

RAPE IN BERLIN: RECONSIDERING THE CRIMINALISATION OF RAPE IN THE INTERNATIONAL LAW OF ARMED CONFLICT

JANET HALLEY *

[The specific criminalisation of sexual violence in war has made immense strides in recent years, as feminists engaged with the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Rome Statute processes have proposed — and often won — a wide range of new legal rules and prosecutorial practices. This essay briefly describes some of these feminist achievements, in particular the reframing of rape and other sexual violations as a freestanding basis for charging serious humanitarian crimes and as the sole predicate act in particular prosecutions; and the demotion of a consent-based defence to charges of rape. The essay then turns to an anonymously published account of one woman's experiences during the fall of Berlin to the Soviet Army in 1945, published in English as A Woman in Berlin: A Diary. By analysing the Diary's ideologically saturated reception in Germany and by analysing the text itself, the essay proposes that rape in war is not merely either ignored and condoned or prosecuted and punished, but intrinsically problematically related to our evaluations of the badness of rape and the badness of war. The essay derives from its reading of A Woman in Berlin a war–rape antinomy: the literary achievement of the Diary, the author argues, is that it keeps the badness of war and the badness of rape in mutual suspension; and the pathos of its typical reception is that this antinomy collapses in ways that ratify some of the most problematic ideological investments linking rape to war. The essay concludes by deriving from this literary-critical excursion some hard policy questions for law-makers deciding how to criminalise rape and other sexual violence in International Humanitarian Law and International Criminal Law: what are the costs of ignoring the ideological discourses that surround rape? What are the downsides of ratifying the idea that rape in war is a fate worse than death? Could the special condemnation of rape weaponise it? How should criminal law handle the problematic of consent under coercive circumstances when those circumstances are armed conflict? And how might the new feminist-inspired rules entrench nationalist differentiation and antagonism? It concludes that the intrinsic dilemma-like structure of our answers to these questions cannot be transcended, and that international policy-makers should temper triumphalist excitement about the new feminist-inspired rules in order to take these problematics on board.]

CONTENTS

I	Introduction	79
II	Governance Feminism and IHL	81
	A Moving Sexual Violence Crimes 'Up' the Hierarchy of IHL and ICL and Prosecuting Them Separately	83
	B Consent.....	86
III	<i>A Woman in Berlin</i>	91
	A Reading <i>A Woman in Berlin</i> , Reading Rape	99
IV	Re-thinking The Politics of Criminalising Rape in IHL	110

* Royall Professor of Law, Harvard Law School. Thanks to Karen Engle, David Kennedy, Duncan Kennedy and two anonymous reviewers for comments on earlier drafts, and to Alison Kamhi, Jimmy Richardson, A Edsel, C F Tupaz, Stephen Wiles, Michael Jimenez, Janet Katz and all the librarians at Harvard Law School for their stellar research assistance. Thanks to my brother John Halley for calling my attention to the text that became central to this essay. Thanks also to the Harvard Legal Scholarship Workshop, the Harvard International Law Workshop, the Women's Studies Program and Kirkland Endowment at Hamilton College, and *Unbound: The Harvard Journal for the Legal Left* for opportunities to discuss earlier drafts of this essay. All errors of fact and judgement are mine alone.

A	Rape as Ideology and Thus as Representation	110
B	The War–Rape Antinomy and the Discourse of Equivalents	112
C	Weaponising Rape	114
D	The Problematic of Coercion	116
E	The Convergence of Feminism with Nationalism	118
V	Conclusions	120
VI	Select Bibliography	121

I INTRODUCTION

The specific criminalisation of sexual violence in war has made immense strides in recent years, as feminists engaged with the International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda and *Rome Statute of the International Criminal Court* ('*Rome Statute*')¹ processes have proposed — and often won — a wide range of new legal rules. Elsewhere I give a detailed account of their work both on the statutes and in adjudication;² here I can only point to the bibliography of feminist writing that forms the basis for my claim that they were not only active but effective.³

I have understood these reforms as the product of something we could call 'Governance Feminism': feminism grown up, professionalised, and adept at wielding power for the good of women globally and locally.⁴ These are days of partial triumph.

But that should also give feminists and their allies pause: what exactly will it mean to inscribe into international humanitarian law ('IHL') and international criminal law ('ICL') new crimes of sexual violence, new commitments to prosecute wartime rape, new understandings of the relationship between sexual violence, sexual pleasure and war? Will these victories be good for feminism? Will they be good for women involved as combatants or civilians in armed conflict? Will they be good for the cause of peace? They are part of a broader turn of Western feminism to criminal law as its preferred mode of deploying their power in policy- and law-making: is this new 'carceral feminism'⁵ — intent on criminalising, indicting, convicting, and punishing perpetrators of sexual violence in numerous domains of domestic law as well as IHL and ICL — going to have entirely good effects in the family, the workplace, the public sphere?

I have been asking this question in one way or another for several years now, and I have found it particularly difficult to ask when the subject matter is rape. In my work on feminist achievements and defeats in the prosecutions of the ICTY and ICTR and in the *Rome Statute* processes, I repeatedly find myself confronted

¹ Opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).

² Janet Halley, 'Rewriting Rape I: Recent Feminist Law Reform of Positive International Humanitarian Law' *Michigan Journal of International Law* (forthcoming); Janet Halley, 'Rewriting Rape II: Feminist Reforms in the Prosecution and Adjudication of Sexual Violence in Armed Conflict' (forthcoming).

³ For a selective overview of the copious literature about these developments, see Select Bibliography, below Part VI.

⁴ See Janet Halley et al, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29 *Harvard Journal of Law and Gender* 335.

⁵ The term is Elizabeth Bernstein's: see Elizabeth Bernstein, 'The Sexual Politics of the "New Abolitionism"' (2007) 18(3) *differences: A Journal of Feminist Cultural Studies* 128, 143.

by a near-universal consensus that making rape in war *more criminal* — criminalising it at the highest possible point in the hierarchy of humanitarian law, prosecuting it preferentially, making it easier for prosecutors to gain convictions and long sentences — is a good thing to do.

For me, this assumption is subject to some doubts. We live in a world in which rape is a terrible wrong *and* rape's badness can be deployed in an alarming number of ways to advance contested ends, ends which one might well want to resist. The badness of rape can be a reason to start a war; can be a reason to fight harder in a war; can be a reason to rape someone. It is possible to charge and convict people of rape who have not raped; it is possible to use the badness of rape to protect accusing women from political or moral scrutiny. The *superior* badness of rape can background other bad things: to import the idea that 'rape is a fate worse than death' into the setting of armed conflict — for example, to declare that the panoramic violence of the Yugoslav conflict was a 'war against women'⁶ — is to background the death that armed conflict brings to people generally, and specifically to the death it brings to men. Of course none of these possibilities cancels out the possibility that intensifying the criminality of rape in war will produce, overall, less rape or less violence or even fewer wars. But that is only a possibility — one which comes with risks.

In my experience, even asking about the possible downsides of this underlying strategy is, repeatedly, almost immediately and universally, taken to minimise the importance of rape, of women's suffering, of women. Working through the legal materials on the ICTY, ICTR and the *Rome Statute*, I found it extremely difficult to articulate my misgivings. To be sure, I had some significant help.⁷ But over and above what I could derive from the critical

⁶ Alexandra Stiglmayer (ed), *Mass Rape: The War against Women in Bosnia-Herzegovina* (Marion Faber trans, 1994 ed) [trans of: *Massenvergewaltigung — Krieg gegen die Frauen*].

⁷ Critical work within internationalist feminism has been extremely useful. I am particularly indebted to the work of Karen Engle: see especially Karen Engle, 'Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 99 *American Journal of International Law* 778. See also Karen Engle, 'Liberal Internationalism, Feminism, and the Suppression of Critique: Contemporary Approaches to Global Order in the United States' (2005) 46 *Harvard International Law Journal* 427; Dianne Otto, 'A Sign of "Weakness"? Disrupting Gender Certainties in the Implementation of Security Council Resolution 1325' (2006) 13 *Michigan Journal of Gender and Law* 113; Vesna Nicolić-Ristanović (ed), *Women, Violence and War: Wartime Victimization of Refugees in the Balkans* (Borislav Radović trans, 2000 ed) [trans of: *Žene, nasilje i rat*]; R Charli Carpenter, 'Surfacing Children: Limitations of Genocidal Rape Discourse' (2000) 22 *Human Rights Quarterly* 428; Katherine M Franke, 'Putting Sex to Work' (1998) 75 *Denver University Law Review* 1139; Vesna Kesic, 'A Response to Catherine MacKinnon's Article' (1994) 5 *Hastings Women's Law Journal* 267.

On rape in Western feminist thinking, the two most helpful articles have been Sharon Marcus, 'Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention' in Judith Butler and Joan W Scott (eds), *Feminists Theorize the Political* (1992) 385; and Pamela Haag, "'Putting Your Body on the Line": The Question of Violence, Victims, and the Legacies of Second-Wave Feminism' (1996) 8(2) *differences: A Journal of Feminist Cultural Studies* 23.

I have also found the following critical interventions in IHL and ICL to be indicative: David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004); Nathan Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War' (2004) 43 *Columbia Journal of Transnational Law* 1; David Kennedy, *Of War and Law* (2006); Martti Koskeniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook of United Nations Law* 1.

literature on international humanitarianism generally, and feminist efforts in that domain more specifically, I wanted to understand why condemnations of rape seemed particularly susceptible to discursive closure.

The essay that follows is my effort to map the discursive investments that we bring to the table when we condemn rape in war. My method is to depart from law for a while, and to develop a literary critical appraisal of a book, *A Woman in Berlin*,⁸ which comes to us as the diary of a German woman who survived the fall of Berlin in 1945 and the occupation of her neighbourhood by the Soviet Army. I selected this text because the narrator explicitly reflects on the questions that have vexed me so much as a politically engaged student of legal reform: when men are killing and being killed, when they are also raping women and women are being raped, what discursive habits do we have for patterning these four modes of human action? Perhaps an understanding of those patterns can help us interrupt our consensus that making sexual violence in war *more criminal* is an unequivocally good thing to do.

This essay comes in four parts. Part one spells out just a very few of the recent achievements of governance feminists advocating for reform in IHL. Part two introduces *A Woman in Berlin* and situates my reading of it in the controversies that have persistently attended its publication. Part three is a close reading of *A Woman in Berlin*. And part four suggests some ways in which this literary critical interlude opens up some specifically legal problems for further reflection.

II GOVERNANCE FEMINISM AND IHL

Feminists have been closely and intensely active in the reform of IHL and ICL, conflicting sometimes among themselves, but also working in consensus. They have been activists, amicus-brief writers, special rapporteurs, prosecutors and judges. As I argue in two articles describing in detail their work on the statutory processes leading to the ICTY and ICTR statutes⁹ and the *Rome Statute*, and their work in and on the prosecutions in the international criminal tribunals ('ICTs') and the International Criminal Court ('ICC'), they have been able to persuade other lawmakers to adopt many — though not all — of their proposals.¹⁰ As a result, IHL and ICL now contain some of the world's most feminist rules on rape and related sexual violence.

The relevant legal materials are voluminous. Where amongst them are feminist interventions most in evidence? Several statutes set out the subject matter jurisdiction of the new courts; the most important are the *ICTY Statute*, *ICTR Statute* and the *Rome Statute*. These include specifications of the crimes and were an important site for feminist intervention. Each of the new ICTs promulgated its own rules of procedure and evidence, and here again feminists worked hard on the definition of sexual violence crimes, the scope of defences,

⁸ See below nn 51–56.

⁹ *Statute of the International Criminal Tribunal for the Former Yugoslavia*, annexed to Resolution 827, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (1993) ('*ICTY Statute*'). The *ICTY Statute* has been amended three times, in 1998, 2000 and 2002. *Statute of the International Criminal Tribunal for Rwanda*, annexed to Resolution 955, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (1994) ('*ICTR Statute*'). The *ICTR Statute* has been amended three times, in 1998, 2000 and 2002.

¹⁰ Halley, 'Rewriting Rape I', above n 2; Halley, 'Rewriting Rape II', above n 2.

the allocation of burdens of persuasion, and so forth.¹¹ The *Rome Statute* authorised the states participating in the ICC regime to promulgate *Rules of Procedure and Evidence*,¹² and those rules now exist and are binding on the ICC.¹³ The *Rome Statute* also authorised the promulgation of an *Elements of Crimes* document, but did not make it binding on the new court.¹⁴ Resolution and/or mediation of many issues of particular concern to feminists was relegated to these secondary and tertiary documents.

The development of prosecutions and the actual litigation and adjudication of cases also occupied feminist attention.¹⁵ The most important cases were *Prosecutor v Tadić*,¹⁶ *Prosecutor v Akayesu*,¹⁷ *Prosecutor v Delalić* (I will call this case 'Čelebići' after the name of the camp where the offences occurred, in part to avoid using the surname of Dejnir Delalić, who was acquitted),¹⁸ *Prosecutor v Furundžija*,¹⁹ *Prosecutor v Kunarac*,²⁰ and *Prosecutor v Kvočka*.²¹ All of these cases show the mark of feminist advocacy, including the work of feminist insiders. The ICC has begun to investigate and indict, but will probably produce only investigations and indictments while this essay is in press.

It is helpful to keep in mind that, though the process of negotiating statutes and the process of charging and trying crimes are quite different, the ICTs were establishing themselves as active tribunals *while* state delegations and NGOs were hammering out the *Rome Statute*. Indeed, it is possible sometimes to see that the courts were aware of the Rome controversies and vice versa. Issues jumped from forum to forum. The feminist reform agenda for the *Rome Statute* grew out of their experience in ICT litigation and vice versa.

¹¹ ICTY, *Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, UN Doc IT/32/Rev.41 (8 March 2008) ('ICTY Rules of Procedure and Evidence'); ICTR, *Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda*, UN Doc IT/3/Rev.17 (14 March 2008).

¹² *Rome Statute*, above n 1, art 51(1).

¹³ ICC, *Rules of Procedure and Evidence of the International Criminal Court*, Doc ICC-ASP/1/3 (3–10 September 2002) ('ICC Rules of Procedure and Evidence').

¹⁴ Assembly of States Parties to the *Rome Statute*, *Report of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, 1st sess, Doc ICC-ASP/1/3 (3–10 September 2002), adopting the *Report of the Preparatory Commission for the International Criminal Court: Addendum — Part II: Finalized Draft Text of the Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (30 June 2000).

¹⁵ Selected decisions of the ICTY and ICTR are reprinted in André Klip and Göran Sluiter (eds), *Annotated Leading Cases of the International Criminal Tribunals* (2007).

¹⁶ *Prosecutor v Tadić (Trial Chamber)* Case No IT-94-1-T (7 May 1997) (Judgment); *Prosecutor v Tadić (Appeals Chamber)* Case No IT-94-1-A (15 July 1999) (Judgment), (collectively, 'Tadić').

¹⁷ *(Trial Chamber)* Case No ICTR-96-4-T (2 September 1998) (Judgment) ('Akayesu').

¹⁸ *Prosecutor v Delalić (Trial Chamber)* Case No IT-96-21-T (16 November 1998) (Judgment); *Prosecutor v Delalić et al (Appeals Chamber)* Case No IT-96-21-A (20 February 2001) (Judgment) (collectively, 'Čelebići').

¹⁹ *Prosecutor v Furundžija (Trial Chamber)* Case No IT-95-17/1-T (10 December 1998) (Judgment); *Prosecutor v Furundžija (Appeals Chamber)* Case No IT-95-17/1-T (21 July 2000) (Judgment) (collectively, 'Furundžija').

²⁰ *Prosecutor v Kunarac (Trial Chamber)* Case No IT-96-23-T/1-T (22 February 2001) (Judgment); *Prosecutor v Kunarac (Appeals Chamber)* Case No IT-96-23-T/1-A (12 June 2002) (Judgment) (collectively, 'Kunarac').

²¹ *Prosecutor v Kvočka (Trial Chamber)* Case No IT-98-30/1-T (2 November 2001) (Judgment); *Prosecutor v Kvočka (Appeals Chamber)* Case No IT-98-30/1-A (25 February 2005) (Judgment) (collectively, 'Kvočka').

This is not the place for an exhaustive description and assessment of these struggles and achievements. I tell here only a partial story, selecting some high watermark events because of their direct relevance to my understanding of *A Woman in Berlin*. I will concentrate on three reform programs. The first two are so closely related that I will discuss them in one section: the effort to move sexual crimes ‘up’ the hierarchy of crimes and to particularise them in specifically feminist terms, and the effort to concentrate specific prosecutions exclusively on charges involving sexual violence. The third requires separate treatment: the effort to minimise the evidentiary requirements for proof of rape or other crimes of sexual violence by eliminating or modifying the defence of consent.

