Chapter 20
Procedural Safeguards and Fair Trial Guarantees in Occupied Territory

1. Introduction

The provisions under GCIV Section III (Articles 64–78), which deal with penal and security laws, furnish the most important basis for assessing the relationship between IHL and human rights law in occupied territory. These provisions relate to the requirements for occupation courts, procedural safeguards for protected persons interned or administratively detained for security reasons, and to the fair trial guarantees for protected persons who are held in pre-trial detention for criminal charges and those who are convicted. The fact that such procedural safeguards and due process guarantees find more elaborate counterparts under international human rights treaties requires careful assessment of the relationship between IHL and international human rights law. This chapter firstly seeks to articulate procedural safeguards that must be accorded to all individual persons interned or administratively detained in occupied territory. The focus of appraisal will then turn to the expanded scope of fair trial guarantees that must be given to all accused persons in occupied territory.

2. Assigned Residence and Internment/Administrative Detention

2.1. The Legal Basis for Depriving Persons of Liberty in Occupied Territory

Both in occupied territories and in the territories of the parties to the conflict, protected persons may be subjected to “such measures of control and security . . . as may be necessary as a result of the war” within the meaning of Article 27(4) GCIV.1 The most that the occupying power can use as such measures of control

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1 GCIV, Article 27(4).
and security will be either assigned residence or the severe measure of internment (administrative detention). However, Article 78(1) GCIV stresses that such deprivation of liberty is of exceptional nature that can be adopted only if there are “imperative reasons of security”.²

Assigned residence consists of moving individual persons from their domicile and forcing them to live in a locality where supervision is more easily carried out.³ The occupying power is obligated to take measures of internment in case individual persons volunteer, through the representatives of the protecting power, to be interned and where their situation “renders this step necessary”.⁴ Measures of internment or administrative detention may cause severe financial predicament on the protected persons under control. In such cases, those affected persons are entitled to the standards of welfare corresponding to the detailed requirements embodied in the section on internment of protected persons (Part III, Section IV) GCIV.⁵

Internment or administrative detention is defined as the deprivation of liberty that has been ordered by the executive branch (and not by the judiciary) without criminal charges brought against the internee/administrative detainee.⁶ In that sense, internment/administrative detention must be strictly distinguished from the circumstances where protected persons are deprived of their liberty while held in pre-trial detention on criminal charges, or where they are serving penalties involving loss of their liberty.⁷ Further, this type of internment or administrative detention is a regime distinct from the internment of prisoners of war in international armed conflicts.⁸

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² GCIV, Article 78(1).
⁴ GCIV, Article 42(2).
⁵ GCIV, Article 41(2) and Article 39(2).
⁷ Pejic aptly describes the danger of confusing the two regimes, stating that “[u]nless internment/administrative detention and penal repression are organized as strictly separate regimes there is a danger that internment might be used as a substandard system of penal repression in the hands of the executive power, bypassing the one sanctioned by a country’s legislature and courts”: Pejic (2005), ibid., at 381.
⁸ On this matter, it may be questioned whether prisoners of war who are benefiting from the system provided by IHL (such as access and visit by Protecting Powers and ICRC) must be