

**Expert Opinion on the Non-Renunciation of Rights Under  
International Humanitarian Law**

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# **Legal Expert Opinion on the Non-Renunciation of Rights under International Humanitarian Law**

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## **Introduction**

This opinion examines the meaning and scope of the non-renunciation of rights provision set forth in article 8 of the Fourth Geneva Convention of 1949 (which corresponds to article 7 of the first three Conventions), in light of related provisions of that Convention and other relevant rules of international law and in the context of belligerent occupation. It then applies this understanding of the provision in answering a series of questions concerning: whether and to what extent Common Article 7/8 (CA 7/8) impacts agreements between the PLO and Israel; whether rights are ever waivable, and how the non-renunciation provision interacts with rules of IHL that appear to turn upon the consent of protected persons; the proper conception of CA 7/8 as it related to both states and individuals; and how the foregoing should inform that work of impartial humanitarian and protection organizations.

## **Preliminary Remarks**

This analysis proceeds on the following assumptions.

It is assumed that the territory of Palestine is (at least partially) occupied by Israel in the sense of the Fourth Hague Convention of 1907 and the Fourth Geneva Convention of 1949. It is consequently also assumed that all individuals within the occupied territory meeting the nationality test set forth in article 4 of the Fourth Geneva Convention qualify as “protected persons” within the meaning of that Convention.

It is also assumed that obligations arising under international human rights treaties to which Israel is a party apply to its conduct vis a vis individuals in territory occupied by Israel. It is also assumed that Palestine, as a geopolitical entity, has sufficient indicia of statehood to validly express consent to be bound by multilateral human rights treaties, and, as such, is bound by all human rights treaties to which it has expressed consent to be bound and that have entered into force in relation to Palestine.

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## **The Meaning and Scope of the Non-Renunciation of Rights Provision of the Fourth Geneva Convention of 1949**

### *Introduction to Article 8*

Article 8 of the Fourth Geneva Convention of 1949 provides:

“Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.”

Article 8 is a “common article,” so called as it is found in each of the four Geneva Conventions of 1949. In the first three conventions, it is found in article 7. It is thus sometimes referenced as Common Article 7/7/7/8, or simply Common Article 7/8 (“CA 7/8”).

It is found among the general introductory provisions of the Conventions, concerning such matters as conditions for, and duration of, application of the Conventions, definitions of persons protected by each Convention, and the Protecting Powers system.

The article immediately preceding CA 7/8 is also a common article. CA 6/7 states:

“In addition to the agreements expressly provided for in Articles 11, 14, 15, 17, 36, 108, 109, 132, 133 and 149, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them.

Protected persons shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.”<sup>1</sup>

In situations of occupation, these provisions are further supplemented by article 47 for the Fourth Convention, which states:

“Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.”

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<sup>1</sup> The verbal formula of CA 6/7 is the same in each of the four Conventions, except for the phrase used to describe the category of individuals protected by each Convention (e.g. civilian “protected persons” under the Fourth Convention versus “prisoners of war” under the Third Convention) and for the enumeration of other referenced articles, as each Convention expressly provides for different types of special agreements in different numbered articles of that Convention.

Taken together, these provisions<sup>2</sup> demonstrate a departure from the traditional understanding of international legal obligations. By eliminating the possibility of derogation by agreement, the Geneva Conventions of 1949 move some distance away from the positivist, contractual model of treaty obligations. It represents an effort to entrench these rules beyond the normal reciprocal, consent-based framework of the Westphalian system. This broader juridical context is important for understanding the rule set forth in CA7/8.

The significance of this departure can be illustrated against the background of the evolution of international humanitarian law (IHL) during the first half of the Twentieth Century.

### *The Evolution of IHL*

Generated and embedded within the classical interstate system of international law, IHL originally regulated only those armed conflicts that were international (i.e., interstate). The events of World War II, however, spurred a number of developments in international law that struck at the core structure of the system. The principal structural developments of that period were the erosion of the non-intervention principle and the emergence<sup>3</sup> of the individual human being as a subject of positive international law, capable of bearing international rights and duties.

These developments are reflected in the subsequent evolution of humanitarian law, resulting in an expanded scope of application. The Geneva Conventions of 1949 pierce the veil of the state in a number of important ways. They provide for direct application to non-state actors (in particular, non-state, organized armed groups), move away from strict reciprocity (e.g. with an explicit prohibition of reprisals against protected persons and their property<sup>4</sup>), require prosecution of those individuals responsible for grave breaches of the Conventions, extend the application of some basic rules of humanitarian law to armed conflicts “not of an international character,”<sup>5</sup> and, most significantly for present purposes, speak in terms of rights of individual human beings (and not only of states).

The evolution of the status of the individual can be seen in a range of international legal developments. Many of these developments were expressed in a progression of humanitarian law instruments that gradually moved from a state-centered focus to an individual-centered focus. These instruments increasingly embraced the language of individual rights and duties, invoked transcendental values, diminished requirements of inter-state reciprocity and nationality-based protection, and moved away from inter-state compensation as the exclusive remedy for violations. These structural developments were consolidated in the work of the Nuremberg Tribunal, which recognized the subjecthood of the individual in strict legal terms.

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<sup>2</sup> The principle underlying these provisions is also found in more specific provisions of the Fourth Convention. See, e.g., GC IV, art. 52(1): “No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power’s intervention.” As the 1958 Commentary notes, “this provision is only one case of the application of the principle of the inviolability of the rights accorded to protected persons. That principle is laid down in Article 8 and dominates the whole Convention.”

<sup>3</sup> It could of course be argued that this was the re-emergence of a much older idea. Jurists such as Grotius had little difficulty conceiving of the individual as a subject of international law. International law in that period was largely comprised of natural law, which, as made clear by Grotius, bound in the first place individuals, and was only through extrapolation rendered applicable to states.

<sup>4</sup> See, e.g., art. 43 of the Fourth Geneva Convention of 1949.

<sup>5</sup> Geneva Conventions of 1949, Common Article 3.

Ultimately, this process found its clearest expression in the adoption of the Universal Declaration against the backdrop of the UN Charter—that is, in the birth of human rights law.

While the Geneva Conventions fail to shed entirely the baggage of the traditional model (e.g., by making qualification for protected person status dependent upon nationality) and consequently fail to provide protection for all individuals as such, they clearly conceive of individual protected persons as rights holders, irrespective of the attitude of their state of nationality. This conception is most clearly evident in the formulation of Common Articles 6/7 and 7/8.

According to the Pictet Commentary to the Fourth Convention, in opting for the present formulation of these articles “the International Committee, doubtless under the influence of the theoretical trends which also resulted in the Universal Declaration of Human Rights, had been led to define in concrete terms a concept which was implicit in the earlier Conventions. It had at the same time, however, complied with the unanimous recommendation of the Red Cross Societies, meeting in conference in Geneva in 1946, to confer upon the rights recognized by the Conventions ‘a personal and intangible character allowing’ the beneficiaries ‘to claim them irrespective of the attitude adopted by their home country’.”<sup>6</sup>

This structural development corresponded to a coalescence of values around a principle conceived as transcendental and universal—human dignity.<sup>7</sup> Recognition by the newly reconceived international community that the dignity of the individual human being was something entitled to legal protection led to the transformation of this principle into positive law. It is this conception of human rights as both transcendental and universal that pushes against the concept of jurisdiction—pushing simultaneously into the domestic sphere and out of it—and underscores both its artificiality and diminished existence. It is this conception that has simultaneously anchored and animated the interpretation of both human rights law and humanitarian law, enabling them to grasp the outer and inner reaches of the power of the state. As expressed by the 1958 Commentary, “In that sense Article 7 is a landmark in the progressive renunciation by States of their sovereign rights in favour of the individual and of a higher juridical order.”<sup>8</sup>

Nonetheless, the 1949 Geneva Conventions were adopted at the dawn of the age of human rights law, when the nascent human rights norms had only begun to crystallize, roughly 17 years before the adoption of the International Covenants on Civil & Political Rights, and on Economic, Social, & Cultural Rights. Thus, the texts of the Conventions and the Commentaries<sup>9</sup> do not reflect the notion and legal content of international human rights standards as they are understood today. On one hand, this informs our understanding of the intent of the negotiating states. On the other hand, the interpretation of the Conventions’ provisions must take into account other applicable rules of international law as they exist and are understood today.