A *Moving Sexual Violence Crimes ‘Up’ the Hierarchy of IHL and ICL and Prosecuting Them Separately*

When the United Nations authorised the establishment of a special tribunal to try violations of the *Geneva Conventions*,²² war crimes and crimes against humanity in the Balkans conflict, feminists at first had the very simple goal of making sure that rape was explicitly included in the statutory statement of the court’s jurisdiction and was vigorously prosecuted. By the time the *Rome Statute* negotiations were underway, they had an elaborate agenda aimed at making a broad range of sexual violence crimes independent predicate crimes of all the categories of IHL criminality; some even sought to make sexual violence crimes freestanding international crimes, not subsumed under *any* higher-echelon category of crime. One way of understanding this aspect of the feminist vision is to see it as an effort to *move sexual violence crimes ‘up’ the hierarchy of IHL and ICL criminality*. We can think of it as the vertical reform project. It was accompanied by a horizontal reform project, of isolating sexual assaults against women not only for high-echelon but for *separate* prosecution.²³

The shift from the initial project of ‘making rape visible’ to the ‘independent predicate crime’ project entailed a major shift in how feminists structured the categorical relationship between armed conflict and sexual violence occurring within it. To put it bluntly, making rape visible contextualised sexual assaults *in* war — while framing sexual violence as an independent predicate crime reclassified rape *as* war. The former placed the rape of women in visible proximity to the death of men; the latter exceptionalised the rape of women, detached it from other aspects of the armed conflict in which it occurred, and focused prosecution, conviction and punishment on rape alone. Both projects manage what I will call the war–rape antinomy, but they manage it very

²² *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively, ‘*Geneva Conventions*’).

²³ For a discussion of this strategy, see Halley et al, ‘From the International to the Local’, above n 4, 380–1.

differently. The strong trend in the feminist vertical reform project over the course of the 1990s was to tilt this antinomy towards rape: to suppress war by accentuating rape, and to accentuate rape by suppressing war. It involved, for instance, understanding the Balkans conflict as a 'war against women', and framing it as continuous with rape in everyday life, life that can be called 'peacetime' only in scare quotes.

The catalogue of feminist successes and defeats in their pursuit of this vertical and horizontal reform project is complex and cannot be presented here, but I can provide some examples. As Karen Engle indicates, feminists were in conflict over whether to seek prosecutions against Serbian militants for rape-as-genocide: the 'genocidal rape camp', as Engle dubs it, devoted immense intellectual and political energy to framing Serbian rape of Muslim and Croat women as a genocidal project; while the 'everyday rape camp' objected to this effort for describing some rapes as worse than others (instead, feminists should object to all rapes — rapes in wartime and everyday rape — as equally grave), for ranking Serbian rapes as worse than the rapes that were committed 'on all sides', and for falling into complicity with nationalist understandings of a war which should instead be seen not as a war of ethno-nationalist groups but as a 'war against women'. This intra-feminist conflict was intense, but short lived: the ICTY prosecutor's office was not having any part of the 'genocidal rape' project, and was instead scrupulous to charge sexual violence crimes against all sides. To be sure, the ICTR held in *Akayesu* that rape and rape alone could be the sole predicate crime sustaining a conviction for genocide²⁴ — a holding that kept the 'genocidal rape' idea alive. But the intra-feminist conflict subsided, at least temporarily.

Elsewhere, the 'sole predicate crime' strategy, conjoined with the 'sexual crimes only indictment' strategy, enjoyed a feminist consensus and had significant successes in the ICTY. Some feminists experienced *Tadić* as a signal defeat: a panorama of crime was proven against the defendants — including a lurid act of forced male-male sexual violence — but the case against the defendants for rape collapsed when the victim witnesses refused to testify. From there we go to *Čelebići*, in which several convictions for rape were included in a panoramic death-camp prosecution of Bosnian Muslim defendants. The facts involved massive and lethal assaults on men. Amongst many convictions for those assaults, some of the defendants were convicted of several rapes, which were held to be torture and cruel treatment, and both of which, in turn, were held to be violations of the *Geneva Conventions'* prohibition on violations of the laws and customs of war.²⁵

From there we go to *Furundžija*, in which a single Serbian commander was initially charged for a wide range of crimes but eventually convicted solely for aiding and abetting the rape and forced fellatio of a single Bosnian Muslim detainee. The court held that both acts of sexual assault were rapes (expanding the *Čelebići* definition of rape to include oral contact; this was also a broader definition than existed in local law). It also held that these rapes were torture and outrages upon the victim's personal dignity; and that these crimes were, in turn,

²⁴ *Akayesu* (Trial Chamber) Case No ICTR-96-4-T (2 September 1998).

²⁵ *Čelebići* (Trial Chamber) Case No IT-96-21-T (16 November 1998) [440]–[449].

violations of the *Geneva Conventions*' prohibition of violations of the laws and customs of war.²⁶ *Furundžija* was the ICTs' first 'sex crimes only' conviction, but this framing of the case happened in medias res, when other charges failed. The feminist vertical and horizontal reform project finally had their most perfect success in *Kunarac*, the first *planned* 'sex crimes only' prosecution in the ICTY. *Kunarac* began as a rape-camp case: panoramic crimes committed against detained civilians, including mass-scale lethal abuses against men, yielded an indictment against several camp overseers for sexual assaults only. But because many of the defendants never appeared in The Hague, the case was reframed by the time of trial to include only the rapes which the accused men committed *outside* the camps, almost all of them under conditions that the court perceived as coerced cohabitation. Several vertical victories were nevertheless gained for the feminist reform effort: the defendants were convicted of rape as torture as a violation of the laws and customs of war, but also of rape as *itself* a violation of the laws and customs of war *and* rape *itself* as a crime against humanity; and they were convicted of *enslavement* as a crime against humanity.²⁷

From the perspective of the feminists' categorical effort, *Kunarac* was only a partial success. The initial indictment tilted the war–rape antinomy strongly towards rape: although men vastly outnumbered women at the Omarska Camp, the indictment charged only assaults on women, and only *sexual* assaults on women. The case framed the Balkans conflict as a 'war upon women'. And in the convictions, rape was moved 'up' the hierarchy of IHL criminality: like *Akayesu*, which recognised rape as the sole predicate crime of genocide, *Kunarac* recognised rape as the sole predicate crime of violating the laws and customs of war and of crimes against humanity. But feminists were aggrieved that the 'rape camp' imagery with which they had first imagined the case dissolved with the narrowing of the indictment; they were aggrieved that the very next important case involving sexual assaults, *Kvočka*,²⁸ reframed the panoramic detention-camp case as involving both the death of men and the rape of women; and they were aggrieved that the Trial Chamber silently declined to describe the enslavement that the women suffered as *sexual* slavery.²⁹

The story does not end with the case law of the ICTs. In their work on the *Rome Statute*, feminists succeeded in securing new rules making 'rape, sexual slavery, enforced prostitution, forced pregnancy ... [and] enforced sterilization', predicate 'war crimes'³⁰ and 'crimes against humanity'.³¹ Rape and sexual

²⁶ *Furundžija* (Trial Chamber) Case No IT-95-17/1-T (10 December 1998) [271]–[275].

²⁷ *Kunarac* (Trial Chamber) Case No IT-96-23-T/1-T (22 February 2001) [744], [782], [822].

²⁸ *Kvočka* (Trial Chamber) Case No IT-98-30/1-T (2 November 2001); *Kvočka* (Appeals Chamber) Case No IT-98-30/1-A (25 February 2005).

²⁹ See, eg, Kelly Askin, 'Commentary on Prosecutor v Kunarac, Kovač and Vuković, Judgment' in André Klip and Göran Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals, Volume V: The International Criminal Tribunal for the Former Yugoslavia 2000–2001* (2003) 806; Kelly Askin, 'Reflection on Some of the Most Significant Achievements of the ICTY' (2003) 37 *New England Law Review* 903, 907 (fn 6). For an ICTY prosecutor's ambivalence about feminist pressure to mount prosecutions concentrating solely on rape and other sexual violence, see Louise Arbour, 'Stephan A Riesenfeld Award Lecture: Crimes against Women under International Law' (2003) 21 *Berkeley Journal of International Law* 196, 203.

³⁰ *Rome Statute*, above n 1, art 8(2)(b)(xxii).

³¹ *Ibid* art 7(1)(g).

slavery are now recognised predicate crimes very high 'up' the hierarchy of IHL/ICL criminality. One of the first cases docketed in the ICC charges Germain Katanga with war crimes and crimes against humanity he allegedly committed in the Democratic Republic of Congo in 2003.³² One hundred per cent of the sexual crimes alleged in this case are charged as sexual enslavement.³³ This indictment suggests that the ICC Office of the Prosecutor will be highly responsive to feminist 'war upon women' framings of current conflicts.³⁴ The emerging consensus shared by feminists and ICL elites is that rapes in wartime are understood to be stand-alone elements of a war — a war within the war, perhaps the most important part of the war *tout court*.

One last example of the (partial, by no means complete) feminist victory in the vertical reform project is the *Rome Statute* provision making it a crime against humanity to engage in

[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, *gender* ... or other grounds that are universally recognized as impermissible under international law³⁵

There are, in all, four new grounds of prohibited persecution: national, ethnic, cultural and gender, with persecution based on gender *alone* now prosecutable as a crime against humanity. The door is now open to prosecute the rapes that happen within an ethno-nationalist conflict like the Balkans war or the Rwandan meltdown as *persecution based on gender*. If this does happen, it will be a signal victory for the new feminist project of tilting the war–rape antinomy away from war and towards rape.

B Consent

The facts underlying the amended indictment in *Kunarac*, combined with the defence offered by several of the accused, suggest a hypothetical that is at the crux of the feminist reform effort to minimise or eliminate the defence of consent when rape is charged as a war crime, crime against humanity, violation of the laws and customs of war or genocide. As part of their assault on the city of Foča, Bosnian Serbs killed Bosnian Muslim men and separated men from women,

³² *Prosecution v Katanga (Appeal Chamber)* Case No ICC-01/04-01/07 (13 May 2008) (Judgment).

³³ Office of the Prosecutor, ICC, *Background Information Sheet: Situation in the Democratic Republic of Congo — Case of Germain Katanga* (18 October 2007), available from <<http://www.icc-cpi.int>> at 23 May 2008.

³⁴ Special Prosecutor Luis Moreno-Ocampo announced an investigation into a concentrated period of time, in the Central African Republic coup attempt in 2002–03, during which rapes peaked: "Rape is the most notorious issue here," said Mr Moreno-Ocampo in a telephone interview. He continued to say:

There are killings, but there are four times more rapes than killings. We are talking about mass rapes, gang rapes, hundreds of cases that took place within a few days ... There were several months of crimes, killings, lootings, but there was a peak of rapes in a few days.

Lydia Polgreen and Marlise Simons, 'Hague Court Inquiry Focuses on Rapes', *The New York Times* (New York, US) 23 May 2007, 6. Moreno-Ocampo's strategy responds to a 'war against women' framing of the Central African Republic conflict by Amnesty International: see Amnesty International, *Central African Republic: Five Months of War against Women* (2004) <<http://www.amnesty.org/en/library/info/AFR19/001/2004>> at 23 May 2008.

³⁵ *Rome Statute*, above n 1, art 7(1)(h) (emphasis added).

children and the elderly for detention in a number of severely inadequate detention centres. The detained women were repeatedly raped — but as I've indicated, no defendant charged with these detention-centre rapes was ever brought to trial. According to the defendants who were captured and tried, they removed several women from these rape-camp conditions and lodged them in houses and apartments in the vicinity. The Trial Chamber found that some of the women had keys to their residences and were free to come and go; that they did housework for their captors; that they repeatedly had sex with them; and that one of the women was forced to dance naked on a table to entertain the men.³⁶ The defendants claimed, essentially, that they were protecting these women; that they had attempted to get the women passes to leave the area to join the men's families in safer regions; that the relationships were consensual. Let us say that the defence was right: that the women, faced with the choice between life in the detention centre under conditions of certain, repeated rape by many men and life as the forced mistress of one man, *chose* the latter. What should that mean, legally? Should the defendants be able to avoid conviction for rape because the women *consented*?

Feminists and the ICTY found this question to be among the most daunting they faced in the entire course of their work on the Balkan cases. The controversy came to the surface of publicly available documents when the ICTY was drafting its *Rules of Procedure and Evidence*. Rhonda Copelon's Task Force initially advocated striking a balance between maximal conviction, maximal protection of victim witnesses and fairness to the accused, by establishing a presumption in all rape cases that the woman did not consent, based on the coercive circumstances of war.³⁷ They would have allowed the accused to upset that presumption and trigger a trial of the consent issue only by showing in camera and through very probative positive evidence, not including the testimony of the victim, that she had consented. In response, the court initially announced a rule simply precluding any defence of consent!³⁸ When that immediately proved controversial, the court held a number of plenary sessions on the question, during which Copelon's Task Force met with other feminist groups seeking to retain the 'no consent defence' rule. And here, the feminists disagreed amongst themselves. In July 1994, Equality Now and the Coordination for Women's Advocacy argued that the consent defence should simply be eliminated from war crimes trials.³⁹ Two members of Copelon's Task Force submitted a further elaboration of their rebuttable presumption rule, modified to make the

³⁶ *Kunarac (Trial Chamber)* Case No IT-96-23-T/1-T (22 February 2001) [63], [156], [772], [780].

³⁷ Rhonda Copelon, 'Proposals relating to the Prosecution of Rape and Other Gender-Based Violence to the Judges of the International Criminal Tribunal for the Former Yugoslavia' in Jennifer Green et al, 'Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique' (1994) *Hastings Women's Law Journal* 171, 201–3.

³⁸ *ICTY Rules of Procedure and Evidence*, above n 11, r 96(ii). This rule was announced on 14 February 1994.

³⁹ Jennifer Green et al, 'Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique' (1994) *Hastings Women's Law Journal* 171, 218.

presumption *irrebuttable* if the victim was in custody or detention or was underage, and stipulating once again that the accused's in camera relevance/probative-ness showing could not include testimony of the victim. Their stated reason for taking this controversial position was:

We believe that although a legitimate defence of consent is exceedingly unlikely, allowing a strictly limited exception for this defense is important *for the legitimacy of the Tribunal's process* and will make it more relevant as a *precedent — to other armed conflict situations and to 'peacetime'*.⁴⁰

The reasons given here for keeping a consent-related defence in place are all strategic. But it may well have been that these two feminist dissenters did not want a blanket rule that all the sex that women on one side of a conflict have with combatant men on the other can be tried, convicted and punished as rape for substantive reasons as well: that is, they may have thought that some chargeable sex fitting this description was actually wanted by the women involved.

The actual rule finally adopted provides that consent is not a defence if the prosecution can show that the victim was subjected to coercion; and that the accused can present evidence of consent only after it has been tested for relevancy and credibility in camera.⁴¹

The division among feminists was repeated within the ICTY itself, sitting as a Trial Court and Appeals Chamber in *Kunarac*. The trial court held that, for an act of intercourse or other sexual contact to be rape, there did not need to be force or coercion on the part of the accused; there did not need to be resistance on the part of the victim; and there was no need for proof that the victim had refused her consent. Instead, if there was penetration and a *lack of consent*, the accused would be liable.⁴² The *Kunarac* Trial Chamber also adopted a sub-rule, that the

⁴⁰ Ibid 219 (emphases added).

⁴¹ Rule 96, governing evidence in sexual assault cases, reads:

In cases of sexual assault:

- (i) no corroboration of the victim's testimony shall be required;
- (ii) consent shall not be allowed as a defence if the victim
 - (a) has been subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression, or
 - (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial chamber in camera that the evidence is relevant and credible;
- (iv) prior sexual conduct of the victim shall not be allowed in evidence.

ICTY Rules of Procedure and Evidence, above n 11, r 96(ii). For a particularly useful account of the work leading to this rule, see Patricia Viseur Sellers, 'The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law' in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (2000) vol 1, 263, 310–16.

⁴² *Kunarac (Trial Chamber)* Case No IT-96-23-T/1-T (22 February 2001) [420]. The judgment sets forth three ways for the court to find non-consent:

- (i) the sexual activity is accompanied by force or threat of force to the victim or a third party;
- (ii) the sexual activity is accompanied by force *or* a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or

court could infer the lack of consent from the existence of coercive circumstances:

the Trial chamber does not interpret the reference to consent as a 'defence' [in Rule 96] as a reference to a defence in its technical sense ... [Instead, it refers to] matters which would be considered to *negate* any apparent consent.⁴³

That is to say, the *ICTY Rules of Procedure and Evidence* refer to a defence of consent in order to contract it: the *Kunarac* court construes them to set up a *prosecutorial* 'defence' negating any showing by the accused of the victim's consent. Such a 'defence' exists when the court can find that the victim's expressed consent was 'not freely given':

where the victim is 'subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression' or 'reasonably believed that if [he or she] did not submit, another might be so subjected, threatened or put in fear', any apparent consent which might be expressed by the victim is not freely given.⁴⁴

If either of these findings were made, the court could find that the sexual contact had occurred under 'circumstances which made the victim particularly vulnerable' and could infer non-consent as a matter of law.⁴⁵

On appeal, the Appeals Chamber reasoned, moreover, that the 'coercive circumstances' were sufficient to meet this test, and drew authority from legal rules in force in the United States that deem the sexual intercourse of a prison guard and a prison inmate to be rape of the inmate even if both parties loved every minute of it.⁴⁶ The *Kunarac* Appeals Chamber describes the US precedent as establishing a strict liability crime and concludes that the Trial Chamber was under a '*need to presume non-consent here*'.⁴⁷

But as we have seen, the *Kunarac* Trial Chamber actually did not go that far: instead it established a presumption that sexual intercourse between a combatant in armed conflict and an enemy civilian, taking place in the zone of conflict broadly conceived, *could be inferred* to have taken place in coercive circumstances and *could be inferred* for that reason to have lacked consent and to have been coerced. The burden of persuasion on some or all of these inferences was shifted to the defence.

