

# Rethinking the Concept of Harm and Legal Categorizations of Sexual Violence During War

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*Sexual violence experienced by women during interstate and internal conflict has long escaped legal regulation. This article explores the extent of that lacuna by analyzing and reflecting upon experiences of sexual violation during the Holocaust. While it is inappropriate to describe the Holocaust experience as a facet of war per se, its horrors did occur in the context of war, and thus ex post facto legal accountability for the perpetration of those dreadful events falls under the legal rubric of international humanitarian law. The article explores the extent to which humanitarian law has limited definitional capacity to address the unique ways in which violence is directed towards and experienced by women. The article also demonstrates that sexual harms combine direct sexual harm to women with broader objectives of eliminating the cultural, social, and physical integrity of the community to which the women belong. The article claims that both victims and perpetrators of sexual harms understand the compounded function of sexual violence, but that international law fails to name or adequately sanction either aspect of sexual harms. The article goes on to assert that in establishing dual conceptions of harm, there may be multiple bearers of rights when questions of remedy arise. Traditional notions*

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\* Faculty of Law, Hebrew University. The empirical basis for this article was facilitated by extensive access to the archival material of the Historical Museum at the Yad Vashem Holocaust Martyrs' and Heroes' Remembrance Authority (hereinafter "Yad Vashem Holocaust Museum") in Jerusalem. In undertaking this work, I acknowledge an intellectual and personal debt to Professor Martha Fineman, who in pushing the boundaries, has encouraged my own endeavors here. My thanks to Lidia Rabinovich for her research assistance and to Leora Bilsky for numerous conversations that sparked my interest in exploring the terrain of this work. This article is written with thoughts and in memory of Peretz Gross.

*of individualized entitlement to rights are inadequate to fully account for the communities of harm resulting from gendered violence that takes place in the context of war.*

Imagine that for hundreds of years your most formative traumas, your daily suffering and pain, the abuse you live through, the terror you live with, are unspeakable — not the basis of literature. When you try to speak of these things, you are told that it did not happen, you imagined it, you wanted it, you enjoyed it. Books say this. No books say what happened to you. Law says this. No law imagines what happened to you, the way it happened.<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>

## INTRODUCTION

Sexual violence has had a history of omission in international law. Until relatively recently, neither law nor recorded narrative dealt with the character or forms of injury to women in situations of conflict. Despite the recent proliferation of legal and sociological writing on the subject, the function of sexual violence during war remains a limited concept. The limitations of legal process as a means of appropriately sanctioning practices of gendered violence are underestimated.<sup>3</sup> There remains ongoing intellectual 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.

Any explanation of the functionality of sexual violence during war will

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- 1 Catherine A. MacKinnon, *Only Words* 3 (1993).
  - 2 Joan Kelly, *The Social Relations of the Sexes: Methodological Implications of Women's History*, 1 *Signs* 812, 812 (1976).
  - 3 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 preceded the fall from power of Indonesian President Suharto, significant numbers of ethnic Chinese women were sexually assaulted and raped in Jakarta. Aid workers reported that up to one hundred women were targeted in Jakarta in this manner. See Seth Mydans, *Jakarta Groups Document Mass Rape*, *Int'l Herald Trib.*, June 10, 1998, at A1, A4.

necessarily conflate the use of sexual violation as a means to achieving broader military objectives with acts that are aimed at women precisely because of their gender. Identifying both of these causalities is critical to putting in place legal structures that are sufficient to remedy the harms experienced by the victims of violation. But acknowledging multiple causality of gendered violation does not mean that each cause is equally important or that causality makes no difference to the forms of sanction that ought to be put in place to prevent the recurrence of such acts. While identifying the general underdevelopment of sanctions pertaining to sexual violation during situations of conflict in international law, this essay explores the extent to which there are particular aspects of gendered violence during war that are notably not subjected to legal scrutiny. In particular, the essay explores the extent to which certain forms of sexual violence that perform political/military functions for combatants eschew legal liability. From this investigation it becomes clear that certain aspects of the violence that women experience during war have markedly different complexions than the forms of violation that women experience when no violent conflict exists. Moreover, exploring the military functionalism of sexual violation in conflict situations makes evident that there is a pressing need to augment traditional legal conceptualizations and their corresponding sanctions regarding the regulation of sexual violation. 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 categorize the harms caused. Such categorization must be done relative to the victim's experience as well as the perpetrator's intentions. Hence, this essay will seek to illuminate the extent to which legal scholars and lawmakers might reassess the tautologies of existing and developing legal categorizations that attempt to create mechanisms of accountability for sexual violation during conflict.

This exercise will be undertaken through the prism of historical reassessment, looking anew at the evidence of sexual violence and violation experienced during the Holocaust. The work, therefore, has a specific empirical basis, an assessment of the real experiences of sexual violation by women during the Holocaust — predominantly of Jewish women — based on archival research.<sup>4</sup> Dealing with the unparalleled violence perpetrated

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4 The archival research was undertaken at Yad Vashem Holocaust Museum and is based on individual files, twenty-three of which are the individual testimonies that form the basis for the narratives quoted in *infra* Section II. Further empirical details are drawn from another twenty-three published personal narratives. Clearly, a gendered perspective on the experiences of the Holocaust could also be useful in

upon men and women during the Holocaust is beyond the scope of any one essay. Nor is the focus on the 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 *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 much 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>5</sup>

The essay starts from the simple proposition that many women experienced different forms of violation because of their gender during the Holocaust. Nonetheless, while my focus is 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 similarly placed 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 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 camps in Auschwitz-Birkenau," one identifies a more detailed and complex story about the experiences of both genders during the Holocaust.<sup>6</sup> I therefore concede from the beginning that gendered violation does not necessarily imply more victimization for women, nor does it deny the potential overlap of violations for women and men during this period.