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<sup>6</sup> 1958 Commentary to the 4<sup>th</sup> Convention, art. 8, at p. 77 (citing ‘ Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems relative to the Red Cross ’ (Geneva, July 26-August 3, 1946), Geneva, 1947, p. 71).

<sup>7</sup> The notion of human dignity and the language of universality figure prominently in the text of all major human rights and humanitarian law treaties of the modern era. Such terminology is also frequently invoked by states, as well as international courts and human rights bodies in discharging their functions.

<sup>8</sup> 1958 commentary to GC IV art. 7.

<sup>9</sup> Although written after 1949, the Commentaries largely reflect views contemporaneous with the adoption of the Conventions, especially to the extent that they capture the travaux préparatoires.

## *The Interpretation of Common Article 7/8*

The interpretation of treaty provisions begins with the text itself. According to the basic rule of treaty interpretation set forth in article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 31(3) further stipulates, “There shall be taken into account, together with the context: ... (c) Any relevant rules of international law applicable in the relations between the parties.” Interpretation may also take into account the drafting history of the particular treaty, as well as the circumstances of its conclusion.<sup>10</sup>

These rules of treaty interpretation are widely regarded as having achieved the status of customary international law, and are thus applicable to all states. They are supplemented by canons of construction, such as the *lex posterior* principle, the *lex specialis* principle, and the principle that interpretations that would render language superfluous should be eschewed. This last principle must be applied with particular care when it comes to the interpretation of multilateral treaties, not only because of the diversity of negotiators, but because of the decentralized nature of the international legal system, which lacks a court or other central interpretive body with compulsory jurisdiction.<sup>11</sup> In such a system, the principal mode of interpretation is auto-interpretation by the relevant subject (i.e. the state party), and, as such, language which might be deemed superfluous in a typical domestic system (e.g., where judicial organs have binding interpretive authority) might be employed by negotiating states in a multilateral context as a back-stop, or reinforcement.

The text of CA 7/8 is remarkable for its categorical language. It provides that protected persons “may in no circumstances renounce” their rights. In this context, the ordinarily permissive term ‘may’ is used in the negative, meaning that it is never permitted for a protected person to renounce their rights. The French version, equally authentic, is also equally categorical. It states, “Les personnes protégées ne pourront en aucun cas renoncer partiellement ou totalement aux droits que leur assurent la présente Convention et, le cas échéant, les accords spéciaux visés à l'article précédent.” The phrase “ne pourront en aucun cas” underscores the mandatory nature of the provision.<sup>12</sup>

This phrase gives the rights conferred on protected persons a special character. While some have described this character as inalienability,<sup>13</sup> it is perhaps more accurately described as unwaivability.

At this point it is useful to distinguish between the related concepts of inalienability, nonderogability, and unwaivability. To say that a right is inalienable means, essentially, that it is indelible, irremovable, undetachable; that it cannot be taken away or given away. To say that a right is unwaivable is somewhat narrower. It means that the right-holder may neither

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<sup>10</sup> The basic rule set forth in article 31 is supplemented by article 32 of the VCLT, which permits recourse “to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

<sup>11</sup> Interpretation by third parties remains exceptional in the international legal system, and compulsory jurisdiction even more so.

<sup>12</sup> This provision echoes similar categorical language found in Common Article 1, which requires states parties to respect and ensure respect for the Conventions “in all circumstances.”

<sup>13</sup> See, e.g., 2016 ICRC Commentary to the First Convention, art. 7., at para. 987.

give up the right nor abrogate the corresponding obligation on the relevant duty-bearer to respect the right. Nonderogability focuses on the duty-bearer. If an obligation is nonderogable, then the duty bearer cannot depart or detract from the obligation, for example, through a subsequent agreement or by reference to extenuating circumstances.<sup>14</sup>

All of these characteristics relate to the concept of *jus cogens* (also known as peremptory norms). According to article 53 of the VCLT, “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” The law of treaties thus renders void any treaty that conflicts with norms of *jus cogens*.<sup>15</sup> Similarly, according to the articles on the responsibility of states for internationally wrongful acts, the circumstances precluding wrongfulness set forth in chapter 5 of Part I of the articles are inapplicable when it comes to norms of *jus cogens*. It has been suggested by scholars and international judges that at least the basic rules of IHL have achieved *jus cogens* status.

Another related concept is that of obligations *erga omnes*. Such obligations are owed to all – either to all states, or to all states parties to a particular treaty (*erga omnes inter partes*). At a minimum, obligations arising under the Geneva Conventions have an *erga omnes* character, and as such, are owed to all other states parties. This is underscored by Common Article 1, which requires to states parties to both respect and ensure respect for the obligations set forth in the Conventions.

The basic function of Common Article 7/8 is to render the rights unwaivable by the protected persons themselves. By the terms of this provision, protected persons are barred from giving up their rights. It does not address the separate issue of whether their rights can be taken away. This latter issue is largely addressed in the preceding article, Common Article 6/7, and is supplemented in situations of occupation, by article 47 of the Fourth Convention. These provisions eliminate the possibility of derogation by special agreement, or, in the case of occupied territory, “by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory.”<sup>16</sup>

The patent concern of all of these provisions is that the relevant duty-bearers (states parties who have protected persons in their power) might try to evade their obligations by ‘contracting out’ of the Convention requirements through subsequent agreements with the relevant rights holders, be they other states parties (under Common Article 6/7), the protected persons themselves (under Common Article 7/8),<sup>17</sup> or “the authorities of the occupied territories” (under article 47). By precluding this, the Conventions have departed from the ordinary framework of treaty relations, in which treaty obligations can be modified by subsequent agreement. While, as a matter of positive treaty law, it may still be the case<sup>18</sup> that these treaty

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<sup>14</sup> See, e.g., art. 4 of the International Covenant on Civil and Political Rights, which provides for derogation from certain obligations in time of “public emergency which threatens the life of the nation.” Art. 4(2) prohibits derogation from certain articles. The rights set forth in those articles are typically referred to as ‘nonderogable rights’.

<sup>15</sup> VCLT, art. 53.

<sup>16</sup> It should be noted that although protected persons may not renounce any additional rights that may be set forth in special agreements, these rights may be withdrawn by the terms of those agreements, and, to that extent, are neither nonderogable nor inalienable.

<sup>17</sup> See also art. 52(1) of the Fourth Convention for a particular specification. See note 2 *supra*.

<sup>18</sup> It could be argued that the ordinary rules of treaty law permitting modification by subsequent agreement would not apply to the extent that some of the norms to be modified have acquired the status of *jus cogens*,

obligations can be modified by subsequent agreement, the *erga omnes* character of the obligations would require that all states agree to the modification.<sup>19</sup>

All of these provisions, taken together, exclude the possibility that the rights of protected persons might be restricted by legal measures beyond the text of the Conventions. Nonetheless, certain rights of protected persons may be taken away, in conformity with the Conventions, in exceptional circumstances, as, for example, in situations governed by article 5 of the Fourth Convention.<sup>20</sup> In this sense, the rights of protected persons are not inalienable.

In sum, CA 7/8 renders the rights unwaivable by the protected persons themselves, and these rights are further protected by CA 6/7, which prohibits states parties from derogating from their obligations in relation to<sup>21</sup> protected persons by special agreement or by changes introduced in occupied territories.

#### *Absolute quality of Common Article 7/8*

By its terms, CA7/8 prohibits any renunciation of rights by protected persons, even a renunciation that is truly and verifiably voluntary. In this respect, their freedom of choice has been removed. The 1958 ICRC Commentary to the Fourth Convention makes clear that this was done in order to exclude the possibility that pressure would be applied to protected persons in an effort to get them to renounce their rights, and also, to prevent any renunciation from taking place by rendering void any purported renunciation.<sup>22</sup>

Thus, although the non-renunciation provision is formulated as a prohibition addressed to the protected persons themselves, this rule is not focused on individual responsibility. The clear import of the rule is in its enhancing of the durability of the rights of the individual, and in its signaling to the states parties that any attempt to get protected persons to waive their rights would be legally fruitless. The wording of the provision “intimat[es] to States party to the Convention that they could not release themselves from their obligations towards protected persons, even if the latter showed expressly and of their own free will that that was what they desired.”<sup>23</sup>

In addition to their desire to disincentivize the use of pressure tactics against protected persons, the negotiating states also recognized the particular vulnerability of these individuals in the inherently coercive situations of armed conflict and occupation. As such, and as explained in the 2016 Commentary to the First Convention, “[The rule set forth in CA 7/8] is best understood as a mechanism to ensure the inviolability of rights even in the extreme

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whether they be the rules set forth in CA 6/7 or CA 7/8, the specific obligation from which derogation is sought, or the Conventions as a whole, on the theory that universal consent to be bound by the rules set forth in CA 6/7 and 7/8 has conferred the status of *jus cogens* on all of the rules set forth in the Conventions.

