject to the death penalty. Mr. Felbar of the German Democratic Republic was not alone in advocating that:

. . . for humanitarian reasons, the protection envisaged for pregnant women should be extended to other categories of women. It had therefore proposed that the death penalty should not be pronounced on mothers of infants and on women or old persons responsible for their care and that it should not be pronounced or carried out on pregnant women.<sup>82</sup>

What is unique about this extended diplomatic conversation is that it constitutes the sole lengthy contribution to the discussion of protecting women from violence during warfare, at the most significant international conference on the topic since the post-war Geneva Conventions of 1949. The sexual, sexualized and sexually violated woman is missing entirely from this conversation. The only passing reference that can be interpreted to cover her absence is the opening statement which concluded that, “opinions were divided regarding the special protection to be given to women in armed conflicts.”<sup>83</sup>

The only movement that is notable in the final document in the article concerned with ‘measures in favor of women and children’, is the inclusion of the phrase ‘special respect’ for women rather than the term ‘honor.’ In addition, under Article 75 of the Protocol I, rape is included under the general heading of being a crime against ‘dignity,’ rather than a crime against ‘honor.’<sup>84</sup> This article also recognized the particular experience of forced prostitution by specifically including a prohibition for that act in the final

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80. See Statement of Mr. Surbeck, ICRC introducing a text drafted by the Committee. para 55. HOWARD S. LEVIE 4 PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS (1981) 86.

81. *Id.*

82. *Id.* at para 61.

83. *Id.* at para 57.

84. Article 75 (2)(B) reads: outrages against personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any other forms of indecent assault. See Doc CDDH/SR.43 and Annex. See Official Records of the Diplomatic Conference. Vol VI (1978).

agreed text.<sup>85</sup> Protocol II, also agreed upon by the same Diplomatic Conference, includes in its provision of Fundamental Guarantees a prohibition on rape.<sup>86</sup> By December 1992, the International Committee for the Red Cross, in an aide-memoir, declared that the provisions of Article 147 on grave breaches of the Geneva Conventions included rape.<sup>87</sup> In the past decade there has been significant debate on the subject of the legal status of violence against women during war, and more so as to the legal prohibitions for the violation of rape. Some academic commentators, particularly Theodor Meron argue that combatants have been technically prohibited by the laws of war prior to the positivist enunciation of the Geneva Conventions and the Additional Protocols from engaging in acts of rape. The Geneva Conventions directly prohibit rape in the Fourth Convention, and Article 76(1) and 85 of the First Additional Protocol contain the same repudiation. However, as noted above, the prohibitions in the Geneva Conventions define rape as an offence against honor rather than an offence of a distinctly violent and sexual nature. Equally problematic was the low status of prohibitions for sexual violations within the hierarchy of humanitarian law offences. In short, not only had all-encompassing sexual crimes against women been excluded from legal prohibition under the laws of war, but when they were included, they had been facets of male status violation.

This commentary does not intend to suggest that there was no advancement in international treaty law from 1945 onwards in relation to the recognition of female dignity as a separate category of protection. From the end of the war, a proliferation of documentation and structures emerged from the United Nations concerning themselves with the status and regulation of women's lives. These included the UN Commission on the Status of Women,<sup>88</sup> the Convention on the Political Rights of Women,<sup>89</sup> the Convention on Consent to Marriage,<sup>90</sup> and the Convention on the Nationality of Married Women.<sup>91</sup> By 1975, the United Nations had united these principles into one single document, the non-binding Declaration on the Elimination of Discrimination Against Women.<sup>92</sup> By 1980, in the middle of the UN Decade for Women, the Declaration was redrafted and accepted as a multilateral treaty, the Convention on the Elimination of All Forms of Discrimination

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85. See Article 76, Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3.

86. See Article 4(2) (e), Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609.

87. See ICRC, Aide-Memoire of December 3, 1992.

88. Created in 1947, promised international commitment to women's rights. For a detailed account of the Commission's creation, see UNITED NATIONS, THE UNITED NATIONS AND THE ADVANCEMENT OF WOMEN: 1945-95 (1995).

89. Convention on the Political Rights of Women, March 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135.

90. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Dec. 10, 1962, 521 U.N.T.S. 231.