The empirical assessment has particular importance as we reassess the adequacy of international legal responses to sexual violation. Taking a microscopic look at the experience, which radicalized the international legal

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examining the unique experiences of men regarding such matters as circumcision and the inability to sustain the family as pivotal to traditional male roles. Such investigation was beyond the scope of the present study, but the author acknowledges that a gendered experience of the Holocaust is not exclusively female.

- 5 See Lenore J. Weitzman & Dalia Ofer, *The Role of Gender in the Holocaust*, in *Women in the Holocaust* 1, 2 (Lenore J. Weitzman & Dalia Ofer eds., 1998).
- 6 See Joan Ringelheim, *The Split between Gender and the Holocaust*, in *Women in the Holocaust*, *supra* note 5, at 340, 346.

response to acts of violence during the Second World War, is instructive because the Holocaust forms the bedrock upon which international legal structures of accountability have been assembled. That is to say that human rights and humanitarian law standards are directly 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 emerged since that time.<sup>7</sup> If we explore the possibility that certain discussions and certain violations were silenced or erased during this creation process, we also acknowledge that existing legal mechanisms of accountability may be inadequate in certain respects. In acknowledging these limitations, I suggest that we can create an alternative to existing models of entitlement, rights, and accountability.

Section I of the essay explores 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 that conveys the experience and to sufficiently punish or remedy it. Section II is concerned with presenting the empirical information that forms the backdrop to this analysis. It presents the two facets of women's Holocaust experience: first, narratives and stories of the ghettos, and second, the severity of the violations suffered by women in the concentration camps. Section III analyzes the concept of harm. In particular, the harms of maternal separation and sexual erasure are assessed, demonstrating the inability of international law to articulate these acts as sexual harms. The limited attention and imagination that have been directed to accounting for the specific harms that women encounter during war is discussed. This section highlights the extent to which particular indignities were not only aimed at women's sexual identity, but were intended to achieve broader military objectives. Section IV 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

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7 For a thought-provoking account of the extent to which criminal trials have served to shape questions of collective memory and national identity in societies that have experienced large-scale brutality, see Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (1996).

sexual and personal identity are awarded legal status, confirming a pattern of exclusion. Section V 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 essay concludes by reflecting on where international standards of protection are going and what may be learned 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>8</sup> The literature on sexual violence during war, which has emerged in recent years, 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 in the Second World War? Was there such an array of brutal and dehumanizing activities occurring during the time that sexual violation paled into insignificance by comparison? Were women not asked or did they not report such experiences when and after they occurred during that time? These questions are bound to arise 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>9</sup> But the existence of such indignities is only part of a much more complicated

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8 Moreover, as Joan Ringelheim notes, "[l]iterature on the Holocaust has been apparently gender neutral, thereby disguising the fact that women, until very recently have been ignored." Joan Miriam Ringelheim, *The Ethical and the Unspeakable, Women and the Holocaust*, Yad Vashem File No. 2083-857 (1993). The first conference on women and the Holocaust took place in March 1983 at Stern College. See *Proceedings of the Conference, Women Surviving: The Holocaust* (Esther Katz & Joan Miriam Ringelheim eds., 1983).

9 Some historical accounts in conjunction with individual narratives suggest that women encountered more difficult conditions than men did. See, e.g., Ruben Ainsztein, *Jewish Resistance in Nazi-Occupied Europe 788-89* (1974); Charlotte Delbo, *None of Us Will Return* (1968).

story for the legal analyst. Any contemporary research of the wartime period is inevitably imbibed with the legal vocabulary of the late twentieth century. This vocabulary is excess intellectual baggage that may prevent the observer from fully understanding the voices of the women who articulate their stories of survival and victimization. So the first warning for the reader and the writer alike lies in pinning our understanding of the period on existing linguistic categorizations.

International law and politics now clearly articulate a terminology of sexual violation. We use the words rape, sexual assault, prostitution, and sexual violation with a sense of a distinct reference model within which the acts are understood and the harms take place. 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 them or to others. In order to make sense of the words women use to describe what happened to them (as women) during the Holocaust, we must be open to the idea that our existing vocabulary may not be sufficient. 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,

[t]he real challenge before us is to invent a vocabulary of annihilation appropriate to the death camp experience; in its absence, we should at least be prepared to redefine the terminology of transcendence — "dignity", "choice", "suffering" and "spirit" ... .<sup>10</sup>

The same challenge exists with regard to legal vocabulary of violation.

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 mechanisms of protection. However, the narrative of atrocity is not complete. Nor does it encompass the distinct forms of inhumanity directed at women and the modalities of that barbarity. A much more complex history of the social, symbolic, and functional aspects of gendered violence during the Second World War exists than is generally acknowledged. Not only is it underestimated in historical reckoning, but the laws and structures that seek to prevent its reoccurrence are crafted without fully absorbing what an unfreezing of the historical legacy might actually mean. The War's catalogue

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10 Lawrence Langer, *The Dilemma of Choice in the Death Camps*, 4 Centerpoint: The Holocaust 54, 58 (1980).

of atrocities has resulted in a half-century long conversation between and about states and citizens.<sup>11</sup> I want to suggest that the conversation needs broadening and its conclusions reworking in light of the appreciation that the authorized narratives do not say it all.

What I hope to demonstrate is that the post-war terrain of understanding is not sufficient to describe the complexity or internal aftereffect (for the women themselves) of the dehumanizing acts perpetrated upon women during the wartime period. The inappropriateness of the legal definitions does not lie solely in the fact that the women who reported sexual crimes did so in a world that failed to categorize their experiences as crimes, but, also, in the fact that post-war legal terminology is inadequate for describing some of their experiences. Acknowledging the limitations of existing legal frameworks and descriptive terms allows us to rebuild the conceptual framework necessary to assess both the kinds of harms experienced and the ability of legal mechanisms to ensure accountability for them.

## 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 or to the process of ascribing legal culpability. Thus, what I seek to illustrate is limited. First, I will give an account of the lack of knowledge available on the unique experiences of gendered violence during the period. Second, I will outline the singular nature of sexual violation during the Holocaust.