The feminists' ambivalence was repeated, once again, in the *Rome Statute* and its *Rules of Procedure and Evidence*. The Statute itself is completely silent about the elements of the crime of rape and sexual slavery. But the *Rules of Procedure and Evidence*, in rule 70, set out the following 'principles' for adjudicating

(iii) the sexual activity occurs without the consent of the victim: at [442] (emphasis in original).

⁴³ *Kunarac (Trial Chamber)* Case No IT-96-23-T/1-T (22 February 2001) [464] (emphasis in original).

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, in which the Chamber refers to the 'second limb' of the test stated at [442].

⁴⁶ *Kunarac (Appeals Chamber)* Case No IT-96-23-T/1-A (12 June 2002) [130]–[132]. In this section, the court cites from the NJ STAT ANN § 2C:14-2 (2001); *State of New Jersey v Martin*, 235 NJ 47, 56, 561 A 2d, 631, 636 (1989).

⁴⁷ *Kunarac (Appeals Chamber)* Case No IT-96-23-T/1-A (12 June 2002) [131] (emphasis added).

crimes of sexual violence, and indicate that the '[c]ourt shall be guided by, and, where appropriate, apply' them:

- a. Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- b. Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- c. Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence⁴⁸

Note that this formulation mediates between the permitted inference and mandatory presumption forms of the rule struggled over between the ICTY Trial and Appeals Chamber: 'consent ... *cannot* [law] ... *be inferred* [fact]'. We now have a 'rule' that sets forth 'principles' which the court may, at its option, *be guided by* or *apply*. The disagreement that struck the feminists in 1994 and that divided the ICTY Trial and Appeals Chambers clearly re-emerged in the sequel to Rome.

But there is a further twist to the *Rome Statute*, one that will not find its elaboration until cases of sexual slavery are tried and appealed. As we've seen, sexual slavery is now triable in the ICC both as a war crime and a crime against humanity; and as we've seen, the prosecutor already has shown a preference for charging rape and other sexual assaults as sexual slavery. Feminists who would have been entirely on the side of Equality Now and Coordination for Women's Advocacy in the 1994 struggles over the consent defence in the *ICTY Rules of Procedure and Evidence* advocated the inclusion of this new crime precisely because it can be argued to come preloaded with a legal presumption that *no one* is capable of consenting to it:

By definition, [an] exercise of ... [the powers attaching to the right of ownership] involves a negation of consent, which is why the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices in armed conflict stated:

As a *jus cogens* crime, neither a State nor its agents, including government or military officials, can consent to the enslavement of any person under any circumstances. Likewise, a person cannot, under any circumstances, consent to be enslaved or subjected to slavery. Thus, it follows that a person accused of slavery cannot raise consent of the victim as a defence.

If a judge finds that the actions of the perpetrator fall within the first element of the crime of slavery, an evaluation of whether a defence of consent can apply to the sexual acts of the second element is not necessary. ... The fact that consent cannot serve as a defence to the crime of sexual slavery is another advance in international law.⁴⁹

⁴⁸ *ICC Rules of Procedure and Evidence*, above n 13, r 70.

⁴⁹ Valerie Oosterveld, 'Sexual Slavery and the International Criminal Court: Advancing International Law' (2004) 25 *Michigan Journal of International Law* 605, 640, quoting UN Commissioner on Human Rights Sub-Commission on the Promotion and Protection of Human Rights, *Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict: Update on the Final Report Submitted by Ms Gay J McDougall*, UN Doc E/CN.4/Sub.2/2002/21 (6 June 2000) 51.

It remains to be seen whether the 1994 feminist resistance to this formulation will emerge in feminist activist engagements with the ICC. I admit to a hope that this essay will suggest some reasons that it should.

III *A WOMAN IN BERLIN*

A Woman in Berlin presents itself as the contemporaneous diary of a German woman struggling to survive the fall of Berlin to the Soviets in 1945. Chronological entries starting at 4 pm on Friday 20 April 1945 relate events in the present tense; as we read, we are privy to the diarist's written stream of consciousness about what she is experiencing.

The form that the book takes has been crucial to the two waves of controversy that it has provoked in Germany; one when it was first published in German in 1959 and another on its republication in 2003. At stake both times has been the link between the book's truthfulness and its moral import: if true, it is a moral indictment of the Soviets (for raping), of the Nazis (for the national calamity of Germany), of the Woman (for being raped), of German men (for letting her be raped). If untrue, it is anti-Soviet, pro-Nazi propaganda, an assault on the honour of German women and the masculinity of German men (1959) — or anti-Soviet, pro-West propaganda or an assertion of German suffering during the War in which German aggression provoked so much suffering (2003). The provenance of the book — the anonymity and identity of the author and the way in which her diary came to be a book in the first place — have been central to these controversies from the start. The debate has repeated the following logic with relentless fidelity: if the diaries are a naïve transcript of the Woman's experiences, they are true; if they have been shaped by any conscious intentions, they are false. The *literariness* of the text has been firmly associated in these debates with its *falsity*. And if literary, and false, the *Diary*⁵⁰ is motivated by occult ideological investments which it is the task of interpretation to root out; if naïve, and true, it teaches us undiluted lessons, more or less in the form of a direct *aperçu*.

In this section, I will tell the story of the second wave of controversy in order to situate the book firmly in its known provenance, and to designate as clearly as possible the things we cannot verify about it and its historical claims. My ultimate aim is to dissolve the tight association of truth with moral certitude and of literary artifice with ideological spin. *A Woman in Berlin* is a better book than that; that is, it is a more *literary* book than that. In the following section, I take advantage of this opening onto the literary to read this little book as providing *a template for understanding* the claims about truth and moral judgement that can be — have been and probably will again be — made when wartime violence includes sexual violence.

First, a brief restatement of the publication history of the *Diary* in its English and German language versions. It was first published in the US in English

⁵⁰ Anonymous, *A Woman in Berlin: Eight Weeks in the Conquered City: A Diary* (Philip Boehm trans, 2005 ed) [trans of: *Eine Frau in Berlin*] ('Diary').

(1954);⁵¹ and subsequently in Britain (1955);⁵² and then in German by a Swiss publishing house (1959).⁵³ The second version was published in German in Germany (2003)⁵⁴ and re-translated into English and published in the US (2005)⁵⁵ and in Britain (2005).⁵⁶ I will call these, collectively, the first version and the second version. The first version was edited and introduced by Kurt M Marek; the second by Hans Magnus Enzensberger.

Both editors have posited that the published *Diary* constitutes the very transcription of their anonymous author's contemporaneous diary. In his introduction to the first published version of the book, Marek describes the manuscript — 'the short pencilled notes ... ; the combination of shorthand, longhand and secret code ... , the significant abbreviations' — and assures us of its objective existence: 'These pages lie before me while I write'.⁵⁷ He claims to know the building described as the Woman's residence almost throughout the diary and vouches for the accuracy of her descriptions of it. And he concludes:

we are faced, then, not with a literary creation whose author has an eye on the public but with a document. ... What I have written here should make it amply clear that this book contains the truth and nothing, but the truth.⁵⁸

In his introduction to the second published version of the book, published in English in 2005, Enzensberger tells us that the author transcribed the notes described by Marek into '121 pages of gray war-issue paper' and that '[t]hese pages — authenticated along with the original notebooks by a foremost expert on twentieth century diaries — stand as a shattering indictment and complete our record of the time'.⁵⁹ The German language cover of this second version links these claims for veracity to the author's refusal to disclose her name: it includes a banner announcing that '[i]t was the desire of the author that her name remain anonymous. Because of this, speculations about her identity are forbidden'.⁶⁰

The new German language edition quickly became a best seller and a significant critical success.⁶¹ But the editors' claims for the book's authenticity, their efforts to weave for it a mantle of objectivity using the warp of the

⁵¹ Anonymous, *A Woman in Berlin* (James Stern trans, 1954) [trans of original German manuscript]. The introduction to this edition was written by C W Ceram. C W Ceram is the acknowledged penname of Kurt M Marek: see Obituary, 'C W Ceram of "Gods, Graves and Scholars" Dies', *The New York Times* (New York, US) 13 April 1972, 46.

⁵² Anonymous, *A Woman in Berlin* (James Stern trans, 1955 ed) [trans of original German manuscript]. The introduction to this edition was also written by C W Ceram.

⁵³ Anonyma, *Eine Frau in Berlin: Tagesbuchzeichnungen* (1959), with a foreword by Kurt W Marek.

⁵⁴ Anonyma, *Eine Frau in Berlin: Tagebuchaufzeichnungen vom 20. April bis 22. Juni 1945* (2003), with a foreword by Kurt W Marek.

⁵⁵ *Diary*, above n 50. This edition contains a foreword by Hans Magnus Enzensberger and an introduction written by Antony Beevor.

⁵⁶ Anonymous, *A Woman in Berlin: Diary 20 April 1945 to 22 June 1945* (Philip Boehm trans, 2005) [trans of: *Eine Frau in Berlin*]. This edition also contains an introduction written by Antony Beevor, with an afterword by Hans Magnus Enzensberger.

⁵⁷ C W Ceram, 'Introduction' in Anonymous, *A Woman in Berlin* (James Stern trans, 1954) [trans of original German manuscript] 6.

⁵⁸ *Ibid* 5–6.

⁵⁹ Hans Magnus Enzensberger, 'Foreword' in Anonymous, *Diary* (2005) x.

⁶⁰ Anonyma, *Eine Frau in Berlin*, above n 54.

⁶¹ A collection of German language reviews can be found at *Eine Frau in Berlin: die Tageszeitung* <http://www.arlindo-correia.com/eine_frau_in_berlin.html> at 23 May 2008.

manuscript's real-time composition and woof of the author's anonymity, have not gone unchallenged. German journalist Jens Bisky, originally an admirer of the book,⁶² soon accused Marek and Enzensberger of a litany of editorial crimes.⁶³ Enzensberger, Bisky charged, asked readers to rely on his personal testimony to the authenticity of the text and the character of the Woman, invoked expert authentication without providing any evidence to support it, and refused to provide access to the manuscript and typescript so that the public could decide for itself how faithfully the published version tracks the typescript and how closely the typescript tracks the manuscript notebooks.⁶⁴ He delved into Marek's ideological history and possible motives for publishing the *Diary* and for manipulating the text, detecting anti-Soviet 'propagandistic' motives.⁶⁵ And he found correspondences between the disclosed facts about the Woman's life and those known about German journalist Marta Hillers, posing the question whether Hillers was the original author of the *Diary*. Bisky is often reported to have concluded that Hillers *was* the Woman, and this identification has since been taken as fact: Wikipedia has a page under the name Marta Hillers, where it credits her with the composition of the *Diary*.⁶⁶ In actuality, Bisky never made any claim so positive. Instead, he laid out the known facts of Hillers' life and posed a series of questions, which he declined to resolve, about her possible political orientation to the Soviets and the Nazis in the pre-war and wartime years:

While writing ... as a kind of small propagandist for the Third Reich, did she nevertheless already possess that internal distance from Nazism, which characterizes the tone in the diary? I do not know. Like most people, she was probably occasionally bothered by the regime, but welcomed the feeling of community ... The same reasons that led this young woman to Moscow might also have made her a good citizen of the Third Reich.⁶⁷

However sympathetic this passage may be, in it Bisky implies that we should not look to good citizens of the Third Reich and Soviet sympathisers for our definitive account of the fall of Berlin.

A fierce controversy ensued,⁶⁸ in which Enzensberger gave numerous reviews denouncing Bisky and defending the Woman.⁶⁹ Neither Enzensberger nor

⁶² Jens Bisky, 'A Little Detour on the Way to the West', *Süddeutsche Zeitung* (Munich, Germany) 10 June 2003, 10 [trans of: *Kleine Fußnote zum Untergang des Abendlandes*]. Unless otherwise stated, all German newspaper articles cited throughout this essay have been translated by Alison Kamhi (2007, unpublished). These translations are on file with the author.

⁶³ Jens Bisky, 'When Young Men Enact World History, Women Have Silent Roles', *Süddeutsche Zeitung* (Munich, Germany) 24 September 2003, 16 [trans of: *Wenn Jungen Weltgeschichte spielen, haben Mädchen stumme Rollen*]. The otherwise puzzling title repeats part of Bisky's quotation from a newspaper article on children's games published in 1935 by Marta Hillers.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Wikipedia Deutsch, *Marta Hillers* <http://de.wikipedia.org/wiki/Marta_Hillers> at 23 May 2008.

⁶⁷ Bisky, 'When Young Men Enact World History, Women have Silent Roles', above n 63, 16.

⁶⁸ For a somewhat tendentious summary of the 2003 German debate over *A Woman in Berlin*, see Jody Raphael, 'Review Symposium: Silencing Reports of Sexual Assault: The Controversy over *A Woman in Berlin*' (2006) 12 *Violence against Women* 693.

Hannelore Marek, the widow of Kurt Marek and the custodian of the manuscript and typescript, confirmed or refuted Bisky's speculations as to the Woman's identity. But as the debate proceeded, new players intensified the confrontation over the authenticity and veracity of the *Diary's* reports and the role of political ideology in its production. I will provide two samples, one pro and one con.

The new English language edition, published into the controversy set off by Bisky's bombshell article, includes a new introduction that I think we are entitled to read as the official editorial defence. It is written by Antony Beevor, a famed scholar of the European War; Beevor had published his magisterial book *The Fall of Berlin 1945* just three years before he stepped in to defend the *Diary*.⁷⁰ In his introduction, Beevor indirectly addresses Bisky:

some have raised doubts over the authenticity of the work, but experts on personal documents from the period have confirmed that the diary's transcript is original and completely genuine.⁷¹

Beevor goes on to vouch for the *Diary* based on his own expert reading of it. He refers to forged wartime diaries that he had helped to identify and then concludes:

Yet any such suspicions I might have had about *A Woman in Berlin* were soon discarded. The truth lay in the mass of closely observed detail. The anonymous diarist possessed an eye so consistent and authentic that even the most imaginative forger would never have been able to reproduce her vision of events.

⁶⁹ There are many reports of what Enzensberger said to the press but, as far as I know, only one direct interview: Szene Kultur, Interview with Hans Magnus Enzensberger, 'The Hidden Findings of Snoops', *Der Spiegel* (Hamburg, Germany) 29 September 2003, 147 [trans of: *Verdeckte Ermittlungen von Schnüfflern*].

⁷⁰ Antony Beevor, *The Fall of Berlin 1945* (2002).

⁷¹ Antony Beevor, 'Introduction' in Anonymous, *Diary* (2005) xvi. It is not clear whether Beevor is the 'expert' invoked by Enzensberger in his foreword. Beevor, on the other hand, refers to 'experts', without clarifying whether he himself is one of these experts and without naming any of them. Beevor's introduction never claims that he has seen the manuscript or the typescript versions of the *Diary*. Both men may be referring to an authentication apparently commissioned by the Eichhorn publishing house and carried out by Walter Kempowski and published in the *Frankfurter Allgemeine* in January 2004: Walter Kempowski, 'Unchanging Tone: No Doubt about "A Woman in Berlin"', *Frankfurter Allgemeine Zeitung* (Frankfurt am Main, Germany) 20 January 2004, 35 [trans of: *Gutachten zur Authentizität des Tagebuchs der Anonyma: Unverwechselbarer Ton*]. For discussion of this authentication and its limits, see Ursula März, 'The Principle of Waiting it Out', *Frankfurter Rundschau* (Frankfurt am Main, Germany) 21 December 2003, 15 [trans of: *Das Prinzip Aussitzen*]; Joachim Günthner, "'A Woman in Berlin" — Walter Kempowski provides his Opinion', *New Zürcher Zeitung Online* (Switzerland) 19 January 2004 [trans of: *"Eine Frau in Berlin" — Walter Kempowski legt Gutachten vor*] <<http://www.nzz.ch/2004/01/19/fe/article9CNMS.html>> at 23 May 2008.