<sup>19</sup> A similar analysis obtains under customary international law. The significance of the distinction between custom and treaty in this context is diminished by the fact that all UN member states are parties to the Geneva Conventions of 1949. Even the possibility of these IHL obligations having *jus cogens* status is of lesser importance in this context, in light of the *erga omnes* nature of the obligations and the practical impossibility of getting all states to agree to modify the obligations arising under the Geneva Conventions.

<sup>20</sup> Article 5 provides that certain rights of individual protected persons may be lost if those individuals are suspected of or engaged in activities hostile to the security of the state.

<sup>21</sup> Recall that CA 6/7 precludes special agreements not only from restricting the rights of protected persons, but also from “adversely affect[ing] the situation of protected persons.”

<sup>22</sup> 1958 Commentary to the Fourth Convention, p. 74.

<sup>23</sup> *Id.*



circumstances of armed conflict, when the exercise of 'free choice' can be severely compromised.”

This understanding has been endorsed by the Supreme Court of Israel. The case of *Adalah et al. v. GOC Central Command* concerned the legality of the IDF’s “early warning” procedure,” according to which Israeli soldiers wishing to arrest a Palestinian suspected of terrorist activity would be aided by a local Palestinian resident, who would give prior warning of possible injury to the suspect or to those with him during the arrest. In its 2005 judgment, the Supreme Court of Israel held that the consent of the local resident providing assistance was irrelevant. The Court reasoned:

“The legality of the ‘Early Warning’ procedure might draw its validity from the general duty of the occupying army to ensure the dignity and security of the civilian population. It also sits well with the occupying army's power to protect the lives and security of its soldiers. On the other hand stands the occupying army's duty to safeguard the life and dignity of the local civilian sent to relay the warning. That is certainly the case when he does not consent to take upon himself the task he has been given, and when its performance is likely to cause him damage. But that is also the case when he gives his consent, and when performance of the role will cause him no damage. That is so not only since he is not permitted to waive his rights pursuant to the humanitarian law (*see* article 8 of *The Fourth Geneva Convention*; *Pictet*, at pp. 72, 74), but also since, *de facto*, it is difficult to judge when his consent is given freely, and when it is the result of overt or subtle pressure.”<sup>24</sup>

This understanding is also confirmed by the drafting history of the Conventions, including by statements of negotiating states summarized in the 1958 Commentary to the Fourth Convention. According to that Commentary, the draft Conventions prepared by the ICRC already contained a non-renunciation provision, but it was limited to barring coerced renunciation. It provided that “protected persons may in no circumstances be induced by coercion or by any other forced means, to renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.” This would have left open the possibility of voluntary renunciation. This was, however, rejected by the negotiating states.

The Commentary explains:

“The Norwegian representative, who stated these motives the most forcibly, said among other things that the question was being examined of prisoners of war or civilians in the hands of a Power being able, through an agreement concluded with the latter, to renounce finally for the whole duration of the war the rights conferred on them by the Convention. To say that such agreements would not be valid if they are obtained by duress was not sufficient in his view; they all knew that it was extremely difficult to produce proof of there having been duress or pressure. Generally, the Power which obtained the renunciation would have no difficulty in asserting that it was obtained with the free consent of those concerned, and the latter, for their part, might confirm this alleged fact. The only genuine means of ensuring the protection they were seeking would be to lay down a general rule that any renunciation of rights conferred by the Convention shall be deemed completely devoid of validity.”<sup>25</sup>

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<sup>24</sup> *Adalah et al. v. GOC Central Command* (2005), at para. 23.

<sup>25</sup> 1958 Commentary to Fourth Convention, art. 8, note 2 (citing 'Final Record of the Diplomatic Conference of Geneva of 1949, ' Vol. II-B, pp. 17 and 18).

The drafters thus opted for a bright line prohibiting any renunciation. Their underlying assumption is that individuals would be better off if they did not renounce their rights. As with most bright lines, they risk injustice at the fringes of their application. Indeed, according to the Commentaries, the negotiating states even acknowledged the possibility that the absolute quality of this rule might exceptionally entail “harsh”<sup>26</sup> or “unfortunate”<sup>27</sup> consequences for protected persons.

It is worth noting, however, that the choice of a bright line was motivated at least in part due to concerns about the difficulty of verifying whether or not a given renunciation was truly voluntary, particularly when the individual is “in the hands of”<sup>28</sup> the adversary in the extreme environments of armed conflict or occupation. This concern, which is essentially about problems of proof, is even more pronounced in the international system, where auto-interpretation remains the norm, and fact-finding and judicial jurisdiction remain exceptional.

Seen against this backdrop, there may yet be room to argue that in concrete situations where the protected person would have a clear net benefit from a course of conduct by the relevant state, where the individual’s free and informed consent could be objectively verified, and where there are competing reasonable interpretations of the obligation(s) governing that course of conduct, it would be permissible to favor an interpretation that would permit the state to carry on that course of conduct. The acceptance of “harsh” or “unfortunate” consequences should thus be limited to situations in which there is no reasonable scope for an interpretation that would accommodate the interests of the protected person.

Take, for example, the rules set forth in the Third Convention regarding evacuation of prisoners of war. The mandatory language of article 19 of that Convention (“Prisoners of war shall be evacuated, as soon as possible after their capture...”) seems to admit of no exception other than that set forth in the second paragraph of article 19, concerning the wounded and sick, for whom evacuation might be more detrimental. Nonetheless, the Commentary to article 41(3) of Additional Protocol I, which concerns “prisoners of war [who] have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation,” admonishes that “the Third Convention should not be interpreted as preventing the release of prisoners, as this interpretation could result in a conduct of hostilities in which there would be no survivors.” The point here is that the Third Convention should be interpreted to allow release as a “humanitarian gesture,” even though this may not be the most natural reading of article 19, in conjunction with CA 7/8.<sup>29</sup> Such an interpretation is in line with the humanitarian purposes of the Convention, and may thus be preferred as a matter of teleological interpretation in accordance with the basic rule of interpretation found in article 31 of the VCLT.

Another example, also drawn from the Third Convention, concerns the repatriation of prisoners of war. This example comes even closer to admitting the possibility of a humanitarian override of the non-renunciation provision. The question has arisen in practice as to whether the obligation under article 118 to repatriate prisoners of war is absolute, or whether it might turn upon the consent of the POWs or upon other considerations concerning the fate that may await them upon return.<sup>30</sup> To the extent the obligation to repatriate may be regarded as corresponding

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<sup>26</sup> 1958 Commentary to Fourth Convention, at p. 75.

<sup>27</sup> 1952 Commentary to First Geneva Convention, at p. 80.

<sup>28</sup> See definition of “protected persons” set forth in article 4 of the Fourth Geneva Convention.

<sup>29</sup> This interpretation in favor of permitting release is possible with reference to the phrase “as soon as possible.”

<sup>30</sup> There are different approaches to understanding the obligation set forth in article 118 of the Third Convention. One approach is to understand the obligation as entailing a duty exclusively to the state of origin,

to a right of PoWs subject to the non-renunciation rule set forth in CA 7/8, it may be argued that the lack of consent of PoWs should be immaterial, as they are not capable of waiving their rights.