Most individual female accounts forming the basis for this study of the Holocaust do not, upon initial reading, give significant information about and detail to a gendered account of victimization.<sup>12</sup> Rather, the gender of the

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11 I rely here on the conceptual work of John and Jean Comaroff in their reconstruction of the long conversations deriving from the South African colonial encounter. 2 John Comaroff & Jean Comaroff, *Of Revelation and Revolution, The Dialectics of Modernity on a South African Frontier* (1997).

12 Autobiographical sources include: Julta 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); R. Ruth Linden, *Making Stories, Making Selves: Feminist Reflections on the Holocaust* (1993); Shelly Love, *Criminal Experiments on Human Beings in Auschwitz* (1993); Fanny Marette, *I Was Number 47177* (1954); Roger A. Rivto & Diane M. Plotkin, *Sisters in Sorrow: Voices of Care in the Holocaust* (1998); Mina Rosner, *I Am a Witness* (1990); Gerty Spies, *My Years in Theresienstadt: How One Woman Survived the Holocaust* (1993); Frances F. Tritt, *Holocaust Diary* (1982);



victim weaves its way into the narrative in ways that belie our categorization both of harms experienced and gender itself. Accounts of victimization are remarkable for their emphasis on the other as opposed to the self. The other is both immediate family and community, but also (and particularly within the camps) other women who formed substitute families in the midst of 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 accounts 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 she experienced as a child in hiding, stated, "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 only important to me at the moment."<sup>13</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. Survival at its most basic 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 will 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 and the gendered component of that process. It also obscures the extent to which the targeting and humiliation of women were purposeful, designed to achieve particular military and political goals. It will be useful at this point to identify and discuss two phases of women's experiences during the Second World War.<sup>14</sup>

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Reske Weiss, *Journey Through Hell* (1962); Sonia Schreiber Weitz, *I Promised I Would Tell* (1993); Chaya Ziskind, *They Watched over Us* (1998).

13 Unnamed survivor's testimony cited in Ringelheim, *supra* note 6, at 343.

14 It should be borne in mind that women constituted the majority of the Jewish population in German-occupied Europe. For example, in Poland in 1931, 52.08% of the Jewish population were women; in Byelorussia in 1939, 53.25% were women; and in Germany in 1933, women comprised 53.24% of the population. Raul Hilberg, *Perpetrators, Victims, Bystanders, The Jewish Catastrophe 1933-1945*, at 127 (1993).

First, I will examine the experiences of women in the ghettos and as 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 1930s, ordinary life for many continued, but with the ever increasing encroachment of the extraordinary. As Kaplan points out, "[l]awlessness, ostracism, and a loss of rights took their toll on Jews of all sexes and ages."<sup>15</sup> As a constitutional dictatorship solidified itself, daily equilibrium was lost. Nowhere was this more true than in the ghettos. Despite the limited availability of information pertaining to gendered experiences in the ghettos, some preliminary comments can be made. For some families, only women, children, and the old were left in the ghetto, as 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>16</sup> This 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 burden of responsibility for children. They were subject to a brutal regime of deprivation and wanton cruelty in conjunction with the continued uncertainty of not knowing their ultimate fate. They were vulnerable to rape, murder (of themselves and their children), the necessity of killing their own or other women's babies, forced abortion, and a range of other forms of sexual violation.<sup>17</sup>

Some women in the ghettos continued to have familial male protection, which, to a degree, limited their potential sexual vulnerability.

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15 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 5, at 39, 39.

16 As Weitzman & Ofer conclude, [m]ost 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 5, at 5.

17 Esther Kraine, born in Romania, describes how in the Ghetto an order was given to collect all gold. A Christian midwife was ordered to search the women's vaginas for hidden gold. Kraine says, "At that time, I considered this action as an act of great

Notwithstanding this protection, there was the constant fear and actual reality of conditions within the ghettos worsening for all. Survivors' stories of hiding in bunkers while liquidation of the ghettos took place are rife with the enormous moral dilemmas.<sup>18</sup> Could children be brought to the bunkers and saved, given the extended periods of silence and stillness required in order to avoid jeopardizing the lives of others? Should younger family members be chosen over older kin if there was a shortage of space in a hiding place? Women in the ghettos were especially vulnerable, both because of traditional attitudes towards them and because of their gender-defined conditions and their unique maternal responsibilities. Understanding the situation of women in the context of their maternal obligations is particularly 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 "interracial" relations.<sup>19</sup> There is consistent evidence in survivors' testimonies that when those laws were violated by the Germans themselves, women who had been sexually violated were immediately murdered.<sup>20</sup> There is also evidence that in these circumstances, non-attached women were prey to the *Judenrat* for sexual favors: protection in exchange for sexual exploitation.<sup>21</sup> It is important to note that this facet of female vulnerability from their own male communities during times of exigency faces particular difficulties with

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violence against me." The procedure was performed on all the women in the Ghetto. Yad Vashem Holocaust Museum Archives File No. 03/1007 (author's translation).

18 See generally Mina Rosner, *I Am a Witness* (1994).

19 Thus, for example, Bella Katz, who was 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.

Yad Vashem Holocaust Museum Archives File No. 03/8196 (author's translation).

20 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 women away 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." Yad Vashem Holocaust Museum Archives File No. 03/8792 (author's translation).