Just as importantly, other written and oral accounts that I had accumulated during my own research into the events in Berlin attest to the truth of the world she describes.⁷²

The Woman's bold and clear writing revealed her objectivity: Beevor praises in her 'the close relationship between an inquiring mind and intellectual honesty'.⁷³ He then concludes:

A Woman in Berlin is a war diary unlike any other. This is a victim's eye view, a woman's perspective of a terrifying onslaught on a civilian population, yet her account is characterized by its courage, its stunning intellectual honesty, and its uncommon powers of observation and perception. It is one of the most important personal accounts ever written about the effects of war and defeat. It is also one of the most revealing pieces of social history imaginable.⁷⁴

This defence suggests that the new supporters of the *Diary* became even more committed to its documentary, not literary, character than Marek had been.

Meanwhile, the opposition became more entrenched and more confident about attributing malign ideological motivations to the *Diary* and its proponents. In a letter objecting to *The New York Times*' favourable review of the 2005 English edition, Gottesmann criticised the reviewer for omitting any mention of Bisky's article. The ideological valence of the text was much clearer to Gottesmann than it was to Bisky: it was pro-Nazi. Marta Hillers, he wrote (drawing very selectively from Bisky's much more nuanced report), 'although no member of the Nazi Party, wrote for minor journals and newspapers during the Third Reich and worked on a navy recruiting brochure'.⁷⁵ Marek is similarly suspect: he 'wrote a book titled *Wir hielten Narvik* (We held Narvik), an account based on diary entries of the heroic battle of the Wehrmacht'.⁷⁶ We *certainly* would not expect objective reporting on the fall of Berlin from Gottesmann's Hillers or from his Marek.

Throughout this controversy, the proponents of the *Diary* construe it as a direct, unmediated documentary account of what actually happened, as politically objective, and as a — if not *the* — superlative statement of the assault upon German civilians, especially German women, wrought by the Soviet invasion of Berlin. But for Bisky, '[t]he book is worthless as a historical

⁷² Beevor, 'Introduction', above n 71, xvi.

⁷³ Ibid xvii.

⁷⁴ Ibid xxi.

⁷⁵ Christoph Gottesmann, 'Letter: A Woman in Berlin', *The New York Times* (New York, US) 11 September 2005, 6. Gottesmann objects to Joseph Kanon's review: Joseph Kanon, 'My City of Ruins', *The New York Times* (New York, US) 14 August 2005, 12.

⁷⁶ Ibid. Marek did indeed publish such a book: C W Ceram, *Wir hielten Narvik* (1942). Marek's *The New York Times* obituary makes a counter-argument to this effort to taint him with involvement in Third Reich propaganda: it is careful to point out that he was drafted into the Wehrmacht and that he abandoned writing contemporary history for a career in the archaeology of antiquities so that he could write free of political interference: Obituary, above n 51, 46.

document'.⁷⁷ Instead:

What has been documented about this document? The diary appeals to our moral faculty of judgement, requires that we re-examine our opinions of history. We can only do that, however, if we have the versions of the text and know the history of its development to know who wrote which.⁷⁸

What are we to make of this intense and emotionally fraught controversy? One thing seems absolutely clear: it cannot be resolved, on its own terms, given what we can know pending public disclosure of the manuscript and typescript.⁷⁹

⁷⁷ Bisky, 'When Young Men Enact World History, Women have Silent Roles', above n 63, 16.

⁷⁸ Ibid. Bisky concludes: 'This is a literary event at least as compelling as that of the Jakob Littner and Wolfgang Köppen': at 16. Bisky's closing salvo likens *A Woman in Berlin* to Wolfgang Köppen's supposed novel, *Jakob Littner's Notes from a Hole in the Ground* (1992). In the mid 1990s, this text was revealed to have actually been the diary of a German Jew, named Jakob Littner, about his Holocaust experiences, containing only a few ersatz embellishments added by Köppen: Phil McCombs, 'Pages Torn from a Life: Jakob Littner Survived to Write of the Holocaust. Years Later, a Novelist Tampered with the Truth', *The Washington Post* (Washington DC, US) 25 July 2000, C1. If *Notes from a Hole in the Ground* was deceptively offered as a novel by one writer and revealed to be the authentic diary of someone else, Bisky implies, *A Woman in Berlin* might have been deceptively offered as an authentic diary so as to mask the fiction-making activities of someone or everyone involved in its publication — that is to say, to obscure its novelistic character.

⁷⁹ Here is what I have been able to glean about the production of the version I am reading, from the introductions provided by the pro-*Diary* team, from the controversy summarised above, and from correspondence with Hannelore Marek, widow of Kurt Marek and custodian of the manuscript. We know that the first version of the *Diary*, published in the mid-to-late 1950s, was at least initially ushered to press by Marek, who describes himself as a personal friend of the Woman. The 2005–06 version was edited by Enzensberger. Both men provided explanations of their work in an introduction or afterword: both claim to have seen the manuscript and the typescript of the diary and to have direct knowledge of the diarist's reluctance to publish; both vouch for the authenticity of the text as we have it and of its transparency as a report of the author's own experiences.

Enzensberger tells us that the Woman wrote about her experiences contemporaneously throughout the eight weeks starting just before the fall of Berlin, often writing by candlelight and always with a pencil, and producing ultimately three separate notebooks: Enzensberger, 'Foreword', above n 59, ix–xii. The text itself describes the manuscript as it existed sometime before 22 June 1945, as full of 'scribbling and the notes stuck inside with all the shorthand and abbreviations': Anonymous, *Diary*, above n 50, 260. Enzensberger tells us that, during July of that year, the Woman converted this jumble of paper into a coherent typescript on '121 pages of gray war-issue paper': 'In the process, words became sentences, allusions were clarified, loose sheets were incorporated where they belonged': Enzensberger, 'Foreword', above this note, x. Hannelore Marek, Kurt Marek's widow, apparently indicated to the German press that there was yet another typescript intermediate between the 1945 typescript made by the Woman herself and the first printed version: Gustav Seibt, 'Counting Pebbles', *Süddeutsche Zeitung* (Munich, Germany) 21 January 2004, 14 [trans of: *Kieselsteine zählen*]. Aside from Seibt's article, I am unaware of any other reference to a second typescript.

Marek's 1955 introduction tells us that, in 1946, he sought out and found the Woman at her apartment in Berlin; the details clearly represent this meeting as the reunion of old friends. She later showed him the manuscript. It took him, he says, more than five years to persuade her to publish it. Marek moved to the US in 1954 and oversaw the *Diary*'s publication in English.

We don't know how or why its first German language version comes from a Swiss, rather than a German, publishing house. If the woman was Marta Hillers, we know she was then living in Switzerland and that may provide the reason. Several sources indicate that Hillers (whom they assume was the Woman) moved to Switzerland during the Soviet blockade of Berlin: see, eg, Luke Harding, 'Row over Naming of Rape Author — Fury after German War Diary Writer's Identity is Revealed', *The Observer* (London, UK) 5 October 2003, 20.

Bisky is clearly right that the editorial status of the *Diary* includes significant uncertainties. We don't know anything about the admittedly pervasive differences between the manuscript and the typescript; we don't know whether Marek modified the typescript in any way before submitting it to the typesetter. If the manuscript and typescript are ever disclosed, systematic synoptic comparisons could finally be done. They would answer many questions; particularly, they would allow us to understand how the Woman transformed the manuscript into the typescript and to detect any late-stage interventions by Marek in the text of the first version. We would probably know, for instance, whether retaining or deleting that ghost final paragraph makes the text more faithful to the typescript.

As Alison Kamhi shows in her forthcoming paper, this intensely orthogonal conflict over the *Diary* is structured not by *its* relationship to truth and falsehood but by the intense problematic that structures the possibilities for narrating the German experience of the Third Reich and the War — a structural problematic

According to Bisky, *A Woman in Berlin* was Marta Hillers' only major work. After the war, she circulated her diary among friends. On this version of events, Marek recognised its value, and had it published in America. Hillers later married, moved to Switzerland, abandoned journalism, and disappeared. It was only after her death in June 2001, at the age of 90, that her memoir could be republished: Bisky, 'When Young Men Enact World History, Women have Silent Roles', above n 63, 16.

Enzensberger implies that the German press, like the German reading public, was 'not ready' for the book's explicitness about the war and the horrors attending it: Enzensberger, above this note, xi. Nothing in my research enables me to authenticate his quotation or verify his understanding of the early German reception of the *Diary*.

The book went out of print and was largely forgotten. Samizdat photocopies circulated in Germany among leftists and feminists during the turmoil of 1968: Enzensberger, above this note, xi; Raphael, above n 68, 695. But otherwise the *Diary* went quiet. Enzensberger began efforts to republish the *Diary* in 1985. He contacted Hannelore Marek. Mrs Marek, who had stayed in touch with the Woman, informed Enzensberger that the Woman refused to allow republication of her *Diary* during her lifetime — 'an understandable reaction,' says Enzensberger, 'given the dismal way it was originally received': Enzensberger, above this note, xi.

In 2001, Hannelore Marek contacted Enzensberger to inform him that the Woman had died; he initiated the process leading to the new versions of 2005–06.

How different are the two published versions? That there are some changes is clear. Enzensberger's introduction tells us that the new edition restores some matter that had been deleted from the 1950s publications 'to avoid touching on delicate matters or to protect the privacy of people still alive': Enzensberger, above this note, xii. It is easy to verify that the new edition deletes a final paragraph, included in the first version, setting out the Woman's plan to produce the typescript. Enzensberger and Mrs Marek indicated to the German press that all these changes were authorised by the Woman before she died and agreed to by Mrs Marek herself: Felicitas von Lovenberg, 'A Woman in Berlin: No Doubt on Anonymous' *Diary*', *Frankfurter Allgemeine Zeitung* (Frankfurt am Main, Germany) 25 September 2003, 42 [trans of: *Eine Frau in Berlin: Kein Zweifel an dem Tagebuch der Anonyma*]; Szene Kultur, above n 69, 147; Seibt, above this note, 14.

It would be possible but quite difficult to collate the two versions; I have not attempted it because it is quite pointless to do this work on the English translations. There is no apparatus indicating which passages were changed. Nor does Enzensberger indicate whether the new German language version was produced directly from the typescript or by editing the 1959 printed version; one assumes it was generated from the typescript. The version I am reading is the new English translation of this new German language version of the *Diary*. It is copyrighted to Hannelore Marek. She has possession of the 1945 manuscript and typescript and, though she has indicated that she will make them public, she has not done so yet: Letter from Hannelore Marek to Alison Kamhi and Janet Halley, 26 April 2007 (original on file with the author).

that is permeated by the ideological oppositions generated by German remorse and blame about the War in the post-War period and by German opposition to and complicity with the Soviet Union pre-Reunification. It has been clear from the very first edition of the book that the published text is not identical to the original diary. Marek regrets this:

These pages [the manuscript] lie before me as I write. Their vividness as expressed in the furtiveness of the short penciled notes; the excitement they emanate [sic] whenever the pencil refuses to describe the facts ... all of this will probably be lost in the depersonalizing effect of the printed word.⁸⁰

And I think it is a profound error to suppose that the question which we should, or even could, aim to answer, if we knew more, is: 'Is *A Woman in Berlin* an objective contemporaneous account of the Woman's actual experiences in the fall of Berlin?' The admitted fact that she translated the manuscript into the typescript means that retrospection and literary art played an important role in the making of the first coherent text. And even if we could study the manuscript, admitted by everyone to be contemporaneously written, we would be studying her initial efforts to make her experiences intelligible, to translate them from event to language. No amount of collation will eliminate the possibility that the author's literary consciousness shaped her very first scribbles.

The Bisky/Enzensberger debate so far has assumed that, if *A Woman in Berlin* is true, then it is not literary; and that if it is literary, it is not true. For Marek, Enzensberger and Beavor, the book is a document of social history, a transparent window onto objective events — and for that reason it is also an indictment, a moral judgement, the capstone on our knowledge of the final defeat of the Third Reich. Bisky and Gottesman repeat this intellectual operation, but in reverse. Bisky objects that 'the recordings begin like the beginning of a movie ... Was there an Anonymous woman in Berlin at all or is she a literary figure?'⁸¹ Gottesmann asks:

who could think — after reading the first day of the diary, April 20, 1945, Hitler's birthday (which is not mentioned in the book) — that this work was written without readers in mind, as ... [*The New York Times*' reviewer] suggests ... ?⁸²

And if it's literary, and is for that reason not true, ideological reasons must be sought for its composition, its revision, and its dissemination.

This seems to me to place this fascinating text at the crux of a false dilemma.⁸³ In the pages that follow I assume that this *Diary* is a literary artefact. I have before me the motto of the great poet John Milton: 'the author is ever

⁸⁰ Ceram, 'Introduction', above n 57, 6.

⁸¹ Bisky, 'When Young Men Enact World History, Women have Silent Roles', above n 63, 16.

⁸² Gottesmann, 'Letter: A Woman in Berlin', above n 75, 6. Gottesman got his facts wrong: the entry for 21 April 1945 clearly refers to the fact that the day before had been Hitler's birthday: Anonymous, *Diary*, above n 50, 11.

⁸³ Others share my reaction: see Constanze Jaiser, H-Soz-u-Kult, Humboldt University, Berlin, Germany, *Rezension zu: Anonyma: Eine Frau in Berlin, Tagebuchaufzeichnungen vom 20. April bis 22. Juni 1945 (2003)* <<http://hsozkult.geschichte.hu-berlin.de/rezensionen/2003-4-138>> at 23 May 2008.

distinguish from the person he introduces'.⁸⁴ Following it, I offer here a reading of the Woman, not as an actual individual woman living in Berlin in 1945 but as our *narrator* — as the person introduced by this actual author to *represent* the fall of Berlin from an *imagined* point of view. I read the text *as text*. And I seek to change the question, to ask — not whether the text is true or false, transparent and objective or confabulated and ideologically suspect — but how it structures our language for understanding the relationship between rape and other kinds of violence in war.

A Reading A Woman in Berlin, Reading Rape

In *A Woman in Berlin* we read that, starting at nightfall on the first day of the city's occupation, the Woman and other women in her building and neighbourhood were raped, again and again.⁸⁵ Not surprisingly, it is typical to read *A Woman in Berlin* as a story about rape.⁸⁶ However, there is another way to read this text: as a book about the complete destruction of the Woman's social world and its gradual, halting, and, by the end, only partial replacement by a new one. On this reading, rape is immersed into the fact of national collapse, wartime defeat; rape is an element of her world but not its metonym and certainly not its totality.⁸⁷

This is the war-rape antinomy that we encountered in the first section of this essay, offered now as a problematic not about how to use law to prevent rape and death, but how to *describe* rape and death, how to have a morally adequate reaction to their immediate juxtaposition.

Here is one way to capture this antinomy about the very subject matter of the book. The *Diary* marks Friday 27 April 1945, the day the Soviet army encamped on its author's street, as a 'day of catastrophe', a day of 'wild turmoil'.⁸⁸ By eight pm that night soldiers had begun raping German women, the Woman not excepted. The very next day she responds with relief at seeing her third rapist arrive at her door: 'A uniform. Shock. The widow clutches my arm. Then a sigh of relief — it's only Petka'.⁸⁹

It is a repeated problem, thematised by the text as we will see, that the Woman accepts her rapist in this scene, and her rapes, with calmness, almost

⁸⁴ John Milton, 'An Apology against a Pamphlet Call'd A Modest Confutation of the Animadversions upon the Remonstrant against Smectymnuus' in Don M Wolfe (ed), *Complete Prose Works of John Milton — Volume 1: 1624–1642* (1953) 880.

⁸⁵ Anonymous, *Diary*, above n 50, 52.

⁸⁶ See, eg, Renée Zucker, 'It Sounds Like the End, but It's Not', *Die Tageszeitung* (Berlin, Germany) 23 May 2003 [trans of: *Es klingt wie das Letzte, Ist es aber Nicht*] 14.

⁸⁷ See, eg, Walter O Weyrauch, 'The Experience of Lawlessness' (2007) 10 *New Criminal Law Review* 415.

⁸⁸ Anonymous, *Diary*, above n 50, 44.

⁸⁹ *Ibid* 60.

with complacency.⁹⁰ She reports only four emotionally suffused moments — direct encounters with the limit of bearable feeling — and none of them, as far as she is concerned, is about rape. Rather, she describes them as moments in which she faced the loss or disenchantment of communal possibility. That is to say, her moments of most intense emotional misery reiterate the rape-war antinomy.