91. Convention On the Nationality of Married Women, Feb 20, 1957, 309 U.N.T.S. 65.

92. G.A. Res. 2263, 22 U.N. GAOR Supp (No.16) at 35, U.N. Doc A/6880 (1967).

Against Women.<sup>93</sup> This flurry of paper might suggest a new centrality for women in international human rights discourse. There can be no doubt that the crystalization of these standards was of tremendous significance in giving a language to the experiences of rights denial for women premised on their gender. However, the continued marginalization of gender in the international legal order and the inherent limitations of the documents themselves meant that the gap between the rhetoric of equality and the reality of inequity for women was stark and unchanging.<sup>94</sup>

In the area of sexual based violence and women's experiences of war, this gap was seismic. Most importantly, the lack of comprehensive legal sanction for sex-based violence during war remained almost entirely ignored. The conflict that forced the attention of the Western World on the lacunae was the Balkan war of the early 1990's that occurred in the wake of the disintegration of the Yugoslav state. Reports of systematic rape emerged from the Former Yugoslavia beginning in the early spring of 1992.<sup>95</sup> It became clear that the International Criminal Tribunal for the Former Yugoslavia (ICTY) and its sister tribunal, the International Criminal Tribunal for Rwanda (ICTR), established to prosecute war crimes committed during the Rwandan civil war, would have to go further than creatively interpreting existing standards of humanitarian law such as the 'grave breaches' prohibitions. 'Reading-in' sexual violence as a form of torture, assault or breach was insufficient.<sup>96</sup> The ICTY and ICTR were being called upon to move beyond subsuming female centered violence into existing categories; such violence had to be acknowledged and articulated in its own right.

Some of the jurisprudence emanating from the two courts in the realm of sexual violence has been encouraging. For example, a recent decision from the ICTR *inter alia* dealt with the particular practice of forced nudity in the broader context of sexual violence.<sup>97</sup> The Prosecutor's indictment against Jean-Paul Akayesu was amended in June 1997 to include charges of sexual violence.<sup>98</sup> The indictment specified that acts of sexual violence included

93. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR 34th Sess., Supp No. 46, U.N. Doc. A/34/36 (1980) (entered into force Sept. 3, 1981) reprinted in 19 I.L.M. 33 (1980).

94. See Renee Holt, *Women's Rights and International Law: The Struggle for Recognition and Enforcement* 1 COLUM. J. GENDER & LAW 117, 132-41 (1991).

95. Tadeusz Mazowiecki, the Special Rapporteur to the Commission on Human Rights compiled 12 reports on the atrocities committed in the Former Yugoslavia. His fifth report stated: Rape is an act whereby the rapist, using force and compulsion, seeks to humiliate, dishonor, vilify and terrify the victim. In all his reports, the special Rapporteur highlighted the diversity of the methods used to achieve ethnic cleansing. Rape is one of these methods, as was said at the beginning. In this context, rape is not only a crime committed against the person of the victim, it also aims to humiliate, dishonor, vilify the whole group. Reliable information has reported instances of public rape, for example in front of a whole village, to terrorise the population and force ethnic groups to flee. Doc. E/CN.4/1993/50 p.19

96. Other international courts have adopted this "read-in" approach to facilitate the consideration of rape as a particularly serious violation of human rights. See, e.g., Aydin v. Turkey, 25 EUR. HUM. RTS. REP. 251 (1998) (Eur. Ct. H.R. 1997).

97. See Resolution Establishing the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994).

98. See Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status* 93 Am. J. Int'l L. 97, 105-06 (1999).

"forcible sexual penetration of the vagina, anus or other oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse such as *forced nudity*." Further, the evidence of witnesses during this trial is notable in that women's testimony of what happened to them attested both to the harm of forced nudity to them as well as of direct acts of sexual violence to their persons.<sup>99</sup> The indictment marks a notable progress in the international prosecution of gendered crimes because it confirms that sexual harm need not solely result from physical violence or direct assault, but is far more pervasive in form. The final judgment by the trial chamber is equally significant in its broad and progressive definition of both rape and sexual violence.<sup>100</sup>

What is also unique about the Akayesu decision is the link established between systematic acts of sexual violation and the practice of genocide. Akayesu was the first international war crimes trial to try and convict a defendant of the crime of genocide. The trial chamber concluded that the sexual violence committed by Akayesu's subordinates was an integral part of the genocide committed in Rwanda. The linkage between the crime of genocide and the pattern of the conflict in relation to rape acts is critical. The trial chamber found that:

[Rape crimes] constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute . . . one of the worst ways of inflict[ing] harm on the victim as he or she suffers both bodily and mental harm . . . Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.<sup>101</sup>

Some feminist commentary has been highly critical of the linkage made between sexual violence and communal destruction.<sup>102</sup> Hilary Charlesworth argues, "This comment [cited above] suggests that the primary problem with rape is either its effect on the ethnic identity of the child born as a result of the rape or the demoralizing effect on the group as a whole."<sup>103</sup> While over-emphasis on the the harm caused to the group may detract attention from the damage to the victim, I do not accept that simultaneous recognition of both constitutes a zero sum gain for women or for international law. Harms caused

99. See *id.* at 106-07 (citing JJ, a thirty-five year old Tutsi woman, who testified about "collective rapes" and forced nudity of women and young girls while being held in confinement by Akayesu and others under his command).

