Chapter 15

IHL-Based Rights of Women and Children in Occupied Territories

1. Introduction

It ought to be noted at the outset that the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the UN Convention on the Rights of the Child are considered continuously applicable in occupied territories. The absence of derogation clauses under these human rights treaties corroborates this assumption. Thorough appraisal of the rights of women and children, which are derived from these treaties and corresponding customary international human rights law, goes beyond the parameters of this monograph. Instead, this chapter focuses on the rights of women and children in occupied territories, which are specifically derived from IHL treaty-based rules. The bulk of their rights relate to economic, social and cultural rights (ESC rights) and hence entail specific positive duties incumbent on occupying powers. While some of their rights deal with conduct of hostilities, they remain of marked significance in occupied territories.

2. IHL Treaty-Based Rights of Women in Occupied Territory

2.1. Overview

The first section briefly appraises the rights of women under IHL, which have evolved from a paternalistic concept of family honour to rights based on the individual dignity of women. It starts with a preliminary discussion on the current gendered rubrics of IHL to highlight the inadequacy of the existing legal framework to meet the special needs of women in occupied territories.

Historically, the contexts of armed conflict and occupation have provided ample evidence of women’s victimisation. Their rights and interests remained fragile and invisible from the very limited scope of protection under traditional
international humanitarian law.\(^1\) Against the sombre background of the history of armed conflict, riddled with mass rapes, sex slavery, forced prostitution or other sexual violence against women, the evolution of international human rights concepts since 1945 and the growing consciousness of women’s rights since 1960s have helped shed greater light on the gender dimension of armed conflict and occupation.

2.2. General Safeguards of the Rights of Women under IHL

Article 46 of the Hague Regulations requires the occupying power to respect “family honour and rights”. This clause has been criticised for surrendering women’s rights of protection against sexual violence during armed conflict to the paternalistic concept of “family honour”.\(^2\) This term has an implied assumption of modesty and chastity imposed only on women, but not on men.

One of the three core principles embodied in Article 27 GCIV is that women must be protected against “any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”. This is the reaffirmation of the obvious, namely the duty to protect women from attacks against their physical and mental dignity. The rights of women embodied under Article 27 GCIV are fully recognised as having acquired customary and non-derogable nature. It is safe to argue that the corresponding customary rules are applicable to any situations affected by hostilities, (in international or non-international armed conflict, or in occupied territory or in a combat zone).

During the Holocaust and the Second World War, gender violence was numerous, rampant and systematised, as this was carried out pursuant to, or in close

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\(^2\) See, for instance, Gardam and Jarvis, *ibid.*, at 97 and Chapter 3. Even the *ICRC’s Commentary* is no exception to this conceptual framework. With respect to the words “women shall be treated with all consideration due to their sex” under Article 12 of the First Geneva Convention, the *Commentary* notes that the “special consideration” that must be given to women refers to “the consideration which is accorded in every civilized country to beings who are weaker than oneself and whose honour and modesty call for respect”: *ICRC’s Commentary to GCI*, at 140.