I will save the first episode for later, because it involves sex which, some would say, constituted rape, though the Woman denies this. The second instance comes when she is evicted from the apartment she had moved into when hers was ‘bombed out’.⁹¹ ‘The widow’ and her boarder Herr Pauli required her to move out when, after the Russian army moved on, she could no longer solicit food from the soldiers and so became a net drain on the ad hoc household’s food supply. Before the occupation, she had relished the communal life that she had shared with her neighbours in bomb shelters and the adventitious households everyone invented in the breakdown of enforced domesticity.⁹² Yet when the stringencies of proper householding began to re-emerge, she faced abandonment, the ‘orphan’s lot’. It’s ‘bad news’, and she records — a very rare event — shedding a tear.⁹³

The third and fourth are moments of intense tragic sensibility presented as distinctly *aesthetic* crises. They both arise when she registers something like a sense of national participation in the death camps and their orderliness. On first hearing ‘the disclosures’ she is pushed to the edge of her endurance:

On top of that everything was supposedly carefully recorded in thick ledgers — a scrupulous accounting of death. We really are an orderly nation. Late in the evening they played Beethoven, and that brought tears. I turned it off. Who can bear that at this moment?⁹⁴

Another evening she hears further reports: the ‘order and thrift’ of it she describes as ‘the most horrific thing ... Aeschylus never saw anything like that’.⁹⁵

Faced with this refusal to characterise her rapes as the distinct matter of her woe or grief, and her persistent location of those emotions elsewhere, we are left with two options for how to behave as readers. If we understand that the *Diary* is a book about rape, we will construe her complacency about her rapes as the symptom of her emotional illiteracy, cauterised sensibility, and amputated emotional capacity. We can decide to distrust her entire reportage for this reason or we can read these deficits as evidence of post-traumatic stress disorder, dissociation, denial, trauma, and thus as part of the *damage* the rapes did. But if

⁹⁰ The Woman’s emotional stance has persistently been problematic for readers. A myriad of citations could be collected, but their range is well represented by the stances taken by Marek and Beevor, respectively. In his 1955 introduction, Marek anticipated this objection: ‘What strikes us as most shocking is the cold objectivity with which she makes her reports ... What strikes one as strange in this book is its absence of hatred’: Ceram, ‘Introduction’, above n 57, 8. He explains her detachment as founded in shock and hunger, but later reviewers would turn it into a positive authenticating virtue. Beevor, for instance, concludes that ‘the author shows bravery and resilience, her account revealing the close relationship between an inquiring mind and intellectual honesty’: Beevor, above n 71, xvii.

⁹¹ Anonymous, *Diary*, above n 50, 2.

⁹² Ibid 7–10.

⁹³ Ibid 228.

⁹⁴ Ibid 223.

⁹⁵ Ibid 257.

we read the *Diary* as a book representing a protagonist experiencing, painfully, the collapse of a world and its gradual replacement by a new one, we will trust her, even admire her, for crying only at the really important moments. It's also, possibly, the other way around: if we distrust the speaker's sensibility, it's a book about rape; if we trust it, it's a book about war.

This tension is, I think, a structural problem in the *Diary*, and it makes the value and intensity we should attribute to her rapes repeatedly problematic. Let's look at two moments, early in the story of the occupation of her street by Soviet soldiers, moments when the text voices the Woman in near-epiphanic reverie about the rapes. The first of my examples comes when she has already been raped several times. As she retells her experience, she first registers this newest assault as a violation not of herself but of her clothes: 'No sound. Only an involuntary grinding of teeth when my underclothes are ripped apart. The last untorn ones I had'.⁹⁶ How are we to understand this? Is she immunising herself through a pathetic denial? Suffering an utter loss of contact with reality? Attending to the really important things in her life, like having clothes to wear? Then:

Suddenly his finger is on my mouth, stinking of horse and tobacco. I open my eyes. A stranger's hands expertly pulling apart my jaws. Eye to eye. Then with great deliberation he drops a gob of gathered spit into my mouth.⁹⁷

This — and not the repeated forced coitus she has suffered so far — produces her first report of intensely dysphoric subjective experience:

I'm numb. Not with disgust, only cold. My spine is frozen: icy, dizzy shivers around the back of my head. I feel myself gliding and falling, down, down, through the pillows and the floorboards. So that's what it means to sink into the ground.⁹⁸

And it is out of that reaction she produces her first decision to act on her own behalf. After puking (remembering not to flush as water was short and she might vomit again):

Then I make up my mind. No question about it: I have to find a single wolf to keep away the pack. An officer, as high-ranking as possible, a commandant, a general, whatever I can manage. After all, what are my brains for ... ?⁹⁹

She immediately secures one such protector, and soon has to juggle two.

This is a seriously ambiguous story. On one reading, we understand that the diarist 'got it' that she was being raped only when she had, literally, to face it. Raped *by being* spat into, she receives into her body, against her will, viscous fluid produced by a man who forces her to accept it because he wants to hurt her. On this understanding, the glob of spit refers profoundly to the rapes and wakes her up to her deeply threatened situation. And on this reading, we probably think that she strategises to protect herself precisely in the vocabulary of male domination: the degree to which she is completely trapped, and to which her

⁹⁶ Ibid 63.

⁹⁷ Ibid.

⁹⁸ Ibid 64.

⁹⁹ Ibid.

‘single wolf’ will be merely a more familiar and steady rapist, is clear. Rape in the mouth, rape negotiated for under coercive circumstances: it’s all rape.

But there’s another reading even of this horrifying passage. It starts from the premise that the rapes didn’t touch her deeply; they were bad, but there was something worse, and that was being spat into. If we understand it this way, we probably also would say that reaching *this* nadir instantly provoked her life-preserving and affirming capacities: her search for ‘one wolf’ is saturated with a will to live, a resistance, a vivid managerial confidence, that differentiates it from her complete abjection at the moment the glob of spit dropped into her mouth, and surely then, also from the less acute concessions she had to make to her protectors.

The genre question now becomes: is this a story about rape *or* about the Woman’s choices in the context of war? The polarity of this dilemma is set up again by the Woman’s second reverie:

Anyway, the unbridled raping sprees of the first few days are over. The spoils are now in short supply. I hear that other women have done the same thing I have, that they’re now spoken for and therefore taboo. ... As a rule, those [Russian soldiers] who don’t have marching orders in their pockets look for a more permanent arrangement, something exclusive, and they’re prepared to pay. They’ve realized how bad off we are when it comes to food. And the language of bread and bacon and herring — their principal gifts — is internationally understood.

As for me, the major [her second ‘wolf’] has brought all sorts of things; I can’t complain. First he brought a pack of candles under his coat. Then more cigars for Pauli. ...

Herr Pauli and the major had a friendly smoke, and I sat there brooding.¹⁰⁰ This is a new situation. By no means could it be said that the major is raping me. One cold word and he’d probably go his way and never come back. So I am placing myself at his service of my own accord. Am I doing it because I like him or out of a need for love? God forbid! For the moment I’ve had it up to here with men and their male desire; I can’t imagine ever longing for any of that again. Am I doing it for bacon, butter, sugar, candles, canned meat? To some extent I’m sure I am. ... In addition, I like the major, and the less he wants from me as a man, the more I like him as a person. ... He’s probably not so much after sexual contact as human companionship, female company — and I’m more than willing to give him that. For out of all the male beasts I’ve seen these past few days he’s the most bearable ... I can actually talk with the major. Which still isn’t the answer to the question of whether I should now call myself a whore, since I am essentially living off my body, trading it for something to eat.¹⁰¹

¹⁰⁰ When a female protagonist ‘sits there brooding’, we are faced with an intensely literary event, a narrative trope repeating a crucial set piece in the evolution of the novel of consciousness. Think of Emma’s ransacking her sore conscience after the Box Hill outing in *Emma*, Dorothea’s brooding acceptance of a complete life defeat in *Middlemarch*, Isabel Archer’s night sitting by the fire to realise of the depth of her betrayal by Osmond and Madame Merle in *The Portrait of a Lady*. That this ‘entry’ in the *Diary* suddenly accumulates so many marks of bourgeois domesticity — monogamous heterosexual couples parcelling out and stabilising power dynamics everywhere; cigars, sausages and candles taking over the visual landscape; the murmur of peaceful conversation between men while a woman broods — intensifies the reference.

¹⁰¹ Anonymous, *Diary*, above n 50, 115–16.

The Woman then wonders whether she actually *likes* being a prostitute, and is relieved to find herself capable of saying a clear ‘No’: ‘So there’s no need to worry. I’ll be overjoyed to get out of this line of work, if that’s what I have to call my present activity, as soon as I can earn my bread in some more pleasant way’.¹⁰² Providing sex and companionship for the major in exchange for food: the wartime equivalent of a paid job.¹⁰³

But is it a ‘line of work’ at all? After all, she has just written that she’s ‘more than willing to *give* him’ her companionship, because that (not sex) is what he *mostly* wants. This query takes us back to the moment when she first connected with the major. What we have, in the text, indicates that she actually *wanted* her first fuck with him. Here’s how it goes:

Just one day before her reverie about prostitution, the major appeared for the first time in her apartment, sought her permission to come into her bedroom, and when she didn’t grant it, came in anyway.¹⁰⁴ In these passages, the Woman strongly suggests that she then felt utterly powerless to deny him anything he wanted from her. Another rape? An act of prostitution? Well, neither term seems to capture it:

He takes my hand and clasps it firmly with both of his, then says, with pathetic eyes and trembling lips, ‘Forgive me. It’s been so long since I’ve had a woman’.

He shouldn’t have said that. Next thing I know I’m lying with my face in his lap sobbing and bawling and howling all the grief in my soul. I feel him stroking my hair. Then there’s a noise at the door. We both look up. The door is ajar, the widow is standing there holding a candle, asking anxiously what the matter is. The major and I both wave her away. She undoubtedly sees that nothing bad is being done to me. I hear the door closing once again.

A little later, in the dark, I tell him how miserable and sore I am and ask him to be gentle. He is gentle and silently tender, is soon finished and lets me sleep.¹⁰⁵

The very next day (as we’ve seen) the major has brought candles, meat, sugar; and the diarist wonders whether she’s his whore. One reason she’s so puzzled is that, according to her at least, he *hasn’t* raped her — not ever, not even once. Surrounded by coercion of the most acute and inescapable kind, our protagonist understands that she and the major comforted each other by having sex. And pretty good sex. For the first time since the troops rode into her street, she sleeps through the night and wakes up refreshed. In the *aubade* that follows the next morning, the major serenades her with the ‘magical’ ‘[l]inger with me, my lovely one’.¹⁰⁶

Long before her rapes produce this series of reflections — instead, during the most violent onslaught at the very beginning of the Soviet occupation — the Woman invokes her own experience of rape as a reason to deny it pre-eminence

¹⁰² Ibid 117.

¹⁰³ Perhaps even, to the extent novelistic expectations are invoked here, the wartime equivalent of marriage.

¹⁰⁴ Anonymous, *Diary*, above n 50, 104.

¹⁰⁵ Ibid 104.

¹⁰⁶ Ibid 105.

among the harms of war:

What does it mean — rape? When I said the word for the first time aloud, Friday evening in the basement, it sent shivers down my spine. Now I can think it and write it with an untrembling hand, say it out loud to get used to hearing it said. It sounds like the absolute worst, the end of everything — but it's not.¹⁰⁷

This is, of course, no less problematic than her experience generally. In that experience, she never encounters 'the absolute worst, the end of everything'. Even her times of intense personal suffering — the gravityless horror produced by the gob of spit; the unnerving, debilitating, resilience-depleting dearth of food she and her neighbours faced after the major and his army left her street (the details of slow starvation and vigilant scrounging for food occupy almost a month of entries and make for 63 pages of particularly trying reading)¹⁰⁸ — come to us in the key of stoic endurance. At her worst moments she feels *cold*, not *pain*.¹⁰⁹ If I'm right, this is a reason both to distrust and to trust her, to see rape as a pre-eminent wrong and not to.

Our narrator avoids superlatives in suffering, but does provide some indicative comparisons. Some rapes, for example, are worse than others: rape of a virgin, she clearly understood, was distinctively worse than rape of an experienced woman, because it could deprive her of uninterrupted access to happy eroticism, perhaps permanently embitter her.¹¹⁰ The gang rape of one woman by twenty men — violent, not tender — left her 'bruised and bitten', her mouth 'a blue plum': the Woman recalls being rendered speechless by the sight.¹¹¹ Other women, unlucky ones, have encountered what might be, for them, 'the absolute worst, the end of everything'. But not our protagonist: definitely raped by at least five different Russian soldiers, and then bargaining for protection with two wolves, all in the course of three tumultuous days — she never describes her experience that way.

And she repeatedly reports a joke circulating among the women: 'Better a Russki on top than a Yank overhead'.¹¹² That is, better to be raped by a soldier in the Soviet occupying force than carpet-bombed by the Americans. The women had a point. As they knew, Allied forces *did* saturation-bomb German cities.¹¹³ It's a refusal of the 'fate worse than death' trope on precisely its own terms. Or maybe it's just what anyone would say, faced with the 'absolute worst' and struggling to protect the tremulous psyche from its onslaught.

So far we have established the affective and fictive dilemma in which the *Diary* situates rape. There is a corresponding problematic attending our moral and legal condemnation of rape as a special element in war.

¹⁰⁷ Ibid 63.

¹⁰⁸ Ibid 193–256.

¹⁰⁹ Ibid (cf 91, in which she dismisses the physical pain caused by the rapes, with 90, 104).

¹¹⁰ Anonymous, *Diary*, above n 50, 147, 165–6.

¹¹¹ Ibid 136.

¹¹² Ibid 20, 220.

¹¹³ They could not have known that it was actually the British Royal Air Force that operated the bombing campaign over Germany. See A C Grayling, *Among the Dead Cities: The History and Moral Legacy of the WWII Bombing of Civilians in Germany and Japan* (2006) 39; Paul Addison and Jeremy A Crang (eds), *Firestorm: The Bombing of Dresden, 1945* (2006) 70–4, 182.

In the early hours of her street's occupation, the Woman worked hard as a lay lawyer against rape. At the very beginning of the occupation, when two soldiers break into the crowded basement shelter where she and her neighbours are hiding, they seek a woman to rape. The diarist complains to their officer. And, quite correctly, he tells his men of the '*ukaz Stalina*' prohibiting 'this kind of thing'.¹¹⁴ One of the soldiers was enraged:

'What do you mean? What did the Germans do to our women?' He is screaming. 'They took my sister and ...'¹¹⁵

The *ukaz* temporarily prevails: the soldiers are ushered out of the basement shelter, and somewhat officiously, the Woman steps out after them to make sure they're gone. They promptly seize and rape her; her neighbours shut the shelter door against her.¹¹⁶

By the next day, the *ukaz* has fully given way. Now, when the Woman and her neighbours go to a Soviet commander to complain about the rapes and to seek his aid in stopping them, he merely laughs: 'Come on, I'm sure they didn't hurt you. Our men are all healthy'.¹¹⁷

There's something twisted, paradoxical, about the operation of the *ukaz* here. To the commander, rape is nothing more than 'this sort of thing', a wartime version of everyday sex in all its banality. And his enforcement of the rule against it is, we might say, *for that reason*, ineffective, futile, so much so that some would even say it is *complicit*. But to the Russian soldier whose sister was raped, the prohibition is full of fiery intensity: rape is a crime *and so* what happened to his sister must happen again. His vengeful repetition of rape pivots on his conviction that rape is a distinctive and intense wrong. Indeed, the rageful soldier seems to me almost to feel that rape was not just his privilege but his *duty*. The *ukaz* accumulates the double character that structures the *Diary* more generally: it signifies not only the prohibition of rape, but the designation of rape as a harm *par excellence*. And so, in a further perverse twist, the *ukaz* in its first meaning is totally ineffective, while in its second it propels events — propels more rapes.

The legal problematic has another dimension: tying rape to national values in ways that extract a heavy price *for women* — including our protagonist — whenever its ambiguity dissolves.

It is never mentioned in the *Diary* but, until Germany officially surrendered, the Woman had a national duty not to give comfort to the major — you might say, a national duty not to take comfort in comforting him. Inasmuch as her sleeping with him is not rape, it is probably treason; at least it's collaboration. It is literally sleeping with the enemy. If what she suffered was rape, however, not

¹¹⁴ Anonymous, *Diary*, above n 50, 52.

¹¹⁵ Ibid 52–3.

¹¹⁶ Ibid 53–4.

¹¹⁷ Ibid 54.

only was she a helpless victim but also — in the perverse logic of the *ukaz* — her suffering constituted a reason for German soldiers to harbour the will to (re)rape Soviet women.

To be sure, the German Reich *was* completely defeated; in many senses the Soviet occupation of Berlin was a *liberation*. That's why the dilemma-like structure of the Woman's cohabitation with the Russian major — in which we can read it as her act of national disloyalty *and* as rape, but not at the same time — now seems attenuated. But just think of the way in which we read stories of French women's sexual liaisons with German soldiers during the German occupation of France: if we can attribute to them the option of resistance, we simultaneously construe their not taking it as collaboration.¹¹⁸ In nationalist normativity, only sheer domination — only the designation 'rape' — makes women's sex with a wartime enemy tolerable.