100. See generally William A. Schabas, *L'Affaire Akayesu et ses Enseignements sur le Droit du Genocide*, 12 COLLECTION DE DROIT INTERNATIONAL 111 (1999).

101. The Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T (September 2, 1998).

102. See Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L. L. 397, 386-389 (1999).

103. *Id.* at 387.

by acts of violence in war can be bidirectional and multiple. Systematic rape aimed at the destruction of individuals as well as their cultural communities is Janus-faced. Not to acknowledge its multiple identities and its dual functionality is to divest the accountability process of depth in addressing the intention of the perpetrator and the actual experience of the subject of violation.

Despite this recent progress there remain tremendous gaps in our understanding of the lived actuality of sexual violence during war. Historical examination of the formative period of international legal norms has much to teach us of what has been missed by observers, jurists and prosecutors. A deeper understanding of this “thicker” history is a means to allow for development of more sophisticated legal mechanisms of accountability. Elaborate and nuanced legality lies within the international community’s grasp in this arena. However, it can only be realized by a willingness to acknowledge the structural deficiencies of existing norms. That is to say, in articulating new or more detailed existing norms the international community must be prepared to say that its understanding of sexual violation may not have been deep enough, or premised on notions of the female self that have little to do with how women actually experience and understand harms done to them.

## V. DEFINING SEXUAL HARMS WITHIN THE HUMAN RIGHTS PARADIGM

A reappraisal of the function and reception of sexual violence during the Second World War in general and the Holocaust in particular leads to an inescapable reevaluation of the framework of rights in the post-war terrain. Why should this be the case? The answer requires a critical look at the propulsion to create a post-war world in which the dignity of the individual person had a meaning in law and morality that was beyond question. The key to understanding the critique that I wish to advance here lies in comprehending that at the core of the international post-war legal structure was a new-found place for the individual. Thus, the post-war world has rightly been called the Age of Rights, in which a seismic tremor repositioned the individual in relation to the state, and metamorphosed the relationships of states with one another. I will not quarrel with or underestimate the overall value of this realignment in advancing the general protection of both men and women from harms committed in peacetime and times of crisis. However, in tandem with a number of other commentators I question the gendered alignment of the individual who is at the core of this repositioning. The construction, neutralization and exclusion of gender is inseparably intertwined with the development of a new legal and political language of rights in the post-war world.

Indisputably the legal transformation of individual status in international law was the direct result of the catastrophic experiences of the war.

The narrative of atrocity prompted the creation of supranational structures of protection. However, the narrative of atrocity has not always been complete. Nor has it encompassed the distinctive forms of inhumanity directed at women and the modalities of that barbarity. There is a much "thicker" history of the social, symbolic and functional aspects of gendered violence during the Second World War than is generally acknowledged. Not only is it underestimated in historical reckoning, but the laws and structures which seek to prevent its reoccurrence are crafted without fully absorbing what an unfreezing of the historical legacy might actually mean. The war's catalogue of atrocity has resulted in a long half-century conversation between and about states and citizens.<sup>104</sup> As I have suggested above, that conversation needs widening and its conclusions need reworking in light of appreciating that the authorized narratives do not say it all.

The post World War international legal community harnessed a framework and language of individual rights as means of deterrence for acts which violated the inherent dignity of the human person. However, as Martin Scheinin points out, "[t]here are two unfounded presumptions that appear to create obstacles for understanding and analyzing the operation of human rights law."<sup>105</sup> The first is the presumption that the concept of a right equates to a specific provision of an internationally agreed upon treaty between states, thus assuming that a right is a single monolithic entity rather than a bundle of intersecting entitlements covered by a single legal term. Second, that rights in general and human rights in particular are thought of as bilateral relationships, the symmetrical relationship logically existing between the state and the individual. Both these presumptions require greater critical assessment in order to demonstrate that it is possible, and in certain circumstances preferable, to conceptualize the notion of a "right" as a shared privilege between persons rather than as a chain of separate entitlement between distinct individuals and the state. From this follows the supposition that a violation of the right of one person can cause the deprivation of the same entitlement for others, because the entitlement is a communal one. This rethinking is critical to understanding the model of harm explored in this essay.

#### *A. Individual Rights and Sexual Violation*

In the post-war world of international human rights law, I suggest that our limited legal conceptualization of sex-based violence is partly located in the manner in which rights entitlement has been constructed. I submit that the

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104. I note my reliance here on the conceptual work of John and Jean Comaroff in their reconstruction of the long conversations resulting from the South African colonial encounter. See generally JOHN & JEAN COMAROFF, II, *OF REVELATION AND REVOLUTION, THE DIALECTICS OF MODERNITY ON A SOUTH AFRICAN FRONTIER* (1997).