21 See Ringelheim, *supra* note 8, at 5, citing Karmel, who reports that "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."

regard to accountability under the formal rubric of international humanitarian law.<sup>22</sup> The *Judenrat* in some ghettos took administrative and social control of various aspects of women's lives. This included the intimate regulation of women's reproductive capacity and the fate of their newborn children. Thus, for example, in the Shavel Ghetto, the *Judenrat* made a collective (male) decision to force women to have abortions.<sup>23</sup> The consequences for women who refused abortions were both personal and familial. Eisenberg describes the response to such women as follows:

[One must] ... 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>24</sup>

It would be misleading to suggest that in all the diverse situations concerning the fate of Jewish children, male leaders of the victims' communities were indifferent to the fate of children (unborn or otherwise) and their mothers. Once again, we must bear in mind that "choice" in situations such as those in which the community leaders found themselves is a restricted and inadequate concept. There is overwhelming evidence that children and their care remained the special concern of community leaders, mostly because of their status as the biological guarantors of the community's future.<sup>25</sup> Nonetheless, women were effectively excluded

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22 Though beyond the scope of the discussion in this essay, violations of civilians by civilians pose particular difficulties in terms of accountability under international humanitarian law, then and now. The application of the Laws of War presupposes a situation of conflict in which violence is perpetrated by one side on 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 to be agents for one side of the conflict in the acts they undertake.

23 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 of the description, *The Agony of the Judenrat of Shavel: Murder of the Unborn*, in its failure to recognize that the greater harm was done to the women who were forced to undergo abortions and not to the men who made the decision to force them to do so. Ringelheim, *supra* note 8, at 9.

24 Eisenberg, *supra* note 23.

25 Thus, for example, Raul Hilberg points out that Jacob Gens in Vilnius would not surrender them [children to the Nazi regime]. Wilhelm Filderman in Romania wrote letters to save orphans languishing across

from such decision-making processes, despite the fact that in the area of reproduction and parenting, they bore the heaviest costs of the decisions that were made.

Numerous individual testimonies attest to extensive sexual assaults upon women as they were being transported from ghettos to work and death camps.<sup>26</sup> Thus, transfer between locations was a particular source of vulnerability for women, as was the possibility of violation by numerous rather than individual men.<sup>27</sup> There is extensive archival information that suggests that such assaults were common; survivors recorded their occurrence in the immediate aftermath of the Holocaust. It also is widely affirmed that following liberation, women survivors remained exposed to sexual assaults by Allied soldiers. For example, one survivor describes traveling 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>28</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. Given the extensive academic treatment of the subject, I will not review the scope and extremity of the dehumanization experienced by both men and women. What I wish to do is concentrate on what we know about sexual violence perpetrated upon women. On arrival at the concentration camps, the initial experience for many of those persons still attached to their families was one of separation. Men and boys were separated from women and girls; parents were separated from children; and relatives from one another. Thereafter, all personal effects were removed from individuals, both men and women. This

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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 14, at 147.

- 26 Archival testimonies of Agnes Horwatt, born in Hungary, and Lora Veron, born in Rhodes, Greece; Yad Vashem Holocaust Museum Archives File No. 03/10423.
- 27 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. Yad Vashem Holocaust Museum Archives File No. 03/7065.
- 28 Hedva Yerushalmi, born in Sub-Carpathic Russia; Yad Vashem Holocaust Museum Archives File No. 03/8805.

included all baggage, clothing, jewelry, and other personal items such as spectacles. Now in a single sex environment, those women who had not been immediately killed in the gas chambers were forced to remove their clothing, their bodies subjected to the scrutiny and ridicule of predominantly male camp guards and soldiers.<sup>29</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 is partially explained by the fact that the onlookers were male and the subjects female, but also by the fact that forced nudity was understood as a particular form of harm by the women themselves. That is to say, women seemed to understand that nonconsensual nudity was intended to harm them in a manner distinct from their male counterparts' sense of harm and humiliation. After the removal of clothing, all the women's bodily hair was shaved in a surgical fashion. This was part of the public spectacle that accompanied the selection process within the camps.<sup>30</sup> Women with young children were usually selected for extermination upon their arrival. Their maternal status and their continued attachment to their children made them uniquely assailable and defenseless.

In certain death camps, medical experimentation carried out by the Nazis specifically targeted pregnant women and women's reproductive organs.<sup>31</sup>

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

Scarcely had we entered when there came a stentorian command for everybody 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).

30 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 bodies." 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.

Myrna Goldenberg, *Testimony, Narrative, and Nightmare: The Experiences of Jewish Women in the Holocaust, in Active Voices, Women in Jewish Culture* 94, 96 (Maurie Sacks ed., 1997).

31 One survivor describes the role of a Jewish female gynecologist, Gizela Perl, who was brought to work in the infirmary at Auschwitz. She was asked to bring pregnant women to the infirmary on the promise of additional food. The survivor, Lea Fridler, reports that Dr. Perl performed numerous abortions at night to save these women

One woman survivor describes being pregnant and escaping selection on numerous occasions by stealth until Doctor Mengele noticed her.<sup>32</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 watch the child starve to death, she used morphine given to her by a Czech woman working in the Auschwitz infirmary to kill her baby.

Notably, sexual experimentation on women is the only specifically gendered violation that was subject to legal scrutiny during the Nuremberg Trials. The so-called "Doctors Trial" tried twenty-three defendants. In relation to the charges of war crimes, the following experiments were examined: high altitude experiments; freezing experiments; malaria experiments; mustard gas experiments; sulfanilamide experiments; bone, muscle, and nerve experiments; bone transplantation experiments; sea-water experiments; epidemic jaundice experiments; spotted fever experiments; experiments with poison; incendiary bomb experiments; and sterilization experiments.<sup>33</sup> Evidence at the trials demonstrated that thousands of inmates, predominantly women, were subjected 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 aim of developing medical science to facilitate the planning and practice of genocide.<sup>34</sup>

### III. ACCOUNTING FOR HARMS

The above is an empirical description that approximates the real experiences both of women who died as well as those who survived the camp experience. The question I now address is how some of these experiences relate to legality and sanction. 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 can be classified as murdered. Under

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from experimentation and inevitable death in the gas chambers because they were carrying children. All the abortions were performed without anesthetic. Lea Fridler, Yad Vashem Holocaust Museum Archives File No. 03/10484.

32 Ruth Aliaz, born in Ostrava, Czechoslovakia, Yad Vashem Holocaust Museum Archives File No. 03/8940.

33 *United States of America v. Karl Brandt et al.*, in 1 *Trials of the War Criminals* (1949).