This flattening of the rape-war dilemma happens when the women's rapes come to the awareness of a *German* public. I hasten to say I don't mean anything specific by this Germanness: it is simply her nationality and, as such, forms the basis for the normative collapse of the problematic that (I've argued) structures the *Diary* until the very last entry.

Here, the text represents its own publication in very deft ways. The *Diary's* first 'public' is the Woman's lover, Gerd, who returns from the front and finds her living in her solitary apartment. In several ways, his reaction to seeing the notebooks presages the actual reception of the *Diary* as a published book. And tragically, from my point of view at least, each of these publications breaks the text's dilemma in two, and reduces it to an either/or.

The process starts inside the text, with Gerd's sudden and unexpected return. The Woman is completely joyful. Plus, he brings food. Ever communal, she invites the widow upstairs to share her first meal with her lover — her own first real meal in weeks.

To understand what happens next we need to backtrack. During the first days of occupation the Woman and her first 'wolf' had persuaded the widow to let herself be raped by a man so violently threatening that he filled everyone with

¹¹⁸ For some complex recently published versions of this torque in the dilemma I'm tracing, see Irène Némirovsky, *Suite Française* (Sandra Smith trans, 2006). This remarkable novel was written in French during the German occupation of France, by a Russian Jew whose family had fled to Paris to escape the Bolsheviks and had assimilated into French society. *Suite Française* is an unfinished novel — unfinished because Némirovsky died at Auschwitz. The sexual tensions between French women and German soldiers fascinated her, and she always gives them to us encased in the norms of resistance-collaboration. (One necessarily wonders: to what extent is this a displaced encounter with Jewish assimilation-particularity?) This frame does not emerge in the *Diary* until Gerd becomes its reader, and I think that's determined by our widely shared retrospective judgement that the fall of Berlin, though horrifyingly violent, was on the whole a good thing, while the fall of Paris was unmitigatedly bad. That is to say, we take sides — and once we do, the paradoxical place of sex-rape in war becomes unintelligible.

dread.¹¹⁹ Here is the immediate aftermath of that rape:

The widow was angry and didn't speak to me the whole afternoon. In the evening, though, she told me what happened. Apparently the young devil turned out to be so tame and docile he was downright boring by the time he let her go. It seems he left her with a compliment. At first she didn't want to reveal it, but finally she told us: 'Ukranian woman — like this. You — like this'. The first 'like this' he illustrated with a circle formed by both his thumbs and forefingers, the second 'like this' with a single thumb and forefinger.¹²⁰

From that point forward the widow told the 'Ukranian woman — like this. You — like this' joke every time women met to talk about the rapes¹²¹ (and the women talked about the rapes constantly).¹²²

The Woman's post-war experience of telling German men about the rapes begins at the little celebratory dinner with Gerd. The widow bumbled forth her little joke yet again — but this time it was decidedly not funny: 'I could see that

¹¹⁹ Several readers have balked at my locution here: she *let herself* be raped? Rape is coerced, by definition, they say; coercion is inconsistent with permission; no one can *let herself* be raped. But see for yourself if that protocol actually helps you to understand the passage in which the widow both suffers coercion and decides.

The *mise en scène*: the Woman is sitting in the widow's apartment on the edge of the bed with Anatol, one of her wolves.

[S]uddenly [the door is] ... pushed open, and Anatol looks up, annoyed. There's the widow, all red in the face, her hair disheveled. She squeezes inside, pursued by a Russian. I recognize him as the handsome Pole from Lvov, the one with the head wound from Stalingrad and the special talent for getting enraged. He looks like he's on the verge of having a fit right now. He immediately starts shouting, appealing to me as well as Anatol as referees: he's young, what's good for others is good for him, too, it's been a long time since he had a woman ... it won't take long at all! His eyes flash, he waves his fists, his hair is flying. He seems utterly convinced that the widow is his by right ... The widow stands there wiping away the tears that are streaming down her face.

Anatol looks at me, then at the widow. It's clear he doesn't want to have anything to do with this. He turns to me, saying it isn't such a big deal, I should talk to the widow, everything will soon be over, she shouldn't make trouble for herself. Then back to the Pole, waving him away: Kindly leave me out of it, I'm in a hurry, I have to go soon. ... I whisper a few quick words to the widow, remind her of the head wounds, the Pole's tantrums. The man is capable of doing anything, goes crazy if he doesn't get his way ... Anatol will soon be gone and won't be able to help ... or does she want to wake Herr Pauli, so he can take care of the frenzied man from Lvov [a ludicrous suggestion; Pauli has done nothing to protect anyone from anything to this point in the *Diary*]? She dismisses that idea: No, what for? And she cries. The Pole, once again calm, strokes her. Then they both disappear.

Anonymous, *Diary*, above n 50, 125–6 (first four ellipses added).

If you don't have a concept of coerced-but-consented-to rape, you can't call this a rape. As we've seen, feminists who seek to eliminate the consent defence do so on a theory that the widow's choice was itself coerced and not in fact a choice — but the *Diary* strongly suggests that she, and everyone else involved in the decision that she should be raped for the common good, did decide. Whether you therefore want to *criminalise it as rape* — in particular whether you want to give it the same legal treatment as entirely coerced sexual contact — is entirely another question.

¹²⁰ Ibid 126–7.

¹²¹ Ibid 152, 164, 258.

¹²² Ibid 136, 147, 165, 180–1, 204, 225.

Gerd was taken aback'.¹²³ Later,

[i]f I was in a good mood and told stories about our experiences over the past few weeks, then he really got angry. Gerd: 'You've all turned into a bunch of shameless bitches, every one of you in the building ...' He grimaced in disgust. 'It's horrible being around you ...'¹²⁴

Soon, the Woman shows Gerd her diaries.¹²⁵ As we read about him reading the manuscript of the text that we are reading, we might well feel that something literary is happening. He reads the text, we read the text in which he reads it; we read about him reading our pages. He becomes what the art historians call a *repoussoir* figure, the little person within and also facing the huge — it is important to say, *painted* — landscape we behold, situated in the left or right foreground, his back to us. He reminds us that the landscape is being *framed* and *seen*; he doubles our perspective on it; he scales the artifice; he habituates us to our place as beholders. And since the *Diary* is fiction, not painting, we get some information about his reactions to what he — and we — read, and about the text's anticipation of its own reception.

Uncannily — we have here another testimony to the literary capacity of our author — Gerd's reaction predicts very well what happened when the *Diary* is first published in German in 1959. He objects testily to the difficulty of reading the scribbles, notes and abbreviations we would so love to have in our hands:

'For example, what's that supposed to mean?' he asked, pointing to 'Schdg.'

I had to laugh. '*Schändung*,' of course—rape. He looked at me as if I were out of my mind but said nothing more.

Yesterday he left again. ... I don't know if he is coming back at all.¹²⁶

This scene appears in the *Diary*'s last entry. We do not learn whether Gerd ever returns.

Gerd's rapidly accumulating disgust attaches not to the rapes themselves, it seems to me, but to the women's attitude towards them. We are asked to understand that, if the Woman and her neighbours had presented themselves as completely destroyed by the rapes — as some women indeed were — he probably would have been fine. It was the jokes, the stories, the laughter, the offhand reduction of the whole thing to a handy *abbreviation* that he found so repellent. It's 'shameless'. We're watching Gerd cut off half of the *Diary*'s dilemma. If her rapes had been 'the absolute worst', her national solidarity with the defeated German soldiers would have remained intact and Gerd would not have been repelled. If instead she and the other women took some of the rapes lightly, even in jest, as one among many harms of war, they became 'shameless', 'disgust[ing]', and — as we will see — nationally *disloyal*.

Each of these possibilities has emerged over the course of the *Diary*'s difficult history as a book. When *A Woman in Berlin* was first published in German in 1959, German readers either ignored or reviled it. According to Enzensberger the author's 'shameless immorality' formed one objection; according to Beevor,

¹²³ Ibid 258.

¹²⁴ Ibid 259.

¹²⁵ Ibid 260.

¹²⁶ Ibid.

another review accused her story of ‘besmirching the honor of German women’.¹²⁷

And as we’ve also seen, when the *Diary* was republished in a new, supposedly unredacted German version in 2000, it became a rave bestseller in Germany. Her editor, Enzensberger, provided an introduction attributing the change to the progress in German post-war sensibility: Germany was not before, but now was, ‘ready for’ it. Enzensberger accounts for the shift as a revival of German interest in German suffering during the war. He indicates that now

discussion of once-taboo issues had become acceptable. Subjects like widespread collaboration in France, the Netherlands, and elsewhere; anti-Semitism in Poland; the saturation bombing of civilian populations; ethnic cleansing in postwar Europe — which for many years had been dwarfed by the German act of genocide — were now legitimate areas of inquiry. These are, of course, complex and morally ambiguous topics, easily exploited by revisionists; nonetheless, they belong on the historical agenda and deserve levelheaded discussion. And it is in this context that *A Woman in Berlin* ought to be read.¹²⁸

As Enzensberger sees it, the *Diary* adds rape to our understanding of the (admittedly complex) *victimisation of Germans* during the war. But the rapes themselves aren’t — to Enzensberger anyway — complex: they are simply that, rapes. The women who suffered them were entirely outside the circuit of moral ambiguity that ensnared the men who fought and died for good causes and bad: ‘it was the women who preserved an oasis of sanity in a world run amok. While the men were fighting a murderous war, the women proved to be true heroines of survival’.¹²⁹

It’s interesting to note here the very different attitude taken by Beevor, the author of *Stalingrad* and *The Fall of Berlin* and perhaps the single historian most responsible for representing victimhood on both sides as part of a cycle of revenge. For him, the Woman’s rapes are nothing like the simple episodes of victimhood that Enzensberger gives us: instead, his English language introduction to the 2005 English edition concedes that the *Diary* represents the sexual encounter of German women with Soviet soldiers as a highly variable, complex and morally ambiguous array of events.¹³⁰

Enzensberger’s is as partial a reading of the *Diary* as that offered by Gerd and the German reviewers of the first edition. Each picks out one half of the structural dilemma which, I want to argue, makes this little volume such a special literary event. Read as literature, the *Diary* suggests that the discourse of equivalents that gives rape a pre-eminence and a purity amidst the killing and destruction of war flattens both the political and moral ambiguities of sexual violence, sexual desire, and sexual conjunction of civilians with armed combatants. And it collapses the intense moral ambiguity of war — legitimate violence at its most sustained — itself.

¹²⁷ Enzensberger, ‘Foreword’, above n 59, xi; Beevor, ‘Introduction’, above n 71, xv. I have been unable to find the source, if any, of these quotations.

¹²⁸ Enzensberger, ‘Foreword’, above n 59, xii.

¹²⁹ Ibid xii.

¹³⁰ Beevor, ‘Introduction’, above n 71, xix–xx.

IV RE-THINKING THE POLITICS OF CRIMINALISING RAPE IN IHL

Feminists working to criminalise rape with the most specificity possible, and at the highest point possible in the hierarchy of IHL prohibitions, have encouraged prosecution strategies which emphasise these crimes over others, on the basis that these reforms are necessary so that IHL can *recognise the harmfulness and wrongfulness of rape in war*. Feminists seek to prevent IHL from repeating the failure of the Nuremberg trials to address rape as more than mere evidence of other crimes. At best, this failure bypassed an opportunity to condemn and punish one of the most salient forms of assault against civilians that pervaded the conduct of the Wehrmacht; at worst it tacitly accepted the idea that rape was a natural or inevitable consequence of war, nothing more than ‘this sort of thing’.

Against these failures of IHL, feminists have been partially successful: rape, sexual violence and sexual slavery have all moved ‘up’ the hierarchy of IHL and ICL criminality, from mere evidence to nominated crimes; and several ICTY, ICTR and ICC prosecutions have focused, either exclusively or at least heavily, on the sexual assaults so amply manifested in the records of recent wars.

The literature of congratulation greeting these developments is immense.¹³¹ Does the preceding excursion into the reception and then the actual text of *A Woman in Berlin* help us to add to the chorus a few minor key notes, notes of worry? I think it does, and offer four possible chords to add to the symphony.

A Rape as Ideology and Thus as Representation

A Woman in Berlin gives us access to the insight that rape, though real and really, really bad, is also inevitably *ideological* — and thus, that rape as representation sticks like glue to rape as event.

How can we use that insight in our work as lawmakers? Well, as we’ve seen, Beevor has certified the historical accuracy of the account offered by *A Woman in Berlin*. Let us accept that account, for the moment: let’s accept that everything narrated in the book actually did happen, if not to the Woman then to someone.

One odd thing about rape is that, even when it’s real, it’s also deeply ideological. Let us consider Beevor’s mournful account of Soviet soldiers’ unrepentant attitude to the rapes they inflicted on German women:

The subject has been so repressed in Russia that even today veterans refuse to acknowledge what really happened during the onslaught on German territory. They will admit to hearing of a few excesses, and then dismiss the subject as the inevitable result of war. Only a few are prepared to acknowledge that they witnessed such scenes. The tiny handful prepared to speak openly, however, are totally unrepentant. ‘They all lifted their skirts for us and lay on the bed,’ said the Komsomol leader in a tank company.¹³²

The capacity of Soviet officers and soldiers to convince themselves that most of the victims were either happy with their fate, or at least accepted that it was their turn to suffer under what the Wehrmacht had done in Russia, is remarkable. ‘Our fellows were so sex-starved’, a Soviet major told a British journalist at the

¹³¹ For some examples, see Select Bibliography, below Part VI, the contributions of Hilary Charlesworth and Christine Chinkin excepted.

¹³² Beevor, *Fall of Berlin*, above n 70, 31.

time, 'that they often raped old women of sixty, seventy or even eighty — much to these grandmothers' surprise, if not downright delight'.¹³³

If Beevor is right that these dismissals and fabrications are despicable — *and* right that *A Woman in Berlin* is 'one of the most revealing pieces of social history imaginable'¹³⁴ — then we have a problem. Because the Woman *had* lifted her skirt for her wolves. Because the widow *had* been raped by a sex-starved soldier and then derived a kind of shy sexual pride from his grateful and admiring compliment about her body. Because the Woman's account ratifies the claim that at least one German woman was fully convinced that, as she reportedly observed to Marek, '[n]one of the victims will be able to wear their suffering like a crown of thorns. I for one am convinced that what happened to me balanced an account'.¹³⁵ The striking motto offered in the *Diary* for this: 'the sum total of tears always stays the same'.¹³⁶ That is, the Woman thought that her rapes were the exact equivalent of rapes inflicted by German soldiers on Russian women — equivalent not only in motive but in justice. She even seems to have thought that this cancelled out her victimhood.

When obviously confabulated justifications overlap so perfectly with our account of things that we believe actually happened, we may be tempted to dismiss the veracity of the account and to impugn the reliability of its narrator. We have seen Bisky and Gottesmann head in that direction. We may even feel tempted to denounce our narrator as complicit with the Soviets and disloyal to her own country. We have already seen Gottesmann (and perhaps Gerd) take this tack. But if we thwart those impulses, if we hold open the possibility that the repugnant justifications invoke actual events — I admit it's a little like trying to see the urn and the face or the rabbit and the duck at the same time — we catch a glimpse of something that is rarely apparent: the *reality of ideology*.

This is why I think it is important to understand *A Woman in Berlin* as a literary text. I don't mean to say by this that it's a good book. I mean to say that it's self-consciously and patently fictional in the sense that it makes its fabrication evident, and by that means makes the materials for its fabrication evident.

There is a real payoff here even for the most pragmatically focused lawyers among us. Inasmuch as this book is *literary*, it admits that its representations of what happened — even if they are *also* perfectly accurate — *are representations*. To tell about rape, the author had to use the available repertoire for representing rape. As do we all.

The text suggests, then, that rape as representation inevitably attends rape as event. The mind-blowing articulacy of rape as a discourse of accusation and defence, with all its ideological specificities, is present all the time. We repeatedly forget this omnipresence of representation, returning it to the latent, the occult — but just at the moment we do, we lose our grip on an important part of rape's reality.

¹³³ Ibid.

¹³⁴ Enzensberger, 'Foreword', above n 59, xxi.

¹³⁵ Ceram, above n 57, 9.

¹³⁶ Anonymous, *Diary*, above n 50, 174.

No amount of criminalising rape will make this problem go away.¹³⁷

B *The War–Rape Antinomy and the Discourse of Equivalents*

Unlike rape in peacetime by your boyfriend, boss or a stranger, rape in war happens in the context of concrete, material and deliberate violence.¹³⁸ IHL regards some of this violence as criminal but one of its main functions is to legitimate the rest.¹³⁹ Men — and, increasingly, women — are out there trying hard to kill each other, destroy each others' property, evaporate each others' political structures. In a real war, lots and lots of people are dying. Rape in the context of war puts particular stress on the old adage, 'rape is a fate worse than death'.