105. Martin Scheinin, *Sexual Rights as Human Rights – Protected under Existing Human Rights Treaties*, 67 NORDIC J. OF INT'L LAW 17, 19 (1998).



concept of a right as a monolithic entity, derived solely from the fallacy of a smart linguistic interpretation upon which there is cohesive interpretative consensus manifests a barren misconception of the content of entitlement.<sup>106</sup> Again as Scheinin points out, this approach assumes incorrectly “that what a human right is about is one single monolithic entity, possibly complicated in structure and grammar if spelled out in full.”<sup>107</sup> This presumption also has a Hartian quality, suggesting that analytic methodology harnessed to shared historical conceptions of the functionality of a right will inevitably lead to core meanings and result in equal protection for all across gendered lines. If anything, the experience of gendered violence tells us that what law may define as a harm subject to sanction is not necessarily or exclusively what the recipient of the harm may understand the harm to herself to be. Moreover, given the lack of concentration and interpretative energy historically expended on conceptualizing what kinds of indignities women experience during conflict, frequently what the law defines as harm is shallow in substance and imagination. Thus, for example, as we survey the jurisprudence emanating from the protected right to bodily integrity, we note that it has generally excluded female experiences of physical violation, deeming them outside the core of its interpretative consensus.<sup>108</sup>

A specific and recent example of both the advances in protection for women from the judicial mechanisms of international human rights and the limits of formal definition comes in the guise of a recent decision from the European Court of Human Rights, concerning the sexual violation of a young Kurdish woman, considered under Article 3 of the Convention.<sup>109</sup> For the first time the Court of Human Rights categorically defined the act of rape as a violation of the European Human Rights Convention’s prohibition on torture. However, closer inspection of this progressive decision also reveals its limitations. Here the applicant, a seventeen-year-old Kurdish woman in Turkish police custody, was subject to the following litany of abuse: “[s]he was stripped naked, beaten, slapped, threatened and abused verbally. She was forced into a tyre, spun around and hosed with ice-cold water from high-pressure jets.”<sup>110</sup> She was also raped while in custody.<sup>111</sup> The European Court was satisfied that the factual evidence of harm was proven and that the charge of rape was sustained, giving rise to a violation of Article 3 of the European Convention by the state of Turkey. The Court’s approach on the issue of rape was highly progressive acknowledging both the physical and psychological

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106. See generally CHARLES BLATTBERG, *FROM PLURALIST TO PATRIOTIC POLITICS* (1999) (Chapter 7, articulating the generally distortive nature of rights conversation).

107. *Id.* at 19.

108. For example, it has not been until recently that a growing consensus has emerged from international human rights enforcement mechanisms that rape can constitute a form of torture. Thus, only in 1992 did the Special Rapporteur on Torture clearly define rape as torture. E/CN.4/1992/SR.21 (Summary Record of the 21st Meeting, February-March 1992).

109. See *Aydin v. Turkey*, 25 EUR. HUM. RTS. REP. 251 (1998) (Eur. Ct. H.R. 1997).

110. *Id.* at para. 75.

111. See *id.* at para. 78.

scars attending the experience of violent sexual assault.<sup>112</sup>

Limitations arise in connection with the litany of other acts perpetrated upon the victim. There can be no dispute that enforced nakedness, lewd verbal assaults, and touching of both intimate and other parts of the body are carried out with the intent of sexual debasement. Their function is to communicate sexual exposure. The harm experienced by the victim is in the realm of her sexual identity and self-worth. This is where human rights linguistics fall short. The formal apparatus of a single right, for example to be free from inhuman and degrading treatment, lacks a depth of capacity to mold itself to the lived experience of the victim. The "peripheral" harms associated with rape, an act that has legal sanction associated with it, may in fact be equally (and sometimes more) harmful to the victim than the centrally sanctioned act. As the extensive discussion of the experience of women during the Holocaust period reveals, many of the acts which were both intended and understood as sexual harms were not then and are not now defined as such. So perhaps we need to look more starkly at the taut link between rights and a narrow concept of harm in the context of those acts which violate sexual integrity. In short, harms are longer and "thicker" than we admit, with definable results when they are not processed as such. Moreover, formal definitions of rights may not correspond to the actuality of "harms" experienced.

*B. The Limits of Autonomy in Accounting for Harms.*

I also wish to question the assumed primacy of autonomy which underpins the post-war liberal idea of human rights. This primacy has a particular effect on the way in which we construct the idea of violation, and most particularly the subject of violation. As Anthony Appiah notes, "Liberalism values political liberty and freedom from government intervention in our lives, because it holds that each person has the right to construct a life of her own."<sup>113</sup> In this way, modern conceptions of human rights predominantly construct rights as entitlements against states. It is the autonomous rational self that holds and asserts the entitlement, and who has ownership of it.<sup>114</sup> It is not a shared entitlement and it is only communal in the sense that societies composed of numerous individuals with their own unique entitlements

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112. See *id.* at para. 83. The Court states:

Rape of a detainee by an official of the state must be considered to be an especially grave and abhorrent form of ill treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.