The issue of whether it would be permissible to refrain from repatriating a PoW for humanitarian reasons is addressed in the 1960 Commentary to the Third Convention. The Commentary sets forth rules to guide interpretation in this context. According to the Commentary, the right of PoWs to be repatriated is predicated on the assumption that this would normally correspond to the wishes of the individual PoW. CA 7/8 therefore seeks “to protect them from themselves, that is to say from the temptation to accept offers by the Detaining Power which might at the time seem advantageous.” However, the Commentary continues:

“2. ' No exception may be made to [the rule requiring repatriation] unless there are serious reasons for fearing that a prisoner of war who is himself opposed to being repatriated may, after his repatriation, be the subject of unjust measures affecting his life or liberty, especially on grounds of race, social class, religion or political views, and that consequently repatriation would be contrary to the general principles of international law for the protection of the human being. Each case must be examined individually. ”<sup>31</sup>

The phrase “who is himself opposed to being repatriated” makes relevant the will of the individual PoW in this determination. This approach, which turns on the will of the individual PoW, would seem to be in tension with the categorical language of both article 118 and CA 7/8. Nonetheless, the Commentary explains that the refusal to repatriate on humanitarian grounds is legally justified in light of the paramount importance ascribed to the principle of humane treatment and the then emerging principle of non-refoulement:

“Apart from Articles 188 [sic] and 7, the Convention, especially in Articles 13 and 14, expresses very general principles prescribing humane treatment and respect for the person in all circumstances. For this reason, where the repatriation of a prisoner of war would be manifestly contrary to the general principles of international law for the protection of the human being, the Detaining Power may, so to speak, grant him asylum.”<sup>32</sup>

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and therefore as not entailing obligations to the individual or to the international community as a whole. According to this approach, the non-renunciation provision would be irrelevant, as the individual would not be a rights-holder within the meaning of CA 7/8. This approach should be rejected. For reasons set forth below, CA 7/8 should be understood to apply to all obligations that benefit or were intended to benefit the individuals protected under the Conventions, even if those obligations are not formulated as rights in the text of the Conventions. The better approach is to understand the obligation set forth in article 118 as entailing obligations to both the state of origin and to the individual PoW, and as a right of the PoW to repatriation. See 1960 Commentary to the Third Convention, at p. 546.

<sup>31</sup> 1960 Commentary, at p. 547.

<sup>32</sup> 1960 Commentary, at p. 547-8. The Commentary continues: “Cases of this kind should be exceptional in normal circumstances; they might be more numerous if, during the period of captivity, an important political change took place in a prisoner's country of origin and, as a consequence of that change, certain groups of people were persecuted. Such a system corresponds to the general tendency which has become apparent since the Second World War against allowing anyone to be sent or returned to a country when he has good reason to fear that measures affecting his life and liberty would be taken against him there. This tendency is reflected, for instance, in Article 45 of the Fourth Geneva Convention of 1949, which forbids the transfer of a protected person to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs. It is also reflected in the Resolution of the United Nations General Assembly calling for release and repatriation to be effected in accordance with the Geneva Convention and with the well-established principles and practice of international law.” Id.

The Commentary also notes that the UN General Assembly adopted a similar approach in the context of the Korean War.<sup>33</sup>

Should this be understood that the right to repatriation may be waived, notwithstanding the categorical language of CA 7/8? The better approach would be to view the expressed unwillingness to be repatriated not as a waiver of the right, but as an important factor in determining the genuineness of a refusal to repatriate on humanitarian grounds.<sup>34</sup>

This approach would seem to support the notion that despite its categorical language, CA 7/8 remains flexible enough to accommodate the best interests of protected persons in light of the humanitarian objectives of the Conventions. In this context, the will and expressed wishes of the protected person are relevant, not as a waiver of rights, but as an indication of the course of conduct which would best serve those objectives.

### *The “rights secured to them”*

Another important dimension of CA 7/8 is the scope of provisions to which it applies. By its terms, CA 7/8 bars protected persons from renouncing any of the “rights secured to them” by the respective Convention. How broadly should this phrase be interpreted? Should it include only those provisions in the Conventions expressly formulated as “rights” of protected persons? Should it extend beyond this to include all obligations of states parties?

To limit its application to those provisions expressly formulated as “rights” of protected persons would drastically limit the scope of application of CA 7/8, particularly since the vast majority of the Conventions’ provisions do not use the term “rights” and are formulated simply as obligations of states parties. At the same time, not all of the obligations set forth in the Conventions are intended to benefit protected persons, and the application of CA 7/8 to these provisions would be nonsensical.

The ICRC Commentaries clearly take the position that the application of CA 7/8 is not limited to those provisions formulated as rights. A clear example is set forth above in the 1960 Commentary’s conception of the obligation to repatriate as an “inalienable right” of PoWs, despite the absence of the term “right” in article 118 of the Third Convention. The Commentaries are replete with similar examples.<sup>35</sup> Indeed, according to the Commentary to

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<sup>33</sup> The 1949 Geneva Conventions did not apply to that conflict. Nonetheless, the approval of the General Assembly may be seen as reflecting the sense of the international community concerning the particular issue of repatriation of PoWs in situations where individual PoWs are unwilling to return to their country of origin, and, for humanitarian reasons, were not compelled to return.

<sup>34</sup> It should go without saying that the custodial Power could not invoke this exception in the context of a humanitarian situation that it has itself created. It would instead be incumbent upon that Power to resolve the humanitarian situation by fixing the situation it had created.

<sup>35</sup> See, e.g., the Commentary to art. 45 of the Fourth Convention, which prohibits transfer of protected persons to a state that is not a party to the Convention (“The prohibition is general in character. It applies to all protected persons in the hands of a belligerent, whatever their status may be (protected persons who are not subject to restrictions on their liberty, internees or refugees); it cannot be lifted, even with the consent of the persons concerned. This is, in fact, a case in which Article 8, relating to the non-renunciation of rights, applies.”). See also the Commentary to the Second Convention, at p. 54 (“It is hardly conceivable that a shipwrecked or wounded person could renounce the assistance and care which the present Convention assures unless his mental faculties were partially impaired or unless he were subject to constraint.”) In addition, the Commentary to article 8 of the Fourth Convention repeatedly speaks of non-renunciation of the “protection” of the Convention throughout.

article 8 (CA 7/8) of the Fourth Convention, “As already seen in connection with Article 7, ‘rights conferred by the Convention’ should be taken to mean the whole system of rules under the Convention.”<sup>36</sup>

It is also clear that the negotiating states did not intend to limit their conception of obligations as corresponding to rights of individuals to only those provisions formulated as rights. This understanding can be gleaned from a contextual interpretation of the Conventions themselves, as provisions that are in some places formulated purely as obligations are elsewhere characterized as rights. For example, Article 110 of the Third Convention provides for direct repatriation of the wounded and sick in certain circumstances. The term ‘right’ does not appear in article 110. Nonetheless, Annex I to the Convention, concerning the implementation of article 110, formulates the obligation of direct repatriation as a “right to direct repatriation.”<sup>37</sup>

The Supreme Court of Israel has also found CA 7/8 to apply to protections of the Conventions that are not formulated as rights of protected persons in the case of *Adalah et al. v. GOC Central Command*, cited above.<sup>38</sup>

It would seem to be the case that the drafting states were not terribly concerned with precisely articulating this particular aspect of the juridical conception of each obligation when elaborating the substantive rules set forth in the Convention. Instead, they addressed this when they chose to use the term “rights” in CA 7/8 not as a limiting factor, but as an expression of their intent that all of the obligations set forth in the Conventions that are intended to benefit protected persons be understood as corresponding to rights of these individuals.

A possible counter-argument may also be made using a contextual mode of interpretation. CA 6/7 states that “[n]o special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them.” It may be argued, a contrario, that inclusion of the phrase “adversely affect the situation of protected persons... nor restrict the rights” (emphasis added) in this article should give rise to an inference that the drafters intended that the rule in CA 7/8 would encompass only rights of protected persons and would not include duties imposed on states parties that benefit protect persons but are not formulated as rights. But this simply begs the question as to what would be encompassed by the term “rights.” In addition, the phrase “adversely affect the situation of protected persons” would include more than simply obligations intended to benefit protected persons. Special agreements could conceivably adversely affect their situation without expressly derogating from those obligations. Whether an individual is adversely affected is a question of fact, of actual impact, while the restriction of rights refers to a legal alteration. While it makes sense to include the former phrase in a provision limiting the scope of special

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<sup>36</sup> As explained in the Commentary to art. 7 of the Fourth Convention, “Should the words be understood to apply solely to provisions which refer directly to protected persons? By no means. A proposal aimed at prohibiting only those agreements which restricted fundamental rights was rejected by the Diplomatic Conference on the grounds that the Convention laid down a minimum standard of treatment for protected persons and it would be difficult to draw a distinction between rights which were fundamental and those which were not. The reference is, therefore, to the whole body of safeguards which the Convention affords to protected persons. These safeguards follow from the whole of the provisions of the Convention, save perhaps the purely formal clauses contained in the last section.”