I have argued that *A Woman in Berlin* reads to me as a (good) literary text because it flips this adage into a question and then disables us from answering it decisively. Is it better to have a Russki on top than a Yank overhead? Looking back on their own rapes, some German women clearly thought the answer was 'No': Beevor's account is rife with believable reports that women begged to be shot and committed suicide in numbers that alarmed even the Soviet command.¹⁴⁰ But the Woman and all the friends with whom she shared her grim little joke disagreed. The most quoted line in the book by far: 'It [rape] sounds like the absolute worst, the end of everything — but it's not'.¹⁴¹

As I read *A Woman in Berlin*, the narrator came to her nadir when the Soviet horseman 'dropped a gob of spit' in her mouth — an assault that both was and was not rape. Her hardest moments, emotionally, came then and when she was evicted from the widow's apartment, and when she learned about the death camps. Probably the most trying part of the book for me as a reader (admittedly this involves my own subjective investments) was the long series of entries focused on her effort to find, contrive and conserve food in the weeks between the departure of the Soviet soldiers and the return of the German ones. But she did not designate any of these as 'the worst' either: one of the great challenges of the book is that it simply doesn't put anything in that spot.

I've noticed in my several attempts to put this problematic before various audiences that people respond to it with comparisons: if rape is not worse than death, does that mean that death is worse than rape? Is mutilation worse than rape, or vice versa? Is rape worse than the death of all the men in one's family? Than forced labour? Than forced *sexual* labour — trafficked prostitution? Than prostitution? My hunch on listening to these questions is that the 'worse than death' formula has a profound grip on all our minds — we understand rape to be inherently *comparative* — but also that, as the feminists work more and more successfully to place rape and sexual violence into the hierarchy of IHL and ICL

¹³⁷ I want to thank Andrew Parker, with whom I taught a seminar on 'The Poetics of Sexual Injury' at Harvard Law School in 2006, for helping me to articulate this (with the proviso of course that he is by no means responsible for the formulation I've reached here).

¹³⁸ I hope I can defer for present purposes the obvious critical point that the distinction between wartime violence and the power dynamics that characterise peacetime may not be coherently distinguishable — and that we persistently return to this distinction because *something* tells us that Berlin in early May 1945 is a very different place than Berlin today.

¹³⁹ Berman, 'Privileging Combat?', above n 7; Kennedy, *Of War and Law*, above n 7.

¹⁴⁰ Beevor, *Fall of Berlin*, above n 70, 29–31, 410.

¹⁴¹ Anonymous, *Diary*, above n 50, 63.

crimes, something new is happening to our normative language for assessing rape. The question ‘is rape sex or is it violence’ which so pre-occupied feminist theory for the last three decades of the 20th century is losing its bite.¹⁴² Everybody is more or less content to think of it as both. And a new question, ‘is it worse than death — and if not, what is it worse than?’ has moved into place as the framing question: rape as a discourse of equivalents.

I would also suggest — though I can’t possibly prove it — that this shift is intensified by the effects of the *legalisation* of wartime rape. Lawyering by analogy — lawyering by precedent — is lawyering by comparison. Prosecutorial discretion rank-orders harms. Long sentences demand superlatives. If Nuremberg implied a discourse of equivalents in which rape barely counted as a harm, the new case law of the ICTY and ICTR and the new rules in and around the *Rome Statute* imply one in which it *ranks*.

What would it be like to think about the new place of rape in IHL and ICL with the detached, sceptical attitude to this discourse of equivalents that we are invited to imagine by *A Woman in Berlin*?

For one thing, we might bring some scepticism to feminist representations that carry forward the ‘worse than death’ figuration of rape. Consider, for instance, the title of Alexandra Stiglmyer’s edited volume on the place of rape in the meltdown of the former Yugoslavia: *Mass Rape: The War against Women in Bosnia-Herzegovina*.¹⁴³ Stiglmyer tells us how she came to see the Balkans war not primarily as a national/ethnic/religious conflict but as a ‘war against women’. She begins by reflecting on interviews she did with women involved in the conflict. Here is a quotation from one of her interviews — I reproduce Stiglmyer’s entire excerpt:

We were rounded up on the playing field. The men were locked up in the school. They burned a few men in the trash bins in front of the windows, so that the smoke and stink of the burned flesh would drift into the school. We saw them rape the hadji’s daughter — one after another, they raped her. The hadji had to watch too. When they were done, they rammed a knife into his throat.¹⁴⁴

What does Stiglmyer then tell us that this story and others like it motivated her *to do*? To *organise around, write about, and distinctively criminalise rape*. The burning of the men’s bodies is a story *about rape*. The garrotting of the *hadji* is a story *about rape*. Note where the quotation ends: its narrative teleology is fulfilled before we learn what happened to the men locked up in the school. As rape emerges as figure, male death recedes to ground.¹⁴⁵ Rape as the fate worse than death — now not in patriarchal but in feminist terms.

Many interlocutors have challenged me at this point, arguing that Stiglmyer’s move made perfect sense in the post-Nuremberg context. She might not, ultimately, get the *emphasis* on the right syllable, but the problem was to ‘make women’s suffering visible’. And that seems right. But the question then

¹⁴² For a canny genealogy of this debate among feminists (at least, up until Michel Foucault’s intervention), see Vikki Bell, ‘Beyond the “Thorny Question”: Feminism, Foucault and the Desexualization of Rape’ (1991) 19 *International Journal of the Sociology of Law* 83.

¹⁴³ (Marion Faber trans, 1994 ed) [trans of: *Massengewalt — Krieg gegen die Frauen*].

¹⁴⁴ Stiglmyer, above n 6, 82.

¹⁴⁵ Jean-Paul Sartre, *Being and Nothingness: An Essay on Phenomenological Ontology* (first published 1943, Hazel E Barnes trans, 1957 ed) 9–10 [trans of: *L’Être et le Néant*].

becomes, what *is* women's suffering? What is this thing that should, we all agree, be visible?

One, admittedly partial, way into that question is to ask, what is rape to women who have been raped? American feminists involved themselves in the Balkans situation because they thought they knew: the women were silenced and needed IHL to help them find their voice as raped women. But not all the women they sought to represent recognised themselves in the lens provided by American feminist activists. Some stood with Judge Nusreta Siva, an Omarska detainee, whose reply was more equivocal:

Generally it bothers me when someone says *raped women* ... *Raped women* — that hurts a person, to be marked as a raped woman, as if you had no other characteristic, as if that were your sole identity.¹⁴⁶

If we follow Judge Siva, the very presumption that only raped women can assess rape is mistaken: she, apparently, would want to assess rape from some other identity she inhabits. Perhaps from the identity, whatever it is, that suffers the loss of the men and boys killed and brutalised by the war. Or the one that suffered the loss of the lifeworld that existed before the war — the lifeworld that existed before the conflict that *produced* the war.

And so there is a broader problem with the current place of rape in its own persistent discourse of equivalents. For anyone who hates male death — and I would guess that includes anyone who wishes IHL were more effective in reducing the incidence and destructiveness of war — moves that make rape pre-eminent should be suspect. Indeed, for anyone attentive to the *legitimizing* function of IHL, such a move should be outright alarming. The Soviet army evicted entire villages into deep snow; torpedoed ships ferrying thousands of refugees at a time; burned people in their homes; looted every building they did not first destroy, seizing virtually the entire supply of food in the process; adopted and executed an official 'take no prisoners' policy towards German soldiers they took captive; conscripted those they did not kill into forced labour.¹⁴⁷ To frame this campaign as a 'war against women' — no matter how many rapes it included, and there were hundreds of thousands of them — would be a historical travesty and a profound misuse of the slight leverage offered by IHL to delegitimize some wartime violence while legitimizing the rest.

C *Weaponising Rape*

Above, I listed just some of the acts committed by the Soviet army as it invaded Germany. These incredibly cruel and destructive acts would surely count as egregious crimes under IHL as it now stands, on the books at least. As Beevor, having written not only *The Fall of Berlin* but also *Stalingrad*, was in a good position to point out, the Soviet war machine *modelled these actions on and/or justified them as equivalent to* the equally incredibly cruel and destructive course of the German invasion of the Soviet Union.¹⁴⁸ Indeed, the Woman seems

¹⁴⁶ Mandy Jacobson, *Calling the Ghosts: A Story about Rape, War and Women* (Video-Recording, Women Make Movies, 1996). Thanks to Karen Engle for calling this film to my attention.

¹⁴⁷ See, eg, Beevor, *Fall of Berlin*, above n 70, 51, 67, 188, 329, 407–8.

¹⁴⁸ See, eg, Antony Beevor, *Stalingrad* (1998) 125, 176.

to have a firm grip on the causal chain linking her rapes to German rapes of Soviet women.

‘They took my sister ...’¹⁴⁹

‘None of the victims will be able to wear their suffering like a crown of thorns. I for one am convinced that what happened to me balanced an account’.¹⁵⁰

The point of this comparison lies in the gap between law on the books and law in action. The combination of legal prohibition with an almost infinitely broad tolerated residuum of abuse may actually *increase* the value of any given class of assault as a tool of war.¹⁵¹ That is, as I suggested above, the strong suggestion I derived from *A Woman in Berlin*, reading the moment of the Woman’s first rape. There, the illegality of a soldier’s raping an enemy civilian — the *ukaz Stalina* in this case — was not only a completely meaningless protection for the Woman but also a fierce motive for her assailant. That is to say, the intensive and specific prohibition of rape can weaponise it.

Of course this perverse dynamic can arise without the intervention of law, through the unnerving propensity of revenge to *mirror*.¹⁵² And the war–rape antinomy applies here too: starving and dispossessing the civilian population, cutting off routes for refugees, converting prisoners back into nominal combatants and killing or otherwise treating them in ways that violate the *Geneva Conventions* and other IHL/ICL instruments — all of these are now clearly violations of IHL/ICL and can thus, given the huge tolerated residuum of abuse that affects the capacity of IHL/ICL to govern many conflict situations, be weaponised by law, just as rape can.

But the possible weaponisation of rape deserves mention because of its near-absence from the justificatory literature about the recent feminist reforms, both in its activist/advocacy and its official/semiofficial modes. Across the span of this literature, the discourse of prohibition is the discourse of ‘ending’ sexual violence in war.¹⁵³ Precious little attention is paid to the chilling fact that propaganda inciting Kosovar Serbs to ethno-nationalist separation and to war included accusations that Serbian women were being raped by Albanian men — and that *that was a fact justifying, indeed requiring, war*.¹⁵⁴ Feminist and IHL/ICL condemnation of rape in war has, nevertheless, been pervasively indifferent to the possibility that its *special illegality* could power up another rape-driven, rape-repeating war. This indifference to basic legal realist understandings of how law generally, and IHL/ICL in particular, really operates has been, to me, one of the most disturbing aspects of the whole campaign. It’s as though harm never comes to women when men punish rape, because men are imagined never to punish rape. I’ll end with an amusing — but also disturbing — anecdote to this effect: I was once in the audience — standing room only crowd

¹⁴⁹ Anonymous, *Diary*, above n 50, 53.

¹⁵⁰ Ceram, above n 57, 9.

¹⁵¹ Duncan Kennedy, ‘Sexual Abuse, Sexy Dressing, and the Eroticization of Domination’ (1992) 26 *New England Law Review* 1309, 1341.

¹⁵² For this reason, revenge is almost always highly literary.

¹⁵³ For examples, see Halley et al, ‘From the International to the Local’, above n 4, 420.

¹⁵⁴ Wendy Bracewell, ‘Rape in Kosovo: Masculinity and Serbian Nationalism’ (2000) 6 *Nations and Nationalisms* 563.

— when a major feminist advocate for the extensive and intensive IHL/ICL prosecution of sexual crimes against women complained that no one has ever started a war because a man raped a woman. A murmur went across the room: ‘*Helen of Troy*’.¹⁵⁵

D The Problematic of Coercion

Feminist activists working in the ICTY process and in the *Rome Statute* negotiations aimed for rules that would allow courts to infer coercion from the circumstances of armed conflict and to narrow the consent defence. As we saw in the first part of this essay, they made considerable progress in this direction, establishing a range of rule innovations that are quite striking if your baseline is US criminal law of rape. But even most feminists — and certainly the ICTY and the drafters of the *ICC Rules of Procedure and Evidence* — were ambivalent about going all the way, about eliminating a consent defence altogether.

Does it bother us at all that both the case law rules announced in *Kunarac* and the code-based rules promulgated in the *Rome Statute* (along with the ‘principles’ set forth in the *ICC Rules of Procedure and Evidence*) would allow an ambitious prosecutor to charge the major in *A Woman in Berlin* with rape, sexual violence, and maybe even sexual slavery? It is perfectly clear that the Woman would never have allowed him to enter her room, and would not have sustained a relationship with him, if she had not been operating in coercive circumstances. But it’s also perfectly clear that she turned to him for solace and had sex with him that pleased them both, slept contentedly with him, awoke refreshed, and basically liked him. He was the first good thing to happen to her since the Soviet army encamped in her street.

The Woman and the major had a tacit bargain: he protected her from far more decisively coercive sex with other troops, provided food that she and her housemates were desperate for, even supplied luxuries; she provided sex, companionship, intelligent conversation, and some of the comforts of bourgeois domesticity. We’re coming perilously close here to an understanding of their relationship that likens it to garden-variety cohabitation, but that’s not what the Woman’s own understanding was: *she* thought that her relationship with the major was basically prostitution, not everyday cohabitation and not rape.

But at least some feminist activists writing the new rules on sexual violence fully intended to include precisely such bargained-for sex within the new canon of IHL sexual crimes. For instance, the Women’s Caucus for Gender Justice in the ICC made an argument to the *Rome Statute* conference explicitly including prostitution precisely akin to the Woman’s arrangement with the major in its understanding of forced prostitution, serial rape and sexual slavery:

[A] category of forced prostitution may exist involving less than slave-like conditions. Women may be forced to submit to serial rape in exchange for their safety or that of others or the means of survival. Even though the women would not, strictly speaking, be prostitutes, they would be forced to engage in an exchange of sex for something of value for one or more men in a dominant

¹⁵⁵ This reaction presumed that Helen was in fact abducted by Paris, and left her husband and Menelaus against her will. See below nn 163–165 and accompanying text, for indication that the story of Helen is even more ambiguous than that of the Woman in Berlin on the key question of her responsibility for ending up in bed with the enemy.

position of power. But even in cases where women are free to go home at night or even to escape, the conditions of warfare might nonetheless be so overwhelming and controlling as to render them little more than sex slaves. The decision whether to charge someone with forced prostitution, sexual slavery or serial rape, would depend upon a thorough analysis of the facts in each case from the perspective of the woman.¹⁵⁶

If a prosecutor imbued with this consciousness applied the law as it now exists in the *ICTY Rules of Evidence and Procedure* and *Kunarac*, or in the *Rome Statute* and the 'principles' stated in its *Rules of Procedure and Evidence*, he or she could prosecute and possibly convict the major of a wide range of sexual crimes. Thoroughly analysing the facts of the Woman's relationship with the major from her perspective as evidenced by her *Diary*, our imagined prosecutor could conclude that they show forced prostitution, serial rape and sexual slavery. Under the rules set out in *Kunarac*, coercion and non-consent would be presumed from the coercive circumstances, and the major could not defeat that presumption using her testimony even if it exactly resembled the relevant passages from the *Diary*. Supposing he had a copy of the *Diary* and was allowed to introduce it in camera, a judge convinced of the Women's Caucus line would regard it as positive evidence against him. Under the principles set out in the *ICC Rules of Procedure and Evidence*, the issue of consent would have to be tried. But none of the Woman's words or conduct could be adduced to prove consent if the court concluded that 'force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent'.¹⁵⁷ Once again, the *Diary* entry recording the Woman's reverie about the major could be direct evidence of such 'taking advantage of a coercive environment'. She may have consented, but, the court could easily find, not 'voluntary[ly] and genuine[ly]'.

In debates over the scope of sex trafficking prohibitions in international and domestic law, feminists pushing the line of the Women's Caucus have been opposed by other feminists, often organised as human rights activists, who resist the legal preclusion of women's decisions to engage in bargained-for sex. They use a liberal feminist vocabulary, seeking to protect women's choices even in conditions of severely unequal bargaining power.¹⁵⁸ I think they have found the conceptual and rhetorical resources for these interventions in everyone's common understanding that, in international labour dynamics, women and men meet each other in a *market*.

It is very difficult to find a commensurate set of resources in the vocabulary of war and war crimes.¹⁵⁹ The Soviet army arrived in Berlin using coercion, intending coercion; they were looking for domination, not exchange. But I think the problematic of coercion exposed by *A Woman in Berlin* asks us to find a

¹⁵⁶ Women's Caucus for Gender Justice in the International Criminal Court, *Recommendations and Commentary for December 1997 PrepCom on the Establishment of an International Criminal Court United Nations Headquarters* (1–12 December 1997) (see especially Part III: War Crimes and recommendation 11).

¹⁵⁷ *ICC Rules of Procedure and Evidence*, above n 13, r 70(a).