*Id.*

113. K. Anthony Appiah, *Human Rights and Cosmopolitan Liberalism*, in HUMAN RIGHTS AT HARVARD, INTERDISCIPLINARY FACULTY PERSPECTIVES ON THE HUMAN RIGHTS MOVEMENT 10 (1995).

114. One caveat on this principle that the enforcement mechanisms of modern international human rights law developed is where the person holding the entitlement has been killed or is unable to exercise the activation of sanction for the loss of rights, a family member or attached "other" may do so on her behalf.

compose communities of mass rights. But the autonomous self remains a human self, a creature of community and sociality. Again to Appiah:

We are social in many ways, and for many reasons. We are social, first, because we are incapable of developing on our own; because we need human nurturing, moral and intellectual education, and practice with language if we are to develop into full autonomous persons. So there is a sociality of mutual dependence. We are social, second, because we humans naturally desire relationships with others—friends, lovers, parents, children, the wider family, colleagues, neighbors—so that sociality is for us an end that we desire for itself. We are social, third, because many other things we value, such as literature and the arts, culture, education, money, food and housing, depend essentially on society for their production. Thus, we have an instrumental interest in sociality.<sup>115</sup>

How, if at all, does the modern language of human rights translate to the human reality of sociality? Why do I argue that it is important that it do so?

Just as the human self is “dialogically constructed”, I suggest that the formal legal entitlements which acknowledge human dignity are “dialogically constructed.” As Charles Taylor has so aptly noted, the essential relation between self and self-interpretation is gained through the relation between selves and other selves. Thus he says:

This is the sense in which one cannot be a self on one’s own. I am a self only in relation to certain interlocutors: in one way in relation to those conversation partners who were essential to my achieving self-definition; in another in relation to those who are now crucial to my continuing grasp of languages of self-understanding—and, of course, these classes may overlap. A self exists only within what I call “webs of interlocation.”<sup>116</sup>

We gain conceptions of self through the other, and equally, our conceptions of entitlement (and thus self-worth) are made meaningful by the realization that the “others” with whom we are intimately and socially connected have equal entitlements. When the human rights of an autonomous individual are violated, such actions do not happen in isolation nor without effect on others. Violations not only destabilize the person(s) toward whom the acts are directly intended but a wider circle whose own autonomous entitlements are precariously in balance with the well-being and safety of others. Violation of X’s right is not a free-standing singular act. It is a primary act from which there may be numerous secondary violations. This may be

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115. Appiah, *supra* note 113, at 11.

116. See CHARLES TAYLOR, *SOURCES OF THE SELF* 36 (1990).

described as the domino effect of rights violation, and it should lead us to assess critically where the site of legal entitlement is located.

### *C. The Communities of Harm*

I am particularly concerned with investigating the extent to which the harms to women committed in situations of armed conflict created a broader community of suffering: children, parents, friends, husbands and partners. That stated, it remains important to assert that the primary victim usually suffers more harm than others, and any accountability model must assume this starting principle. However, the individual harm/rights model fails to account for *any* broader community of suffering. When the perception of injury is focused solely on the individual aspect of the experience and the recipient, accountability mechanisms are also singular and not group in concentration. By “group” here I imply two definitions. The first is group in its broadest sense of ethnic, national or religious community to whom the subject of harm belongs. The second are identifiable “others” who have co-dependent relationships with the subjects of violation.

Why is this important? Let me first address the issue of “community” or group harm in its broadest sense. As I will seek to illustrate, harm in war is frequently perceived by the recipient as an attack not only on self but on the community to whom she belongs. The injury is internalized as such, with a cogent understanding that the object is not only her body but the dignity of her community and the broader identity of her people. Thus, many women clearly understand that the “harm” being done to them is not just sexual and not just personal, though the experience of it is overwhelmingly personal. In this way, many women internalize what I claim as a premise at the outset of this article: their bodies are the means to achieve particular military objectives, be they the attempted eradication of an entire people, the facilitation of ethnic cleansing, or to symbolically cripple the nation by desecrating its symbolic purity—its women. Critics may argue that existing mechanisms of accountability are sufficient insofar as they facilitate legal liability for the personal trauma experienced by individual women, and thus, the duty of redress is fulfilled. I would like to suggest otherwise.