<sup>37</sup> Third Convention, Annex I, II(2).

<sup>38</sup> See *Adalah*, supra note 23, at para. 23.

agreements (CA 6/7), it would not make sense to include it in an article barring the waiver of rights by protected persons themselves (CA 7/8).<sup>39</sup>

Could the scope of CA 7/8 be broad enough to encompass other rights conferred by international law that are not included in the Conventions? By its terms, CA 7/8 applies to the rights of protected persons that are “secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.” This wording would seem to exclude any other rights conferred by international law independently of the Conventions and any special agreements contemplated by article 6/7.

Nonetheless, the rules of treaty interpretation stipulate that there “shall be taken into account ... [a]ny relevant rules of international law applicable in the relations between the parties.” Thus, while other rights are not covered by CA 7/8, the existence of those rights informs the interpretation of the substantive provisions of the Conventions, including those provisions that are covered by CA 7/8.

Against this backdrop, the choice of the phrase “rights secured to them” was not intended to restrict the non-renunciation provision to those provisions expressly formulated as rights, but rather to underscore the conception of the individual as a rights-holder, which was an extraordinary development within IHL, and within the international legal system more generally. As such, the scope of CA 7/8 is best understood as encompassing not only those rules expressly formulated as rights of protected persons, but also all other obligations that were intended to benefit protected persons.<sup>40</sup>

### *The relevance of consent*

As noted above, protected persons are barred by CA 7/8 from waiving their rights, and to this extent, their consent is irrelevant. However, as the Commentary points out, “The Conventions do not, it is true, completely ignore the wishes of protected persons.”<sup>41</sup> Some of the obligations set forth in the Conventions turn on the consent, or will, of the protected person. Whether the application of the rule turns on the consent of the individual is distinct from whether the right

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<sup>39</sup> It is also worth recalling the caveat expressed above concerning the application of rules of interpretation in a decentralized system without compulsory court jurisdiction. For example, one should not presume that language is superfluous just because it would be deemed so in the context of a highly evolved legal system with a final, central interpreter. Consider article 52 of the Fourth Convention, which provides that in situations of occupation “[n]o contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power’s intervention.” This is a right that would be covered by CA 7/8. As such, this provision would seem to be superfluous. However, in a system that tends toward self-serving interpretations that push the bounds of reasonableness, complete textual coherence cannot be expected.

<sup>40</sup> A related issue is whether the scope of provisions encompassed by CA 7/8 includes the rules set forth in common article 3. It may be argued that as CA 7/8 is found in the introductory provisions of the Convention, it should be construed as having a general application to all of the rules set forth in the Conventions, similar to common article 1. However, CA 7/8 follows common article 4, which defines the group of persons protected by each Convention in situations covered by common article 2. As such, “protected persons” within the meaning of article 4 exist only in situations of international armed conflict. The better view is therefore that CA 7/8 applies only in international armed conflict, and that common article 3 is a self-contained regime, not subject to the rule in CA 7/8. See also the ICTY’s interpretation of the term ‘protected persons’ in the context of the grave provisions of the 1949 Conventions. Whether the rule in CA 7/8 has acquired the status of customary law, and whether it has evolved to apply in situations of non-international armed conflict is a separate matter beyond the scope of this paper.

<sup>41</sup> Commentary to article 8 of the Fourth Convention, at p. 75.

is waivable.<sup>42</sup> While protected persons cannot consent to giving up their rights, some rights are defined in such a way as to make consent relevant in determining what the rule requires or whether it has been violated.<sup>43</sup>

The Commentary to the Third Convention lists a number of examples of such rights. The “provisions in the Third Convention [that] nevertheless take into account the wishes of prisoners of war” include “those relating to release on parole (Article 21, paragraph), the assembling of prisoners in camps (Article 22), recreation (Article 38), dangerous labour (Article 52), religious duties and attendance at the services of their faith (Article 34), and the repatriation of wounded or sick prisoners of war (Article 109, paragraph 3).”<sup>44</sup> As explained in the Commentary to the First Convention, “[I]n these instances the expression of the will of the protected persons contributes towards the application -- a more elastic application -- of the Convention; it never results in the suppression of the Convention, either in its entirety or in part.”<sup>45</sup>

Another example is found in article 49 of the Fourth Convention, which prohibits, *inter alia*, “Individual or mass forcible transfers.” The Commentary makes clear that the inclusion of the

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<sup>42</sup> See ILC Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts (2001), at art. 20, para. 10 (“The rights conferred by international human rights treaties cannot be waived by their beneficiaries, but the individual’s free consent may be relevant to their application. In these cases the particular rule of international law itself allows for the consent in question and deals with its effect. By contrast article 20 states a general principle so far as enjoyment of the rights and performance of the obligations of States are concerned.”) See also the ILC Commentary at art. 26, para. 6 (“In accordance with article 26, circumstances precluding wrongfulness cannot justify or excuse a breach of a State’s obligations under a peremptory rule of general international law. Article 26 does not address the prior issue whether there has been such a breach in any given case. This has particular relevance to certain articles in chapter V. One State cannot dispense another from the obligation to comply with a peremptory norm, e.g. in relation to genocide or torture, whether by treaty or otherwise. But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility.”)

<sup>43</sup> There may also be situations in which the rule implicitly turns on the consent of the protected person, even though it is not expressly phrased as such in the Conventions. Take the example of forced-feeding. The Conventions requires states parties to provide to protected persons in certain circumstances (e.g. detention) “the medical attention required by their state of health.” (See, e.g., articles 76 & 81 of the Fourth Convention.) If a detainee chooses to go on hunger strike, does CA 7/8 require the state to ignore the will of the protected person and to forcibly provide nutrition? The issue of forced feeding was addressed by the World Medical Association in its Malta Declaration. Principle 2 of the Declaration states: “Respect for autonomy. Physicians should respect individuals’ autonomy. This can involve difficult assessments as hunger strikers’ true wishes may not be as clear as they appear. Any decisions lack moral force if made involuntarily by use of threats, peer pressure or coercion. Hunger strikers should not be forcibly given treatment they refuse. Forced feeding contrary to an informed and voluntary refusal is unjustifiable. Artificial feeding with the hunger striker’s explicit or implied consent is ethically acceptable.” (Principle 2, World Medical Association, Declaration of Malta on Hunger Strikers (1991), most recently revised in 2006. URL: <https://www.wma.net/policies-post/wma-declaration-of-malta-on-hunger-strikers/>.) If the hunger strike is truly voluntary, should the state party be required to provide nutrition? A possible argument is that the “medical attention required by their state of health” implicitly requires the express or implied consent of the protected person, and that without such consent, it cannot be regarded as “medical attention.” However, reading a consent element into the protections provided by the Geneva Conventions would have to be done with great caution, for all of the reasons that the drafters included CA 7/8. (Note also that article 11(5) of Protocol I states that persons in the power of the adversary “have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.”)

<sup>44</sup> Commentary to the Third Convention, at p. 90.

<sup>45</sup> Commentary to the First Convention, at p. 81.

word “forcible” was intentional.<sup>46</sup> It explains, “[T]he Diplomatic Conference preferred not to place an absolute prohibition on transfers of all kinds, as some might up to a certain point have the consent of those being transferred. The Conference had particularly in mind the case of protected persons belonging to ethnic or political minorities who might have suffered discrimination or persecution on that account and might therefore wish to leave the country. In order to make due allowances for that legitimate desire the Conference decided to authorize voluntary transfers by implication, and only to prohibit ‘forcible’ transfers.”<sup>47</sup>

Nonetheless, the Conventions consistently recognize the difficulty of ascertaining valid consent on the part of protected persons, who are by definition in the hands of the adversary state in a situation of armed conflict or occupation. Although the Occupying or Detaining Power is prohibited from exercising “physical or moral” coercion against protected persons,<sup>48</sup> the drafters nonetheless opted for an absolute bar on the renunciation of rights by protected persons, understanding that they are in an inherently coercive environment and in light of the difficulty of ascertaining valid consent in such circumstances.