34 *Id.* at 48, 694-702.

the formal legal rubric of modern humanitarian law, we ask whether the harms experienced are defined as crimes by the Geneva Conventions of 1949 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>35</sup> However, I suggest that this legal catalogue of harms lacks breadth. It encompasses only a fraction both of what women actually experienced and of what their captors intended them to experience.

### **A. The Harm of Separation**

A detailed analysis of all violations experienced by women during the Holocaust is well beyond the scope of this essay. Thus, I wish to focus on two particular aspects of maltreatment, as a means of illustrating the broader themes: 1) the law fails to identify certain acts perpetrated upon women during war as harms; and 2) such acts are distinct, not only because they are experienced by women rather than men, but because they have political/military objectives. 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 is forcibly separated from her dependent child, whose fate she cannot control and can only imagine as grim, I would suggest that another quantifiable harm has been perpetrated. I would also suggest that the harm occurs in the realm of sexual harm.<sup>36</sup> This harm of separation that I identify is linked to the broader jurisprudential claim articulated so cogently by Robin West. She states,

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35 Crimes against humanity were defined in Article 6(c) of the Nuremberg 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 or religious grounds whether 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 perpetuated.

Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

36 The issue is all the more horrifying when a woman had to make a choice as to which of her children would survive or whether to kill a newborn baby in order to ensure the survival of other adults or herself. These choiceless choices are aptly summed up in one narrative of such acts: "... 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).



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>37</sup>

In the context of the Holocaust, the destruction of culture was a primary function of the violence that was perpetrated. Targeting the family by destroying the relationships of dependency and nurture was a logical method for carrying out the act of cultural annihilation. Social subsistence was, at that time, and remains a gendered institution at its core. Women carry children and remain the primary caretakers of their offspring until they reach 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 from the point of view of both the victim and the perpetrator. Both psychological studies and individual testimonies demonstrate that women experienced forced separation from their children in profoundly different ways than did men. 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 ultimate expression of the reproductive self — the child. There is an undisputed, unarticulated communication between the perpetrator and the victim in this context. Both profoundly understand the nature of the harm. There is no misunderstanding 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>38</sup> Some of the case law

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37 Robin West, *Jurisprudence and Gender*, in *Feminist Legal Theory: Readings in Law and Gender* 201, 202 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

38 For example, Article 17 of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 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.

that has emerged from the regional human rights systems,<sup>39</sup> such as that of the European Court and European Commission on Human Rights, is striking both in its determination to guard the right to family integrity and in its recognition of the centrality of due process in any legal proceeding that seeks to deprive parents and their children of one another's support. The Laws of War also place a high rhetorical premium on the protection of children and their caretakers. Both the regulatory mechanisms of human rights and humanitarian law in this arena derive their protective scope from notions of the value of family and parenting as separate social goods, in conjunction with the conception of the cohesive family unit as best promoting the integrity of a child. However, neither system, and especially the humanitarian law prohibitions (given their primacy in war situations), has developed a concept of separation as a harm that is tied to a sexual harm experienced by the mother as a result of forced severing. In short, the act of separation itself is not viewed as a sexual harm. Nor is the act of separation identified as functioning to facilitate 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 the broader ethnic or cultural group, because destruction of mother and child, as "carriers of the nation," leads to the realization of broader military objectives by destroying the future of a people and, hence, the people themselves. If we wish to name harms and make those who perpetrate them accountable, then it is imperative that the intent that underlies the action in the first place be identified. Only then can it be factored into the definition of the harm, the sanction that applies to it, and the remedy that may be 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 within the realm of sexual harm? First, there is a general reluctance to face the contradictions and complexities of the sexual dimensions of mothering head-on. On the one hand, the act of reproduction is infinitely sexual. On the other, there have been (with good reason) ongoing critical assessments by feminists of the essentialism that is inherent in reducing or linking the female person's value and status to the act of reproduction. While, for example, Martha Fineman's

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39 Namely, those systems created in Europe, Latin America, and Africa following the Second World War to facilitate regional human rights enforcement.

innovative scholarship has focused on the care aspect of child dependency which is potentially gender neutral, in practice most societies and cultures are far removed from any such model.<sup>40</sup> Many feminists remain wary of motherhood and the implications of "woman as mother" for the broader agenda of gender equality.<sup>41</sup> However, removing sexuality and sexual reproduction from the consideration of gender equality and reproduction may make it more difficult to define legal accountability for sexual harms associated with the status of mother in conflict situations.

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 an "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 caregiver? Or, rather, should we dismiss these practices of culture and focus instead on a desired situation in which the woman is not essentialized to the role of mother and caregiver? One question for the jurist is whether legal sanction should reflect the reality of the actual practices, even though identifying them as harms may bolster their embeddedness as social norms. Or should the legal sanction conform to the ideal type of self, unencumbered by social context, which could be considered to be unsophisticated? Some might argue that if I am content to agree to the linkage between sexuality and offspring, a greater disservice is done to the 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 nonconsensual familial separation in war are insufficient to encompass any individual harm experienced by the mother. Moreover, unless international legal prohibitions can address the totality of harm experienced by the victim, prohibitions will fail to produce any meaningful form of accountability for sexual violations.

This particular example 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 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. These include: separation from their children; sexual

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40 See Martha Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (1995).

41 See, e.g., Herma H. Kay, *Equality and Difference: The Case of Pregnancy*, 1 Berkeley Women's L.J. 1 (1985) (sex differences should be ignored except during the time when the female is actually pregnant).

erasure; certain forms of assault on their person that do not reach the required legal standard for rape; and, until recently, rape and direct sexual violation. This is confirmation that existing categories are limited and exclude acts that are indisputably 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.