In exploring the terrain of broader harms we must keep the following in mind: Many acts of sexual violence during war are not private acts. Unlike the experience of gendered violence during peacetime, which is predominantly located in the domain of the private, the home, sexual violence during war is strikingly public. Women are raped in front of their families and their communities, and acts of sexual conquest are flouted as a means to demonstrate the humiliation of the loser and the advantage of the victor. There is a measurable community of harm in such contexts. The legal question is perhaps how do we quantify that harm, how do we measure it, and how do we

compensate and punish for its experience?

There are particular extremes of such harm. When a woman is sexually assaulted in front of her community or those in intimate relationship with her, there is a quantifiable harm to the passive and subjugated onlookers. Their presence is a required element of the ritual of violation. The rationale for this is at least two-fold. First, the observer's presence is required because sexual violation is not only a sexual act but an aggressive act.<sup>117</sup> More importantly, it is an aggressive act in the context of war, where the message is one of the primacy of the combatant over the civilian. Second, as Scarry has noted, the destruction of culture is part of the logic of the violence itself.<sup>118</sup> Women's defilement is not simply a message of sexual assault to the victim herself; it is a message to her community. This is made all the more explicit when that community whether familial or other is forced to participate as observers to the act.

Recognizing this community raises some profound and difficult questions for feminist theory. Is the harm I identify related to the perceptions of honor historically attached to virtuous womanhood?<sup>119</sup> Is the harm connected to the loss of masculine power demonstrated in the inability to protect "their" women from external plunder?<sup>120</sup> Though legal systems have punished the particular sexual offense of rape for thousands of years, current feminist critiques of rape law fairly thoroughly negate the normative significance of such practices, focusing on the end of such laws as reinforcing the interests of males in controlling sexual access to females.<sup>121</sup> Thus, there is a cogent

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117. See Ruth Seifert, *The Second Front: The Logic of Sexual Violence in War*, 19 WOMEN'S STUD. INT'L FORUM 35, 36 (1996).

118. See ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* (1985).

119. For example the Hague Convention Respecting the Laws and Customs of War on Land (Hague Convention IV) does not explicitly enumerate rape as a violation of the laws and customs of war. Article 46 of the Convention states in part: "Family honor and rights, the lives of persons, and private property, as well as religious convictions and practices must be respected." Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 205 Consol. T.S. 277, reprinted in DOCUMENTS ON THE LAWS OF WAR 44 (Adam Roberts & Richard Guelff eds., 1982). The notion of female honor was specifically included in the prohibitions of the Fourth Geneva Convention, Article 27. Paragraph 2 enumerates that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 6 U.S.T. 3516, 75 U.N.T.S. 287. Notably, international law here has its roots in domestic legal provisions concerning crimes of honor. Thus, for example, the French Penal Code Article 324 (which was abolished on November 7, 1975 by Article 17 in law no. 617/75) reads:

Pourra bénéficier d'une excuse absolutoire quiconque, ayant surpris son conjoint, son ascendante, sa descendante ou sa soeur en flagrant delit d'adultère ou de rapports sexuels illicites avec un tiers se sera rendu coupable sur la personne de l'un ou l'autre de ces derniers, d'homicide ou de lésion non préméditées. L'auteur de l'homicide ou de la lésion pourra bénéficier d'une excuse atténuante s'il a surpris son conjoint, son ascendante, sa descendante ou sa soeur avec un tiers dans une attitude équivoque.

EMILE GARÇON, CODE PENAL ANNOTE 151 (1952).

120. Many ancient codes linked the legal treatment of rape to the victim's relationship with a man. Thus, Deuteronomy 22:23-29 categorizes victims as betrothed or unbetrothed virgins; the penalty for rape of an unbetrothed virgin was marriage. Anthropological evidence also reflects this pattern. Among aboriginal peoples, much customary law is devoted to the payment of compensation to a man whose legal rights to control sexual access to his wife or daughter is disregarded. See, e.g., E. ADAMSON HOBEL, *THE LAW OF PRIMITIVE MAN* 119-20 (1968).

121. The most influential feminist critique in this vein is SUSAN BROWN MILLER, *AGAINST OUR WILLS* 16-30 (1975).

danger that a recognition of a broader shared harm of sexual violation may serve to inadvertently revalidate a discourse of ownership over the sexual purity of the female and the linking of that purity to the status of men with whom she has relationships. Further overshadowing any such proposal is the historical refusal to grant and protect women's autonomy and property, including the property of their own bodies.<sup>122</sup> Hence while the experience of a broader harm made be genuine and deeply felt, it is also potentially located in a version of female status that is troubling. Though such disturbing questions arise, there is yet another way to conceptualize injury.