Thus, while article 49 contemplates the possibility of a permissible voluntary transfer, the Conventions as a whole would seem to require a high threshold for the expression of valid consent to such a transfer. It would also be appropriate in this context to look to the standards found in international human rights law, which requires that consent be free and informed, not only because these constitute “relevant rules of international law applicable in the relations between the parties,”<sup>49</sup> but also because they are aimed at the same objective – ascertaining voluntariness, especially important in inherently coercive circumstances.

This threshold has been set forth in a string of cases before the International Criminal Tribunal for the former Yugoslavia, both at trial level and on appeal. The issue of valid consent, or “genuine choice,” was discussed by the Appeals Chamber in the *Stakić* case. Although the Chamber was discussing deportation, as opposed to forcible transfer, at issue was the voluntariness of the transfer. Indeed, they drew upon their prior jurisprudence that specifically concerned forcible displacement. The Chamber found:

“279. The definition of deportation requires that the displacement of persons be forced, carried out by expulsion or other forms of coercion such that the displacement is involuntary in nature, and the relevant persons had no genuine choice in their displacement. Factors other than force itself may render an act involuntary, such as taking advantage of coercive circumstances. The Appeals Chamber has previously stated, albeit in the context of forcible displacement, that ‘it is the absence of genuine choice that makes displacement unlawful’, a statement which is equally applicable to deportation. Therefore, while persons may consent to (or even request) their removal, that consent must be real in the sense that it is given voluntarily and as a result of the individual’s free will, assessed in the light of the surrounding circumstances.

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<sup>46</sup> The Commentary notes that the “draft submitted by the International Committee of the Red Cross read[]: ‘Deportations or transfers of protected persons out of occupied territory are prohibited...’” Commentary to article 49 of the Fourth Convention, at p. 279.

<sup>47</sup> Commentary to article 49 of the Fourth Convention, at p. 279.

<sup>48</sup> Fourth Convention, art. 31. The Conventions also prohibit forms of indirect coercion. Article 52(2) states, “52(2): All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited.”

<sup>49</sup> VCLT, art. 31(3).



280. In the Krstić Trial Judgement, for example, the Trial Chamber held that ‘despite the attempts by the VRS to make it look like a voluntary movement, the Bosnian Muslims of Srebrenica were not exercising a genuine choice to go, but reacted reflexively to a certainty that their survival depended on their flight.’

281. The Appeals Chamber therefore agrees with the statement made in the Krnojelac Trial Judgement that the term ‘forced’, when used in reference to the crime of deportation, is not to be limited to physical force but includes the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.”

The issue was also addressed on appeal in the Krnojelac case. In that case, the Appeals Chamber found that even the expressed wishes of the detainees and their expressed happiness about being exchanged were insufficient to constitute a genuine choice in this context. While the “Trial Chamber [had] held that ‘there was general evidence’ that the detainees wanted to be exchanged,” the Appeals Chamber “examined the testimony on which the Trial Chamber relied and found that they were of a general nature and did not specifically refer to the 35 detainees in question.” The Appeals Chamber continued:

“This testimony shows that the prisoners were happy about the exchanges, which gave them hope and made them keenly wish to be liberated, and that some of the detainees even went so far as to ask to be exchanged. However, the Appeals Chamber holds that this does not necessarily imply that it was a matter of ‘genuine choice’. Yet it is the absence of genuine choice that makes displacement unlawful. Similarly, it is impossible to infer genuine choice from the fact that consent was expressed, given that the circumstances may deprive the consent of any value. Consequently, when analyzing the evidence concerning these general expressions of consent, it is necessary to put it into context and to take into account the situation and atmosphere that prevailed in the KP Dom, the illegal detention, the threats, the use of force and other forms of coercion, the fear of violence and the detainees’ vulnerability. Yet the Trial Chamber was content to consider the testimony in isolation.”

After reviewing evidence of beatings and other forms of mistreatment, the Appeals Chamber concluded:

“233. The Trial Chamber finds that living conditions in the KP Dom made the non-Serb detainees subject to a coercive prison regime which was such that they were not in a position to exercise genuine choice. This leads the Appeals Chamber to conclude that the 35 detainees were under duress and that the Trial Chamber erred in finding that they had freely chosen to be exchanged.”

Thus, while certain obligations turn on the consent of the protected persons, great care must be taken in ascertaining voluntariness. In addition to taking account of the inherently coercive circumstances of armed conflict or occupation, it is important to examine whether any conditions have been imposed in order to induce consent. The Fourth Convention recognizes the possibility in relation to the question of working for at Occupying Power. Article 52(2) of the Fourth Convention prohibits “[a]ll measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power.”

The Commentary to article 118 of the Third Convention, concerning repatriation of PoWs, may provide, analogously, some guidance as to potential safeguards for assessing the will of the protected person.<sup>50</sup> For example, “the prisoner of war concerned must spontaneously and of his own accord have expressed his unwillingness to be repatriated. It would therefore be an abuse if beforehand the Detaining Power were to offer him the opportunity of not being repatriated or, by insidious propaganda, induce him to refuse repatriation.”<sup>51</sup> Thus, one relevant factor might be whether the proposed course of action was initially sought by the protected person, or whether it was suggested to them. The Commentary also points out that it is “therefore essential that the supervisory bodies -- and in particular the representatives of the Protecting Power -- should be able to visit prisoners of war regularly, receive their complaints and give them all information which may clarify the situation.”<sup>52</sup> The point here is that the protected person must have sufficient information on which to base their decision, in line with the principle of informed consent. The Commentary also suggests the importance of verification by a third party, in stating that “the Protecting Power will thus be able to vouch for the sincerity of a prisoner of war who refuses repatriation vis-a-vis the Power whose interests it safeguards.”<sup>53</sup>

In addition to these potential safeguards, consideration must also be given to the object and purpose of the Conventions as a whole, and of CA 7/8 in particular. As such, regard must be had to the interests of the protected person, objectively understood, on a case by case basis, and whether the course of conduct by the Detaining or Occupying Power has a humanitarian purpose, both subjectively and objectively.

**Question I:** Could the agreements concluded between the Palestine Liberation Organization (PLO) and the Government of Israel, as the Occupying Power, be seen as compatible with CA7/8; and could they form the legal basis of derogation from, *inter alia*, the right to self-determination, control of a permanent population; sovereignty over a defined territory, the forming of a government, and the capacity to enter into relations with the other States? If they were not compatible, (a) what would their legal validity be, if any, and what would be the legal implications and repercussions of having entered into such an agreement, if deemed invalid and contrary to CA 7/8? (b) Could it be argued that the Government of Palestine is not bound by the agreements, and could act to respect, protect and fulfil the rights of Palestinians in ways not enumerated in the agreements, or even in apparent contravention of the agreements?

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<sup>50</sup> See 1960 Commentary, at p. 548-9 (“In the case mentioned above, the prisoner of war concerned must spontaneously and of his own accord have expressed his unwillingness to be repatriated. It would therefore be an abuse if beforehand the Detaining Power were to offer him the opportunity of not being repatriated or, by insidious propaganda, induce him to refuse repatriation. For a member of the armed forces, patriotic allegiance is an essential part of his mental make-up, and the treatment which he receives from the enemy should not tend systematically to destroy this feeling for which the Convention endeavours to ensure respect. It is therefore essential that the supervisory bodies -- and in particular the representatives of the Protecting Power -- should be able to visit prisoners of war regularly, receive their complaints and give them all information which may clarify the situation. Moreover, the Protecting Power will thus be able to vouch for the sincerity of a prisoner of war who refuses repatriation vis-a-vis the Power whose interests it safeguards.”).

<sup>51</sup> Commentary to the Third Convention, at p. 548.

<sup>52</sup> *Id.*

<sup>53</sup> Commentary to the Third Convention, at p. 549. The importance of third party verification is also stressed in *The Handbook of International Humanitarian Law*, 3rd ed, D. Fleck, ed. (“As grave infringements of the rights of inhabitants of occupied territories forced removal is now unlawful, regardless of the political motives behind it. The alleged consent of those affected is immaterial. Legitimate requests for resettlement – for example, by members of a minority – must be verified and confirmed by a neutral authority.”) In addition, the authors also seem to imply that the request must come from the protected persons themselves.