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

My second illustration of both the limits of legal accountability and the intentions that underlie sexual violation concerns 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 the process of being selected into the camp system. This was invariably accompanied by the shaving of all hair from intimate parts of the body, oftentimes by male guards (who were generally connected to the Nazi regime) and to the amusement of other soldiers. The forced removal of clothing and the public viewing of the private physical self were infinitely sexual acts. Their intent was to demonstrate to the woman her sexual vulnerability and to her community the complete absence of guardianship for her honor. Moreover, the particular act of removing bodily hair constituted an encoded communication of control in that it stripped the women of their sexuality. This was sexual obliteration.

Both men and women experienced many of these dehumanizing acts.<sup>42</sup> Viewing the experience in the context of women's assigned social and familial roles in Europe of the 1930s and 1940s, it is clear that there would have been no confusion between victim and perpetrator over the content of the message.<sup>43</sup> Taking away a woman's clothing, forcing her to be subjected to the gaze of men

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42 For example, for religious men, the shaving of facial hair was also encoded with a clear personal, religious, and cultural message of obliteration, and it is inappropriate to compare the degrees of dehumanization. However, the shaving of female bodily hair was a victimization that was predominantly sexual.

43 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." 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 that encouraged the exclusion of some women and not others from public and social space. Gisela Bock, *Racism and Sexism in Nazi*

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 they would experience it as such. Moreover, we should remember that many of these women were religiously observant, a fact that would have augmented the shame and humiliation of the acts they experienced.<sup>44</sup> Shaving women thus had a communicative value, intimately tied to their sexual personality. Shaving these women was sexual defilement — but it was organically linked to the enterprise of cultural eradication to which destruction of the carriers of the community was central.<sup>45</sup>

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 or 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 had been added to the meager food rations to achieve this end, although doubtlessly, the lack of food, excessive hard labor, and the horror of surrounding circumstances were primarily responsible. Thus, the camp experience had a deep physical impact on its female victims. Survival meant wiping out many of the physical connections with a woman's sense of being female. The female body was deliberately obscured through 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. These practices not only include invasive sexual violence and assault on the female person, but

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*Germany: Motherhood, Compulsory Sterilization, and the State*, 8 Signs 400, 402 (1983).

44 Particularly in Eastern Europe where economic development was slower than in the West and where there was disproportionately greater extermination relative to population, religious observance was more entrenched. As Hyman notes, "[a]lthough 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." Paula E. Hyman, *Gender and the Jewish Family in Modern Europe*, in *Women in the Holocaust*, *supra* note 5, at 25, 25.

45 The act of shaving facilitated visually what Anna Pawelczynska described: "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 Pawelczynska, *Values and Violence in Auschwitz* 53 (1979).

significant other practices, which may appear non-gender specific on superficial viewing but can be shown to affect women disproportionately and uniquely when examined in detail. Such practices include: forced displacement; familial separation; limitations upon access to food; denial of medical care; and restrictions limiting the ability to maintain certain standards of personal hygiene. Some of these practices arguably are heightened manifestations of a culturally-rooted contempt for women that is elevated in times of crisis. But in order to fully understand the manner in which sexual violence is experienced, we need to examine the variety of social practices that come to the fore in times of conflict. To reduce examination of these acts to a litany of narrow deeds upon the physical person of the woman is to impoverish 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.

Examples of such limited thinking are found in the legal conceptualization of what constitutes acts of interference with the bodily integrity of a woman. Both international human rights conventions and humanitarian law confirm in general and specific terms the right to bodily integrity.<sup>46</sup> Currently, under the legal regime of humanitarian law, certain specific sexual acts are prohibited and subject to criminal sanctions. They include rape, enforced prostitution, and acts that seek to prevent birth within a social or cultural group. There is no dispute that the articulation of these acts as crimes in the context of war constitutes progress in the quest for 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 in which sexual violation manifests itself during conflict. This subsequently creates an interpretative task, whereby one is forced to ask whether a certain act fits within the definition, and if it does not, it is excluded as a harm, or its specifically sexual nature goes unacknowledged.<sup>47</sup> Thus, the shaving of a woman's body is precisely illustrative of an invasive sexual act, which, among other things, has never been specifically defined as constituting a sexual offense nor as falling within a defined class of unacceptable sexual acts. More particularly, the catalogue of violations specifically excludes a concept of

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46 For example, Article 7 of the International Covenant on Civil and Political Rights, *supra* note 38, bars any "person from being subject to torture or to cruel, inhuman or degrading treatment."

47 See, e.g., Deborah Blatt, *Recognizing Rape as a Method of Torture*, 19 N.Y.U. Rev. L. & Soc. Change 821 (1992).

sexual erasure, where the violation is specifically aimed 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 to respond to these forms of violation. They were simply not articulated by states as matters of legality and conformity between them. They were, in short, invisible. Since then, it is evident that 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, despite the overwhelming evidence that by and large, the civilian casualties of war, displacement, and conquest are females and their dependent offspring. Second, the Laws of War relating to females have been predominantly focused on the pregnant woman and the woman as mother. This is true despite the recent substantive augmentation of humanitarian law with respect to sexual crimes through the statutes and jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.<sup>48</sup> There has also been progress towards the creation of an International Criminal Court.<sup>49</sup> Despite recent progress,

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48 On May 25, 1993, the U.N. Security Council adopted the official Statute of the International Criminal Tribunal for the Former Yugoslavia (hereinafter "ICTY"); Sec. SCOR Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993). The ICTY represents considerable progress in 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 particular national, ethnic, racial, or religious group and the destruction of that group. 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, as I have pointed out elsewhere, is the practical definition given to the crime of rape, which acts will be interpreted to constitute rape, and whether penetration alone will be conclusive. See Fionnuala Ni Aolain, *Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War*, 60 Alb. L. Rev. 883 (1997).

49 Article 7(1)(g)j of the Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183.9 (hereinafter "Rome Statute") 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

existing standards for accountability lack depth and imagination regarding the forms of violation that women experience, even in the specific areas of pregnancy and motherhood.

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 by the Geneva Conventions of 1949. Despite the particularity of violence and violation experienced by women in the War, there was little reflection of that distinctiveness in the treaty. 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>50</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>51</sup> Thus, the limited prohibition against rape was defined solely in terms of a breach of the honor of the woman. By 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.