This task requires a general movement away from individual theories of right toward broader communal and derivative locations of entitlement and thus redress when injury occurs. It requires us to recognize that sex-based harm in war has unique characteristics that should not be overlooked when reconceptualizing mechanisms of penal sanction and remedy. The primary acceptance must be that sex-based harm can (though not necessarily always must) serve a dual function for the perpetrator. That functionality by definition may affect individuals and groups beyond the primary victim. This does not mean that we lose sight of nor diminish the individual harm experienced by the primary victim; quite the opposite is true. We must accept both primary and secondary harms and by extension rights.

We must be prepared to reimagine the concept of "communal" harm as inclusive of a broad and non-exclusionary definition of the community. Communal harm in this context cannot and should not mean patriarchal harm. The community of harm is both male and female. It consists of daughters, mothers, sisters, and grandmothers as much as it does of fathers and husbands. An idealized notion of the communal harm may be far from the practical reality of the lives lived in most Western and non-Western societies. But to abandon the possibility of its gestation is a disservice to the context in which most women and men live out their ordinary lives. Reimagining communities of equality is part of the broader project of international human rights law, in striving to observe and enforce its central equality and non-discrimination provisions within states' domestic practices. Thus, it is not impractical to suggest that such communities may be appropriate locations for acknowledging that the harm to the one may be a harm to all. Ultimately we must be wary of an outright unwillingness to explore an expanded panoply of legal protections simply because they raise the ghosts of patriarchal injustice.

#### *D. Who Counts as a Victim?*

Let me now turn to the second category: the codependent individuals who

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122. It bears reminding that early jurisprudential regulation of gender relationships merged women's legal identities with that of their husbands. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES \* 442 ("[T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of her husband . . . under whose wing, she performs everything.").

experience a domino harm from the experiences of the primary subject of violation. One outstanding challenge posed to the post-war world of rights relates to the bearers of entitlement. As I have suggested in brief above, exclusive binary relationships between state and individual are too narrow a viewfinder to explain the way in which violations may actually be experienced. But more than this, they may also be insufficient to take account of a wider class of victims which may result from a single act. To begin, let me put the argument in a factual context. I have outlined above a catalogue of indignities experienced by women during the Holocaust in terms of their effects on the female person. Here the descriptive model conforms to the paradigmatic basis upon which individual conceptions of entitlement are based: a person experiences harm; the harm is legally defined and subject to sanction; the individual seeks and receives redress. So far so good. However, what if we look past the individual who has experienced the primary harm and view the shadows around her? What of her partner, family, and friends? We must visualize a context in which the damage caused to X is perceived, felt, and actualized as a harm by others linked to X because of emotional, familial, and communal bonds. It is also grasped by X herself as a harm intended to produce that effect. The victim also understands that she is not the sole target of the act, but that the perpetrator expects and seeks its communicated value to those in relationship with her.

As a starting point, I suggest there is that there is a distinct harm caused to the linked observer, as demonstrated in the extreme observer position identified previously. But the linked observer position is not the only one which leads to my position on shared entitlement. International human rights law to some degree, albeit in a different context, already facilitates the articulation of entitlement by persons other than the primary victim. This articulation is found in the enforcement provisions of the major international human rights treaties including the International Covenant on Civil and Political Rights<sup>123</sup> and the European Convention on Human Rights.<sup>124</sup> Under these treaty enforcement provisions, there exists a legal basis for individual litigation premised on the definition of "victim" in international law. A "victim" has procedural standing to proceed with a claim against a state for a violation of defined treaty rights. Under the applicable law, a "victim" need not be the primary subject of violation. Indeed the jurisprudence of both the Human Rights Committee and the European Court of Human Rights (each to varying degrees) expressly recognize that the "victim" with standing to proceed can be a family member, partner, or person(s) in close non-familial relationship with the primary victim. Implicit in the existing jurisprudence is the premise that the third party is claiming in part to themselves the rights

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123. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 (Mar. 23, 1976).

124. European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, Eur. T.S. No. 5 (Sept. 3, 1953).

denied to the primary victim. Standing itself means an implicit recognition of the validity of claim for violation, premised on a relationship of familial or emotional proximity. We recognize that "something" valued is lost in the violative process, which another person (not the primary victim) has a stake in, by allowing this third party standing. Clearly third party standing may also simply be a procedural necessity in certain cases. For example, where the primary victim has been killed, she is obviously not in a position to assert a claim for violation against the state in her own right. But necessity alone does not explain this procedural device. Rather, on some instinctive level, it also responds to a need to value and acknowledge the interest and stake that international law gives to relationships of proximity when violation occurs. If our starting point is here, its existence also points to the possibility for meaningful expansion of that value past the procedural to the substantive.

I would argue that both the community and those in specific codependent relationships with the primary subject of violation have much in common as we seek to create a model of rights entitlement that can encompass both kinds of broader entitlement. In both cases the harm has its roots in a certain stake that the linked observer has in the entitlements of the primary victim. Another way to describe this is that we may be shareholders in the rights belonging primarily to another person. A closer look at the concept of shareholding can shed some useful light on the analysis undertaken here. It signifies both a communal and individual endeavor bound into one another in a codependent relationship. It is a relationship of autonomous codependency, where the actions of one can and do affect the other. In the usual course of events, that shareholding gives us no lien over the actions, choices, and free will of the other.