Question I has two basic components. The first is (A) compatibility of these agreements with CA 7/8. The second is (B) the legal consequence of a finding of incompatibility. Each of these components is further subdivided. The issue of compatibility of the agreements with CA 7/8 is subdivided into the question of (A)(1) whether these agreements could derogate from the so-called Montevideo criteria or (A)(2) from the right of self-determination (or, as understood through follow-up conversations with NRC, from other rights under international human rights law). The issue of legal consequences of incompatibility is subdivided into the issue of (B)(1) the legal status of such agreements (in particular, whether they are of any legal effect, and to what extent), and (B)(2) whether the government of Palestine could act in ways that would appear to contravene the agreements.

The answer to the first question (A) regarding compatibility of the agreements with CA 7/8 is straightforward. They are compatible. CA 7/8 is directed to protected persons themselves. It is not directed to states or authorities in occupied territory. As such, CA 7/8 has no application to these agreements. The more relevant provisions would be CA 6/7, prohibiting derogation by special agreement, or article 47 of the Fourth Convention, prohibiting the deprivation of benefits through agreement with local authorities or through other changes introduced in occupied territory.

Pursuant to CA 6/7 and/or article 47, any agreements between the PLO and Israel could neither deprive protected persons of the benefits of the Fourth Convention nor restrict their rights thereunder. Such agreements would have to be interpreted in a manner that avoids doing so, to the extent that such an interpretation is possible. To the extent any particular provision cannot be interpreted in a manner consistent with the above, that provision would be void. While the law of treaties permits modification of obligations<sup>54</sup> by subsequent agreement, the modification of the rules in CA 6/7 and article 47, imposing obligations *erga omnes*, would require the consent of all states parties to the Fourth Geneva Convention. As noted in the Commentary to article 7 of the Fourth Convention, “The correct application of the Convention is not a matter for the belligerents alone; it concerns the whole community of States and nations bound by the Convention.”

As for question (A)(1), it must be recalled that the scope of CA 7/8, as well as CA 6/7 and art. 47, is limited to rights (CA 7/8) or benefits (CA 6/7) under the Conventions. Thus, it would not include the establishment or non-establishment of the Montevideo criteria, which are questions of fact.<sup>55</sup>

In general, IHL is applied without prejudice to questions of sovereignty. This is *a fortiori* the case with respect to the law of occupation. The law of occupation is based on the notion that occupation is temporary, pending some final settlement. It employs the legal concept of usufruct. Without taking a position on whether the occupant has a legal right to be there (which would be a question of the *jus ad bellum*), the law of occupation recognizes the occupant’s

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<sup>54</sup> However, *jus cogens* norms, by definition, may not be modified by subsequent agreement, unless replaced by a new *jus cogens* norm. VCLT, at art. 53.

<sup>55</sup> It may be argued that fulfillment of the Montevideo criteria is insufficient for statehood where such fulfillment is achieved pursuant to a violation of a peremptory norm. See, e.g., article 41(2) of the ILC Articles on State Responsibility. However, this would not provide an exception to the requirement of fulfilling the Montevideo criteria as a matter of fact, even where fulfilment is hindered by violation of a *jus cogens* norm. Can it be argued that hindering the fulfillment of the Montevideo criteria constitutes a violation of the right to self-determination? This argument is addressed below.

possession of, use (*usus*) of, and ability to exploit the fruits of (*fructus*), the occupied territory. Thus, Occupying Powers are not prohibited from using the territory or its fruits. However, the conception of occupation as a temporary situation yields a certain legal stasis under IHL. The Occupying Power is barred from changing the law and institutions of the occupied territory, unless absolutely necessary to do so for security reasons or to achieve certain public goods set forth in the Hague Law. The so-called ‘transformative occupations’ of recent years have caused some controversy, at least partially because of the perception that they have violated this stasis principle.

The stasis principle, upon which the law of occupation is based, preserves the legal status quo on the question of sovereignty. Thus, the law of occupation cannot be used to infer any right to statehood or the establishment thereof. Similarly, any agreements between the PLO and Israel should be interpreted according to the same principle (i.e. without prejudice to questions of sovereignty).

The same is true for the right of self-determination, in answering question (A)(2), to the extent that this right is interpreted as implying a right to statehood. The law of occupation applies, in general, without prejudice to the right of self-determination. Whether the law of occupation, by its specific requirements concerning the treatment of peoples in the occupied territory, provides for greater or lesser exercise of this right depends on the extent to which these peoples enjoyed the right prior to the occupation. Another possible argument concerning the right of self-determination is set forth below.

As for whether CA 7/8 would also bar the waiver of rights under international human rights law, the answer would be no. The language of CA 7/8 clearly limits its scope to rights under the Conventions and special agreements. International human rights treaties could not be regarded as special agreements within the meaning of CA 7/8, which contemplates special agreements between parties concerning a particular conflict or occupation. However, as noted above, the rules of human rights law, as rules of international law applicable in the relations between the parties, would inform the interpretation of the Conventions, and to the extent may become infused into the rights under the Conventions that may not be renounced. In addition, it should be recalled that individual rights under human rights law are, in general, not waivable pursuant to that body of law.

A stronger argument for the inclusion of rights under international human rights law may be made under CA 6/7, which bars not only restriction of the rights of protected persons, but also any agreement that “adversely affect[s] the situation of protected persons, as defined by the present Convention...” While one might argue that the language “as defined by the present Convention” would limit the scope of this article to the range of benefits under the Convention, the better interpretation would be to view this phrase as applying only to the term “protected persons,” simply clarifying that this term has a special meaning within the framework of the Convention as defined in article 4.

Thus, it may be argued that any restriction of rights of protected persons, irrespective of source, that is not expressly sanctioned by the Convention, would “adversely affect the situation of protected persons” and would therefore be barred by CA 6/7. According to this interpretation, special agreements may not restrict human rights in a way that is not expressly permitted by the Convention. This would accord with the evolution of international humanitarian law generally, where the starting principle has shifted from the freedom of states to the protection of individuals.

Thus, notwithstanding the general principle that the law of occupation applies without prejudice to sovereignty, it may be argued that any special agreement that restricts the right to self-determination of protected persons adversely affects them, and to that extent is prohibited. However, the dearth of authoritative jurisprudence on the right to self-determination makes it difficult to analyze the extent of any incompatibility.

As for the legal status of such agreements, as noted above, assuming they could not be interpreted in such a way as to avoid a conflict with CA 6/7, CA 7/8, or article 47, they would be without legal effect to the extent of the incompatibility. As noted in the Commentary to the First Convention, “If need be, the neutral organizations mentioned above may also forewarn the Parties concerned which are contemplating the conclusion of derogatory agreements, intervene against such as are concluded and refused to recognize them when carrying out their activities on behalf of persons protected by the convention.”<sup>56</sup> To the extent such provisions are incompatible, they are void<sup>57</sup> and, as such, would have no binding effect on Palestine as a matter of international law.

**Question II:** In the provision of humanitarian assistance to persons under belligerent occupation, particularly those at risk of forcible transfer, it would appear the coercive circumstances would entail reasons for such a provision to be borne in mind. In adopting the above principle, could it be asserted that protected persons are not really in a sufficiently independent and objective moral position to realize fully the implications of a renunciation of their rights under the Convention? In instances where protected persons concede to their forcible transfer, for example, could their coerced consent be seen as a prohibited act of renunciation of rights, or how else could it be legally portrayed? Can it be asserted that the acts of protected persons(s) do not amount to a renunciation of rights under any circumstances? How could the invalidity of renunciation be best argued to safeguard the interest of protected persons against the forming of a negative precedent?

On one level, Question II simply asks whether protected persons can ever renounce their rights, explicitly or implicitly, under the Convention. The short answer is no. The rights of protected persons under the Convention are unwaivable, either by the protected person (CA 7/8), or by their state of nationality or other surrogate (CA 6/7, art. 47 of GC IV). As only forced transfers are prohibited, a voluntary transfer would not constitute a renunciation of rights, and thus would not be prohibited by CA 7/8. While coerced consent may be viewed as a prohibited renunciation of rights, one need not reach that question. Coerced consent is by definition not free and informed, and thus would be valid consent. Therefore, a transfer for which consent has been elicited through coercion would remain a prohibited forced transfer.

On another level the question is about the logic of the non-renunciation provision, and the extent to which it resonates beyond its explicit requirements. From this perspective, the question concerns the extent to which the inclusion of the non-renunciation should inform the interpretation of those provisions of the Conventions that turn upon the will of the protected person.