The 1977 Diplomatic Conference expanded the protections of the Laws of War to include a list of internal conflicts. Again, the Diplomatic Conference focused little of its attention on the physical violence experienced by women in war, despite a notable preoccupation with the fertile and expectant woman and the woman as mother. The Conference acknowledged that women, because of their "special situation," had to be given "special protection."<sup>52</sup> Women in a special situation were defined as those who "were pregnant women, maternity cases and women who were in charge of children

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a widespread attack directed against any civilian population.

50 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 1949 Geneva Convention).

51 Article 27 of the Fourth Geneva Convention of 1949 states:

Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.

*See generally* Yougindra Khushalani, *Dignity and Honour of Women as Basic and Fundamental Human Rights* (1982).

52 Statement of Mr. Surbeck, International Committee of the Red Cross (hereinafter "ICRC"), introducing a text drafted by the Committee, paragraph 55, extracted in 4 Howard S. Levie, *Protection of War Victims: Protocol I to the 1949 Geneva Conventions* 86 (1981).



of less than seven years of age or who accompanied them."<sup>53</sup> In addition, the Conference had vocal consensus on the appropriate manner of dealing 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>54</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 entirely missing from this conversation. The only passing reference that can be interpreted to cover their absence is the opening statement, which concluded that "[o]pinions were divided regarding the special protection to be given to women in armed conflicts."<sup>55</sup>

The only progress 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 Protocol I, rape is included under the general heading of crimes against "dignity" rather than crimes against "honor."<sup>56</sup> This article also recognized the particular experience of forced prostitution by specifically including a prohibition against it in the final text.<sup>57</sup> Protocol II, agreed upon by the same Diplomatic Conference, includes in its provision of Fundamental Guarantees a prohibition on rape.<sup>58</sup> By December

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53 *Id.*

54 *Id.* ¶ 61.

55 *Id.* ¶ 57.

56 Article 75(2)(B) of Protocol I reads "outrages against personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any other forms of indecent assault." 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. 609.

57 *Id.* art. 76.

58 Article 4(2)(e), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of Non-International Armed Conflicts, *id.*

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 includes rape.<sup>59</sup> Though this document had no binding legal status, it nonetheless represented a significant step forward, demonstrating the direction in which international legal opinion was moving.

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

A reappraisal of the role and reception of sexual violence during the Second World War, in general, and the Holocaust, in particular, leads to 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 desire 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. Key to understanding the critique that I wish to advance here is comprehending that at the core of the international post-war legal structure was a newfound place for the individual. Thus, the post-war world has rightly been called the Age of Rights, in which the individual was repositioned vis-à-vis the State and in which the relationships of states to one another changed as well. 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, along with a number of other commentators, I question the gendered specification of the individual who is at the core of this repositioning. The construction, neutralization, and exclusion of gender are inseparably intertwined with the development of a new legal and political language of rights in the post-war world.

The post-World War II international legal community harnessed a framework and language of individual rights as a means of deterrence for acts that violated the inherent dignity of the human person. However, as Martin Scheinin points out, there are "two unfounded presumptions that appear to create obstacles for understanding and analyzing the operation of human rights law."<sup>60</sup> The first is the presumption that the concept of a right is embodied in a specific provision of a treaty between states, thus assuming that a right is a single monolithic entity, rather than a bundle of intersecting

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59 See ICRC Aide-Memoir of Dec. 3, 1992. An aide-memoir is a public statement released by the ICRC outlining its view on a particular matter.

60 Martin Scheinin, *Sexual Rights as Human Rights — Protected under Existing Human Rights Treaties*, 67 *Nordic J. Int'l L.* 17, 19 (1998).

entitlements covered by a single legal term. The second obstacle is 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 entitlements between distinct individuals and the State. From this follows the supposition that a violation of one person's right can result in 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 sexual violation is partly a result of the manner in which rights entitlement has been construed. I submit that the concept of a right as a monolithic entity, derived solely from the fallacy of a smart linguistic interpretation upon which there is general interpretative consensus, manifests a barren misconception of what the content of that right actually is. 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>61</sup> Thus, even making the grammar and language of human rights treaties more comprehensible will not solve the fundamental problem of understanding what the rights themselves actually mean. 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 the legal definition of a sanctionable harm is not necessarily the same as the victim's definition of the harm. Moreover, given the lack of 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

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61 *Id.* at 19.

the core of its interpretative consensus.<sup>62</sup> Cogent critiques have been offered demonstrating the patriarchal assumptions that underlie such decisions.

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

I also wish to question the assumption of the primacy of autonomy, which is integral to the post-war liberal idea of human rights. As Anthony Appiah notes, "[l]iberalism 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>63</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 that determines who owns it.<sup>64</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 are, in a sense, communities of mass rights. But the autonomous self remains a human self, a creature of community and sociality. According to Appiah,

[w]e 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

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62 For example, not until recently has a growing common acceptance emerged from international human rights enforcement mechanisms that rape can constitute a form of torture. Hence, only in 1992 did the United Nations Special Rapporteur on Torture clearly define rape as torture. E/CN.4/1992/SR.21 Summary Record, 21st mtg., Feb.-Mar. 1992.

63 K. Anthony Appiah, *Human Rights and Cosmopolitan Liberalism*, in *Human Rights at Harvard, Interdisciplinary Faculty Perspectives on the Human Rights Movement 10* (1999).

64 One caveat to this principle has been developed by the enforcement mechanisms of modern international human rights law, which is that 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.

society for their production. Thus, we have an instrumental interest in sociality.<sup>65</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 that acknowledge human dignity are "dialogically constructed." We gain conceptions of self through the other, and 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 or without affecting others. Violations not only destabilize the person(s) at whom the acts are directed: they similarly destabilize those members of a wider circle whose own autonomous entitlements are precariously balanced with the well-being and safety of others. This may be described as the domino effect of living in society, and it should lead us to critically assess where the site of legal entitlement to rights is located.