However, where the entitlements of the other have been violated, a quantifiable harm may be caused to the shareholder. How do we measure that harm and how is it justifiable? This harm will only make sense if we move away from the idea that rights belong in a free-standing way to unattached autonomous individuals. Only when we see persons as infinitely connected to their families and their communities can we begin to see how that connection gives one person a quantifiable interest in the maintenance of equilibrium for another. Hence, when parents, partners, or children are forced to be observers to the violations experienced by a woman (both temporally and psychologically in the aftermath of violation) as child, wife, partner, or mother there may be quantifiable harms caused to that person.<sup>125</sup> Conceivably the further the link from the primary subject of violation the more likely that a

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125. The lack of understanding as to the nature of harms caused is not only limited to the legal field. Judith Pinter has been undertaking interesting work of the failure of the Western psychological model to account for the trauma experienced by women and children in the former Yugoslavia. What she has cogently demonstrated is that the Western model of "one on one" counseling has proven to be inadequate to respond to the actuality of group victimhood. Notes from conference proceedings (Nov. 20, 1997), *JUSTICE AND SOCIAL RECONSTRUCTION: A CONFERENCE ON THE EXPERIENCE OF BOSNIA AND THE RULE OF LAW* (on file with author).



gradient of remedies comes into play. Equally, the notion of a community harm, while based on the same premise as the codependent harm, can be distinguished in terms of remedy received by the group or community asserting the broader violation.

The existing framework of international human rights and humanitarian law does not name or envision such broader rights. It certainly defines the primary act of violation as harm and as a violation of entitlement, but an underlying text of autonomy prevents any further rights from being recognized. I stress again that what I outline here is not a conception of rights which derives from a separate entitlement belonging exclusively to the observer. Rather it is a derivative entitlement based on a share in the maintenance of rights for the other with whom one has familial or communal links. This tells me that when we reconceptualize rights in this way (which conforms with empirical experience) the scheme appears profoundly different from existing frameworks. Rights take on a multi-party structure, where the number and nature of the persons who may have ownership over any one right is varied and diverse. We see a trilateral rope rather than a single thread between the state and the individual derived from each articulated treaty right. The state is at one end, the individual title holder is in the middle, and there is a spray of threads connecting the middle to multiple persons with whom there is a connection of interest in the maintenance of right for the primary shareholder.

## VI. CONCLUDING COMMENTS.

As I have sought to articulate in this article, there remain tremendous gaps in our understanding of the lived actuality of sex-based violence during war. Historical examination of the formative period of international legal norms has much to teach us of what has been missed by observers, jurists, and prosecutors. A deeper understanding of this “thicker” history is a means to allow for development of more sophisticated legal conceptualization of accountability. Elaborate and nuanced legality lies within the international community’s grasp in this arena. However, it can only be realized by a willingness to acknowledge the structural deficiencies of existing norms. That is to say, in articulating new or more detailed existing norms, the international community must be prepared to say that its understanding of sexual violation may not have been deep enough, or is premised on notions of the female self that have little to do with how women actually experience and understand harms done to them.

Reexamining the prevalence and forms of sexual violence experienced by women during the Holocaust has some very important consequences. Primarily it reclaims a historical record of the war period that is under-acknowledged. In doing so we facilitate a reappraisal of international legal sanctions whose roots and causality are frequently traced to the

cathartic experiences of the Second World War. At its most simplistic, we need to understand why it is that while women experienced gross violations of human rights during the war, there is little evidence that criminal accountability was sought for such actions in the post-war period, or that positive legal prohibitions were put in place to prevent the recurrence of such acts.

What is also revealed by scrutiny of the war-time period are the limitations of the legal vocabulary we bring with us to name and place the harms that were caused to women as women during that time. In a sense, this tells us that while international law has progressed significantly in the naming of harms that women experience both by the state and third party actors in situations of war, we cannot be complacent and assume that the task is complete. The Holocaust has been described as the monstrous experience that forced states to move beyond sovereignty, beyond indignation at external intervention in their internal affairs and gave voice to a new vocabulary of protection for the singular person. Acknowledging that some voices were not fully heard or understood at the post-war historical moment may tell us that there is still some shoring up to be done on those foundations. At this later historical moment we may be better equipped to hear what is being said by women about what happened to them during the Holocaust, to internalize and understand the harms they identify, and to translate those harms to sanctions. In doing so we give history the benefit of facilitating and encouraging legal transformation, as we learn from looking backward.