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<sup>56</sup> Commentary to article 6 of the First Convention.

<sup>57</sup> As noted above, while the law of treaties permits modification of international obligations (other than peremptory, or *jus cogens*, norms) by subsequent agreement, the modification of the rules in CA 6/7 and article 47, imposing obligations *erga omnes*, would require the consent of all states parties to the Fourth Geneva Convention.

As noted above, the inclusion of CA 7/8 reflects the understanding of the negotiating states of the inherently coercive environment in which protected persons find themselves. It underscores their recognition of the particular vulnerability of protected persons. Thus, a contextual interpretation of the Fourth Convention would require an exacting standard for verifying the voluntariness of a transfer. For this purpose, the factors identified above should be employed (source of the proposal, freedom from negative conditions imposed by the relevant Power, verification by a neutral third party, the objective purpose of the transfer, etc.).

Given this inherently coercive environment and the particular vulnerability of protected persons, is it ever possible to have a truly voluntary transfer? Clearly the negotiating states seemed to think so. As noted above, the Commentary indicates that the possibility of a voluntary transfer was contemplated during the negotiations. But again, this would be exceptional, and would require the most exacting standards to verify that the consent was free and informed.

The final question relates to the concern that conceding the possibility of a voluntary transfer might undermine the protection afforded by the Conventions -- that this exceptional case might swallow the rule. This legitimate concern may be mitigated by underscoring that this possibility would be realized only exceptionally and that any claimed voluntary transfer would have to be verified according to the most exacting standards to ensure that the consent is free and informed, including by verifying the absence of any push factors imposed by the relevant Power.

**Question III:** Should it be concluded that such a conception rather reflects instruction vis-à-vis the rights and duties of States than as per the individual within the legal order set up by the Convention? Could a distinction be drawn between the prohibition of renunciation related to the ostracized government and which will apply to natural persons? Would it be of use to draw distinctions between the abdication of rights of an ostracized government and the capacity of the ostracized government to renounce the rights of individuals?

The 1949 Geneva Conventions are a snapshot in the evolution of international humanitarian law. They mark a progression toward the recognition of the individual as not only worthy of protection, but also as a rights holder in international law. Nonetheless, the Conventions retain some of the baggage of the traditional, state-centric Westphalian system. Protected persons, e.g., are defined by reference to nationality. Instead of providing protection for all individuals as such, the bulk of protections are conferred on the basis of nationality. While the Conventions provide for some degree of protection in situations of non-international armed conflict, these protections are minimal in comparison to the extensive protections afforded in international armed conflict.

This tension is also reflected in the formulation of CA 7/8. This provision underscores the conception of individual protected persons as rights holders, while simultaneously restricting their right to waive their rights. However, as explained above, this restriction was seen as a necessary safeguard in a decentralized state-centric system, where court jurisdiction is elusive, and in light of the particular vulnerabilities of protected persons. As such, even though the wording of CA 7/8 addresses the prohibition of renunciation to the protected persons themselves, it has been rightly understood as implying for the relevant Powers, together with

the specific prohibitions on coercion found elsewhere in the Conventions,<sup>58</sup> an obligation to refrain from attempting to elicit such a renunciation.

**Question IV:** How would that inform the position adopted by impartial humanitarian and protection organizations in providing assistance and protection to protected persons, and in informing its relations to the Occupying Power and the ostracized government? As a legal and policy matter, must such impartial organizations, first and foremost, strive to assist protected populations to refrain from renouncing their rights, particularly when such renunciation is the result of coercion?

It is important to recall that protected persons cannot renounce their rights. Thus, there is no way to assist them to refrain from renouncing their rights. For obligations that turn on the consent of the protected person, organizations might attempt to compensate for any push factors in order to assess the validity of the consent. However, this approach might be seen to lessen the significance of the imposition of negative conditions designed to induce consent. The imposition of those conditions invalidates consent, and the temptation to mitigate them might blur that invalidity.

As for legal obligations, it must be recalled that IHL does not impose obligations directly upon NGOs engaged in the provision of humanitarian assistance. Individual staff members, however, are of course subject to those rules of IHL that have evolved into rules of international criminal law in the strict sense. It goes without saying that individuals must refrain from assisting in the commission of war crimes.

As for policy matters, organizations should, of course, also refrain from assisting in the commission of any other violations of international law. In addition, to the extent the organization is mandated to assist in the protection and promotion of the rights of protected persons, it could provide a useful rule in monitoring compliance with the Conventions, and in particular with CA 7/8. To the extent the organization provides legal services, it should inform protected persons of their rights under the Conventions, how to exercise them, and their unwaivability. It can also help to ensure that protected persons have access to all other relevant information. It can also propose standards and mechanisms for assessing the voluntariness of any obligations that turn upon the consent of protected persons. Ensuring strict adherence to free and informed consent will help prevent the creation of a harmful precedent.

The organization should also recall that the protections afforded by the Conventions exist first and foremost for the individual protected persons, and not for groups, governments, or other entities. Human rights concerns should be de-coupled from sovereignty issues to the extent possible. The blurring of individual rights with rights of states (or to statehood) could potentially undermine the protections afforded to the individual. The focus of the Geneva Law, as well as of international human rights law, is to mitigate the abuses of the unfettered exercise of sovereign authority and power, and to channel it into the protection of the rights of individuals. While international human rights law does confer some rights upon groups, these rights cannot override the rights of individuals.

At the same time, organizations should avoid assisting in the violation of group rights, including the right of self-determination. This right is not waivable.<sup>59</sup> It is a right that belongs

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<sup>58</sup> See, e.g., articles 31 and 52(2) of the Fourth Convention.

<sup>59</sup> Although the right is unwaivable, the group may choose not to exercise it.

to peoples, and not to individuals. As the individual is not the holder of the right, the individual could not waive the right, even if it were waivable. Thus, for a variety of reasons, CA 7/8 is entirely inapplicable to this right. Nonetheless, as explained above in the answer to Question I, it may be argued that this right could be subsumed under the language of CA 6/7, which prohibits special agreements that “adversely affect adversely affect the situation of protected persons.” To the extent any special agreement infringed upon this right, organizations could insist upon its invalidity.

At the same time, in the interpretation of IHL, the organization should give primary consideration to the best interest of the individual protected person. The interests of the individual protected person in this context should not be subordinated to the interests of any other entity. Impartial humanitarian and protection organizations may be better able to assess these interests than any of the concerned Powers or other local actors, apart from the individual protected person him or herself.



## **Conclusion**

Common Article 7/8 was framed in absolute terms in order to provide the strongest protection for the rights of individual protected persons. It completes and complements the durability provided by Common Article 6/7, which prohibits derogation by special agreement, and which is further supplemented in situations of occupation by article 47 of the Fourth Convention. Together these rules exclude the possibility that the rights of protected persons might be restricted by legal measures beyond the text of the Conventions.

Any purported renunciation of rights by a protected person is without legal effect. To the extent any special agreement restricts these rights or adversely affects the situation of protected persons, it is similarly void. It may be argued that any infringement of international human rights standards that is required or imposed by a special agreement, and that is not expressly sanctioned by the Geneva Conventions, would adversely affect the situation of protected persons and would therefore be void to the extent of the infringement.

While CA 7/8 by its terms admits of no exceptions, its interpretation should remain flexible enough to accommodate the best interests of protected persons in light of the humanitarian objectives of the Conventions. In this context, the will and expressed wishes of the protected person are relevant, not as a waiver of rights, but as an indication of the course of conduct which would best serve those objectives.

For those of obligations on the relevant Powers that are formulated in such a manner as to depend on the will or consent of the protected person, any expression of consent must meet the strictest standards of free and informed consent, in light of the very vulnerabilities that prompted the inclusion of CA 7/8 by the negotiating states.

In the interpretation of IHL, primary consideration should be given to the best interest of the individual protected person, with due regard for the views of the individual him- or herself. It is imperative to refrain from denying the agency of the individual protected person. To the extent IHL has been informed by IHRL, the importance of autonomy has only been magnified. While CA 7/8 appears to restrict autonomy in making the rights of protected persons unwaivable, that requirement is predicated on an assumption particular to the relationship between the relevant Power and the individual protected person. And even that apparently unqualified obligation has been subject to a degree of flexibility in the case of overriding humanitarian imperatives, as, e.g., in the context of the repatriation of Prisoners of War.