## VI. THE COMMUNITIES OF HARM

I am particularly concerned with investigating the extent to which harm to women creates a broader community of suffering: children, parents, friends, husbands, and partners. The individual harm/rights model fails to account for this broader community of suffering. When the perception of injury is focused solely on the individual aspect of the experience, accountability mechanisms are also singular and not group oriented. By using the term "group" here, I imply two definitions. The first is group in its broadest sense of the ethnic, national, or religious community to which the subject of harm belongs. The second is a collection of identifiable others who have codependent relationships with the subjects of violation.

Why is this important? Let me address first the issue of community or group harm in its broadest sense. As I will seek to illustrate, harm is frequently perceived by the recipient as an attack not only on the self but also on the community to which she belongs. The injury is internalized as such, with a clear understanding that the object is not only her body but also the dignity of her community and, more broadly, the identity of

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65 Appiah, *supra* note 63, at 11.

her people. Hence, 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 claimed as a premise at the outset of this essay, namely, that their bodies are the means used to achieve a particular military objective, be it the attempted eradication of an entire people, the facilitation of ethnic cleansing, or the symbolic crippling of a nation by desecrating its symbolic purity — its women. Critics may argue that existing mechanisms of accountability provide sufficient legal redress for the personal trauma experienced by individual women. 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. That is to say, unlike the experience of gendered violence during peacetime, which is predominantly located in the private domain — 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 prowess of the victor. There is a measurable community of harm in such contexts. The legal questions are, perhaps, how do we quantify that harm, how do we measure it, how do we determine who is a member of the harmed community, and how do we compensate victims and punish perpetrators?

Recognizing such a 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>66</sup> Is the harm connected to the loss of masculine power that is demonstrated by the inability to protect women from external plunder? 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. While such questions arise, there is, I suggest, another way to conceptualize injury here. It requires moving

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66 For example, the Hague Convention Respecting the Laws and Customs of War on Land (1907 Hague Convention VI) and Armed Regulations, Oct. 18, 1907, 36 Stat. 2277, does not explicitly include rape as a violation of the laws and customs of war. Article 46 of the Convention states in part that "[f]amily honor and rights, the lives of persons, and private property, as well as religious convictions and practices must be respected." The notion of female honor was specifically included in the prohibitions of Article 27 of the Fourth Geneva Convention (Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287). Paragraph 2 of Article 27 states that "[w]omen shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault."

away from individual theories of right into broader communal and derivative locations of entitlement and of redress when injury occurs.

## VII. WHO COUNTS AS A VICTIM?

Let me now turn to the second category — that of codependent individuals who, through the domino effect, experience harm as a result of the experiences of the primary subject of the violation. One outstanding challenge for the post-war world of rights relates to the bearers of entitlement. As I have suggested in brief above, exclusive binary relationships between the State and the individual are too narrow to explain the way in which violations may actually be experienced. Moreover, they may also be insufficient to take account of a wider class of victims that 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, and 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 harm that is caused to X is perceived, felt, and experienced as a harm by others linked to X because of emotional, familial, and communal bonds.

When a woman is sexually assaulted in front of her community or those in intimate relationships 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, because sexual violation is not only a sexual act but an aggressive act.<sup>67</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 a part of the logic of the violence itself.<sup>68</sup> Women's defilement is not simply a message of sexual assault to the victim herself;

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67 See Ruth Seifert, *The Second Front, The Logic of Sexual Violence in War*, 19 *Women's Stud. Int'l F.* 35, 36 (1996).

68 See Elaine Scarry, *The Body in Pain, The Making and Unmaking of the World* (1985).

it is a message to her community. It is made all the more explicit when that community is forced to participate by observing the act. I therefore suggest that there is a distinct harm caused to an observer.

I would argue that both community and those in specific codependent relationships with the primary subject 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 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. 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 freestanding 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 what happens to another. Hence, when parents, partners, or children are forced to observe the violations experienced by a woman, there may be quantifiable harms caused to that person.<sup>69</sup> Conceivably the further the link from the primary subject of violation, the more likely that a range of remedies can come into play. The notion of a community harm, while based on the same premise as codependent harm, can be distinguished in terms of the remedy received by the group asserting the broader violation.

The existing framework of international human rights and humanitarian law does not recognize and name broader harms. It certainly defines the primary act of violation as a harm and as a violation of entitlement, but an underlying text of autonomy prevents any further harms from being recognized. I stress again that what I outline here is not a concept of harm that 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. When we re-conceptualize rights in this way (which is in accord with

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69 The lack of understanding as to the nature of harms caused is not limited only to the legal field. Judith Pinter has been undertaking interesting work pertaining to 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.



actual experience), the scheme appears profoundly different from existing frameworks. Rights take on a multiparty structure, where the number and nature of the persons who may have ownership over any one right are varied and diverse. For each articulated right, rather than a single thread connecting the State to the individual, we see a trilateral rope, with the State at one end and the individual title holder in the middle with a spray of threads connecting her to multiple persons, all of whom have an interest in maintaining her rights.

## CONCLUSION

Tremendous gaps remain in our understanding of the real experiences of sexual violence during war. Historical examination of the formative period of international legal norms has much to teach us about what has been missed by observers, jurists, and prosecutors. A deeper understanding of this complex 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 norms, the international community must be prepared to say either that its understanding of sexual violation may not have been deep enough or that it was 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 it had previously under-acknowledged. In doing so, we facilitate a reappraisal of international legal sanctions whose roots and causality are frequently traced to the horrors 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.

The legal vocabulary we bring with us to name and place the harms that were caused to women as women during the Second World War is inadequate. 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 by 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 individual. Acknowledging that some voices were not fully heard or understood during the initial post-war introspection may tell us that there is still some shoring up to be done on these foundations. Today, with more perspective, 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 into sanctions. In doing so, we give history the benefit of facilitating and encouraging legal transformation, as we learn from looking back.