¹⁵⁸ See especially the contributions of Chantal Thomas to Halley et al, 'From the International to the Local', above n 4, 347–60, 385–94.

¹⁵⁹ David Rosenblum et al, 'Democracy, Gender, and Governance' (2007) *American Society of International Law: Proceedings of the 101st Annual Meeting* 379, 379–87.

legally intelligible vocabulary in which the Woman could oppose the major's prosecution and the major could effectively defend it.

Let me put the question one last time, in the consequentialist terms which I think we need here. Imagine that, in the next ethno-nationalist war, the facts I attributed to the *Kunarac* indictment and trial happened again: men detained in lethal camps; women detained separately and repeatedly raped; a combatant on the other side considers offering to extract a detained woman from the gymnasium where she is being held and to take her to his apartment. He knows, and she knows, that if he makes this offer, and she accepts it, it would be understood that she would have sex with him, clean the house for him, be free to come and go; they both know that he would be her 'lone wolf' and protect her from the other men. And let's say that, if asked to come with him, she would actually consent.

Do we think that he would *ever* not make the offer because of the new rules in IHL/ICL? And if we think that the new rules would, even once, deter him — if we think that for even one time he doesn't make the offer because he knows that to do so is to commit a special and especially vehemently condemned IHL/ICL crime — are we *sure* that we are protecting her by securing this deterrence?

E *The Convergence of Feminism with Nationalism*

The morning after the Woman's surrender to the major, on 2 May 1945, 'the widow hears that Berlin surrendered around 4:00 AM — someone heard it on a crystal set. "Peace" — so we think, and are happy. Until we find out that there is fighting going on north and south of the city'.¹⁶⁰ This conforms to Beevor's history of the surrender, which was a lurching and difficult process. He relates that some German officers surrendered on 1 May 1945, but that fighting and intense negotiations about how, where and under what terms the official, final surrender should take place continued until the complete surrender was staged at midnight on 8–9 May 1945.¹⁶¹ The Woman heard rumours of a final capitulation and declaration of peace on 8 May: it's unclear whether these were anticipatory or she mistook the date by one day.¹⁶²

When the Woman went to sleep with the major in her bed, she was committing an act of treason, an act of collaboration. She was the citizen of a state at war, one that had proliferated orders providing for the instantaneous execution of any soldier surrendering to the Soviet Army and of any civilian assisting it. But by the time she and the major woke up, and he sang '[I]nger with me, my lovely one' to her in the bright morning air, rumours of surrender and peace suggest the onset of a new legal order, in which she would be relieved of her responsibility to resist him. In the interim, in the acute but temporary absence of local law, their intimacy was suspended between the legally illicit and the legally licit.

Licit legally, perhaps, but not morally — not in the eyes of Gerd. The return of the defeated German soldiers brought back the cultural forces of national solidarity: he saw even her rapes as shameless disloyalty and punished it by his

¹⁶⁰ Anonymous, *Diary*, above n 50, 106.

¹⁶¹ Beevor, *Fall of Berlin*, above n 70, 370–6, 402–5.

¹⁶² Anonymous, *Diary*, above n 50, 148.

silent departure. If he had known about the delight with which the Woman and the major greeted each other that first morning of German defeat, he would have been even more repelled.

It may be helpful here to return to Helen, the infamous instigator of the Trojan War. Her story was told and retold in antiquity, significantly different versions appearing in Homer's *Iliad*, in his *Odyssey*, in Stesichorus' *Palinode*, in Sappho's lyric fragments, in fragments of Herodotus, and in Euripedes' *Helen* and other Euripidean fragments.¹⁶³ In some versions, particularly Homer's, she shamefully abandoned her husband for Paris. Sappho agrees that she abandoned her husband but praises her for celebrating desire and beauty above all. And still others track Stesichorus' redemptive revision of the Homeric narrative: she stayed in Troy and a phantom Helen joined Paris.¹⁶⁴ Even within the Homeric tradition, it is persistently unclear whether she was raped or seduced — and apparently this is because ancient Greek norms about male honour and female betrayal turned not on whether the woman was free from force or consented, but on whether she was married or seduced from home; if either of the latter, rape and seduction were equally grave crimes and retaliation and retrieval were entirely warranted.¹⁶⁵ If Helen were not abducted, if she had instead been seduced, Agamemnon's *causus belli* would have been no less forceful.

What does the intensification of the condemnation of the Woman's sexual liaison with the major, through the good offices of IHL and/or ICL — and the feminist push to make IHL/ICL indifferent to the role of her volition in forming that liaison — add to this cascade of nationalist, sometimes belligerent, condemnations? As we've seen, the new rules of IHL relating to sexual violence in war — if they could have been applied to the major's role in this tryst — would have recriminalised it yet again: the major could have been criminally punished if the current rules had been in place.

But note that this framing of the major's transgression is completely commensurate with the framing of hers as treason. Like the Third Reich's rules requiring that soldiers fight to the death and that civilians resist to the utmost, the new IHL/ICL rules presume an antagonism between armed combatants on one side of armed conflict and civilians on the other. For many civilians, this antagonism would come quite naturally: civilians being bombed out of their homes, drowned in sinking hospital ships and forced into slave labour no doubt would ratify that antagonism, at least insofar as their own personal interests are at stake. But notoriously, women who have sex with enemy combatants will not always believe that they are being assaulted. Sometimes they want it. The new rules, making it more possible to have prosecutions and convictions that are indifferent to this fact, *ratify civilians' obligation to be antagonistic to their national enemy*. They entrench the women they protect in their nations. They recruit civilians to the very armed conflict which IHL more generally deprecates.

¹⁶³ Norman Austin, *Helen of Troy and Her Shameless Phantom* (1994); Mary R Lefkowitz, 'Seduction and Rape in Greek Myth' in Angeliki E Laiou (ed), *Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies* (1993) 17, 17–19.

¹⁶⁴ See Austin, *Helen of Troy*, above n 163, 1–20.

¹⁶⁵ Lefkowitz, 'Seduction and Rape', above n 163, 17–20. Indeed, Lefkowitz argues, the *Iliad* itself portrays Helen's rape/seduction inconsistently: 'Even though it is clear in the *Iliad* that Helen gave her consent and feels guilty about it ... , the Greek generals, like the Greeks in Herodotus' account, insist on talking about it as if it were abduction or rape': at 19.

Such a re-entrenchment can be detected in the reasoning of the Appeals Chamber in *Kunarac*. As Engle deftly demonstrates, the court justified its presumption that one of the victims did not consent by invoking her captivity and the fact that she was discriminatorily selected because of her ethnicity.¹⁶⁶ These were facts supporting the legal conclusion that the circumstances were so coercive that the need for a showing of non-consent was fully met.¹⁶⁷ In this formulation, the ethnic animosity between the perpetrators (Serbs) and the victims (Bosnian Muslims) should have precluded the Serbian soldier from assuming, or rationally concluding, that his Bosnian Muslim sex partner was consenting.

It's a small, but I think important, victory for the Serbian policy of ethnic cleansing. We must remember that the war in Bosnia-Herzegovina produced the ethnic-national division of what had been, at least in the cities, a cosmopolitan population, one in which inter-ethnic sexual liaisons and marriages had been common and — in the cities at least — uncontroversial. At what point in such a conflict should IHL come in on the side of the ethnic-nationalists, and presume that the inter-ethnicity of such encounters *constitutes evidence of non-consent*?

Like the ratification of the Woman's national duty to pursue the ethnic antagonisms of her thoroughly ethnic-nationalist state, this holding in *Kunarac* places IHL's new feminism at odds with its cosmopolitanism. It may well be that no actual application of IHL will ever in reality intensify national or ethnic-national antagonism. It may be no stronger for evil than it is for good. But I think the indifference to this tension that has marked the discussion so far — only Engle has had the temerity to raise it — is a deficit.

V CONCLUSIONS

A Woman in Berlin is, I have argued, a compelling literary achievement because it constructs, across the dense surface of its finely constructed narrative, an implicit problematic that belongs not merely to it, its author, her personal life — but to our very language and conceptual tools for understanding sexual violence in war. I've used its deep ambivalences to develop four problematics that belong, I think, in any thorough consideration of the new IHL rules of rape, sexual violence and sexual slavery in armed conflict: the war-rape antinomy and rape's discourse of equivalents; the weaponisation of rape; the problematic of coercion; and the partial convergence of feminism with nationalism. None of these problematics is so decisive in any one policy direction that they should cause us to loosen our vigilance against violence, and sexual violence, in war and outside it. But they do suggest that clean prohibitions operate — just as the *Diary* does — in a web of contradictory and intensely politicised meanings and conceptual tools that they cannot fully transcend.

¹⁶⁶ Engle, 'Feminism and its (Dis)Contents', above n 7, 804.

¹⁶⁷ *Kunarac (Appeals Chamber)* Case No IT-96-23-T/1-A (12 June 2002) [132].

SELECT BIBLIOGRAPHY

I ACCOUNTS ABOUT FEMINIST INTERVENTIONS BY PEOPLE HOLDING OFFICIAL POSITIONS

Accounts of the ICTY, ICTR and Rome Statute processes abound. I selected the following contributions because they reflect modes of official 'uptake' of feminist advocacy — and also modes by which officials could report on their responses in legal scholarship or occasional papers published in law reviews.

Arbour, Louise,¹⁶⁸ 'Stefan A. Riesenfeld Award Lecture: Crimes against Women under International Law' (2003) 21 *Berkeley Journal of International Law* 196.

Goldstone, Richard,¹⁶⁹ 'The United Nations' War Crimes Tribunals: An Assessment' (1997) 12 *Connecticut Journal of International Law* 227.

—'Prosecuting Rape as a War Crime' (2002) 34 *Case Western Reserve Journal of International Law* 277.

Oosterveld, Valerie,¹⁷⁰ 'Sexual Slavery and the International Criminal Court: Advancing International Law' (2004) 25 *Michigan Journal of International Law* 605.

—'The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?' (2005) 18 *Harvard Human Rights Journal* 55.

Sellers, Patricia Visser,¹⁷¹ 'Emerging Jurisprudence on Crimes of Sexual Violence' in Payam Akhavan et al, 'The Contribution of the Ad Hoc Tribunals to International Humanitarian Law' (1998) 13 *American University of International Law Review* 1509.

—'The Cultural Value of Sexual Violence' (1999) 93 *American Society of International Law: Proceedings of the 93rd Annual Meeting* 312.

—'The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law' in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (2000) vol 1, 263.

—'Sexual Violence and Peremptory Norms: The Legal Value of Rape' (2002) 34 *Case Western Reserve Journal of International Law* 287.

—'Individual(s) Liability for Collective Sexual Violence' in Karen Knop (ed), *Gender and Human Rights* (2004) 153.

¹⁶⁸ The Honourable Madam Justice Louise Arbour sat on the Supreme Court of Canada from 1999 until 2004 and was previously Chief Prosecutor of the ICTY and ICTR.

¹⁶⁹ Justice Goldstone of the South African Supreme Court served as Chief Prosecutor in the ICTY.

¹⁷⁰ Valerie Oosterveld served as a member of the Canadian delegation to the Rome Conference.

¹⁷¹ Patricia Visser Sellers served as the Legal Advisor for Gender-related Crimes and as Senior Trial Attorney in the Office of the Prosecutor for the ICTY.

- and Kaoru Okuizumi, 'Intentional Prosecution of Sexual Assaults' (1997) 7 *Transnational Law & Contemporary Problems* 45.

II ACCOUNTS THAT ARE BOTH OBJECTIVE IN STANCE AND PRO-FEMINIST

Again, the bibliography of painstakingly documented and rigorously argued law review analysis on the ICTY, ICTR and Rome Statute processes is voluminous. This short list selects some of the most significant contributions to this literature, selected because they combine scholarly objectivity with strong pro-feminist advocacy.

Surely the most consistent and prolific contributor is Kelly Dawn Askin:

Askin, Kelly Dawn, *War Crimes against Women: Prosecution in International War Crime Tribunals* (1997).

- 'Issues Surrounding the Creation of a Regional Human Rights System for the Asia-Pacific' (1998) 4 *ILSA Journal of International & Comparative Law* 599.
- 'The International War Crimes Trial of Anto Furundzija: Major Progress Towards Ending the Cycle of Impunity for Rape Crimes' (1999) 12 *Leiden Journal of International Law* 935.
- 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status' (1999) 93 *American Journal of International Law* 97.
- 'Judgments Rendered in 1999 by the International Criminal Tribunals for the Former Yugoslavia and for Rwanda: Tadić (App. Ch.); Aleksovski (ICTY); Jelisić (ICTY); Ruzindana & Kayishema (ICTR); Serushago (ICTR); Rutaganda (ICTR)' (2000) 6 *ILSA Journal of International & Comparative Law* 485.
- 'News from the International Criminal Tribunal: Part IV — ICTY' (2001) 8(3) *Human Rights Brief* 20.
- 'Omarska Camp, Bosnia: Broken Promises of "Never Again"' (2003) 30 *Human Rights* 12.
- 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkeley Journal of International Law* 288.
- 'The Quest for Post-Conflict Gender Justice' (2003) 41 *Columbia Journal of Transnational Law* 509.
- 'Reflections on Some of the Most Significant Achievements of the ICTY' (2003) 37 *New England Law Review* 903.
- 'A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993-2003' (2004) 11(3) *Human Rights Brief* 16.
- 'Gender Crimes Jurisprudence in the ICTR: Positive Developments' (2005) 3 *Journal of International Criminal Justice* 1007.

There is also a growing shelf of feminist 'restatements' of IHL and ICL. For example, the following two codification-style handbooks purport to restate the work of the ICTs and the Rome Conference but are permeated with feminist advocacy moves:

De Brouwer, Anne-Marie L M, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (2005).

Gardham, Judith and Jarvis, Michelle, *Women, Armed Conflict and International Law* (2001).

III ACCOUNTS THAT REPORT ON OR ARE PRO-FEMINIST ACTIVISM

Here we encounter those much scrappier figures, the feminist advocate, the feminist academic who criticises rather than expounds IHL and the feminist activist.

Doubtless, the inaugural feminist-activist article is this one:

Charlesworth, Hilary, Chinkin, Christine, and Wright, Shelley, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613.

Hilary Charlesworth and Christine Chinkin position themselves outside the IHL/ICL intelligentsia and sometimes reach a voice that is almost visionary:

Charlesworth, Hilary, 'Feminist Methods in International Law' (1999) 93 *American Journal of International Law* 379.

Chinkin, Christine, "'Reconceiving Reality': A Ten-Year Perspective' (2003) 97 *American Society of International Law: Proceedings of the 97th Annual Meeting* 55.

The following are actual gestures in controversy, reflecting feminist disagreements and convergences on how the ICTY should deploy its authority to charge and convict:

Copelon, Rhonda, 'Surfacing Gender: Reconceptualizing Crimes against Women in Times of War' in Alexandra Stiglmeier (ed), *Mass Rape: The War against Women in Bosnia-Herzegovina* (Marion Faber trans, 1994 ed) 197 [trans of: *Massenvergewaltigung — Krieg gegen die Frauen*].¹⁷²

¹⁷² The material of this chapter was quite substantially revised and republished under a new title: 'Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law' (1994) 5 *Hastings Women's Law Journal* 243.

Green, Jennifer, Copelon, Rhonda, Cotter, Patrick and Stephens, Beth, 'Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Critique and Proposal' (1994) 5 *Hastings Law Journal* 171.

Stiglmayer, Alexandra (ed), *Mass Rape: The War against Women in Bosnia-Herzegovina* (Marion Faber trans, 1994 ed) [trans of: *Massenvergewaltigung — Krieg gegen die Frauen*].

— 'The Rapes in Bosnia-Herzegovina', in Alexandra Stiglmayer (ed), *Mass Rape: The War against Women in Bosnia-Herzegovina* (Marion Faber trans, 1994 ed) 82 [trans of: *Massenvergewaltigung — Krieg gegen die Frauen*].

MacKinnon, Catherine, 'Rape, Genocide and Women's Human Rights' in Alexandra Stiglmayer (ed), *Mass Rape: The War against Women in Bosnia-Herzegovina* (Marion Faber trans, 1994 ed) 183 [trans of: *Massenvergewaltigung — Krieg gegen die Frauen*]. (This essay is now reprinted in Catherine MacKinnon, *Are Women Human? And Other International Dialogues* (2006).)

And the following (together with Oosterveld's article cited in Part I above) are particularly indicative of feminist struggles in the making of the Rome Statute:

Bedont, Barbara and Hall-Martinez, Katherine, 'Ending Impunity for Gender Crimes under the International Criminal Court' (1999) 6 *Brown Journal of World Affairs* 65.

Bedont, Barbara, 'Gender-Specific Provisions in the Statute of the ICC' in Flavia Lattanzi and William Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (1999) 183.

Lehr-Lehnardt, Rana, 'One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court' (2002) 16 *Brigham Young University Journal of Public Law* 317.