NOTES

TOSS THE *TRAVAUX*? APPLICATION OF THE FOURTH GENEVA CONVENTION TO THE MIDDLE EAST CONFLICT—A MODERN (RE)ASSESSMENT

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The Israeli-Arab conflict remains one of the longest running disputes in history. The cycle of battle and negotiation has strewn the landscape with failed attempts at peace and generated decades of discussion. Much of this discussion has focused on the concern over human rights violations, overshadowing analysis of potential political and legal resolutions to the conflict. At the center of the human rights discussion stands the Fourth Geneva Convention, an international agreement codifying certain rules of war designed to protect civilians caught in the midst of conflict. The bulk of the literature calls for Israel's application of the Fourth Geneva Convention and hones in on methods for Convention enforcement. In this Note, however, David John Ball argues that the Final Record of the Diplomatic Conference from the drafting of the Fourth Geneva Convention, or the travaux préparatoires, *makes clear that the Convention does not apply to nonstates. The Note undertakes a close reading of the* travaux *and finds that the widely accepted interpretation of the Fourth Geneva Convention contained in the Pictet Commentary cannot justify its application in the Middle East context. Specifically, the* travaux *reflects that the drafting states' concerns over sovereign rights following World War II led to a disconnect between the Convention's allegedly humanitarian aim of protecting civilians above all else and its capability to do so in all situations. Instead, the drafting states neither intended nor created a treaty capable of application to the complex situation existing in the Middle East. The unique history and prolonged occupation of the region, given the statements contained in the* travaux, *reveals that the Fourth Geneva Convention is not applicable to the conflict between Israel and the nonstate entity commonly known as "Palestine." This Note concludes that eliminating incorrect assumptions about the applicability of the Fourth Geneva Convention is crucial to making progress toward political and legal resolutions to the conflict.*

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INTRODUCTION

As the Middle East peace process once again cycles through its pattern of battle and negotiation but becomes obscured by events in Iraq, it is appropriate now, more than ever, to reassess the applicability of the Fourth Geneva Convention to the region's unique position in international law. Recent events suggest both a positive move toward resolution of the conflict and the continued fragility of the situation.[1] Coverage—in both the media and academia—focuses on the provisions of the Fourth Geneva Convention, which codifies certain rules of war designed to protect civilians trapped in the midst of hostilities, as the backdrop for political and legal resolution to the conflict. This Note argues that the states drafting the Fourth Geneva Convention neither intended nor created a treaty capable of wide application, especially not one wide enough to encompass the complex situation existing in the Middle East. Instead, the drafting states' preoccupation with sovereign rights following World War II led to a disconnect between the Convention's allegedly humanitarian aim of protecting civilians above all else and its capability to do so. Because the Fourth Geneva Convention's General Provisions[2] discuss applicability of the Convention to "High Contracting Parties" only as a direct result of post–World War II sovereign rights concerns, the fact that the Occupied Palestinian Territory[3] is neither a recognized state[4] nor

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[1] *See* James Bennet, *Israeli Rightists Endorse Plan to Withdraw from the Gaza Strip*, N.Y. TIMES, Apr. 19, 2004, at A7 (discussing Israeli plan for withdrawal from West Bank and Gaza Strip); Greg Myre, *Vows of Reprisal as Arabs Mourn Slain Hamas Leader*, N.Y. TIMES, Apr. 19, 2004, at A8 (describing outrage following targeted killing of Hamas leader Abdel Azis Rantisi and noting effects on peace).

[2] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 1–12, 6 U.S.T. 3516, 3518–26, 75 U.N.T.S. 287, 288–96 [hereinafter Fourth Geneva Convention].

[3] The phrase "Occupied Palestinian Territory" refers to the West Bank, East Jerusalem, and the Gaza Strip. *See* Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, 67 & n.20 (2003) (providing concise history of creation of this term and noting general difficulty in finding neutral terminological references).

[4] International law recognizes the state qua actor based on four characteristics: 1) a permanent population; 2) a defined territory; 3) a government; and, 4) independence (or as alternatively articulated in Article I of the Montevideo Convention on Rights and Duties of States, the "capacity to enter into relations with . . . other [s]tates"). *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 70–72 (6th ed. 2003) (discussing legal criteria of statehood in international law and referring to Montevideo Convention). For a full discussion of Palestine's arguable statehood, see generally BARRY RUBIN, THE TRANSFORMATION OF PALESTINIAN POLITICS: FROM REVOLUTION TO STATE-BUILDING (1999); JOSEPH H.H. WEILER, ISRAEL AND THE CREATION OF A PALESTINIAN STATE: A EUROPEAN PERSPECTIVE (1985); Anis F. Kassim, *The Palestinian Liberation Organization's Claim to Status: A Juridical Analysis Under International Law*, 9 DENV. J. INT'L L. & POL'Y 1 (1980).

signatory[5] renders the provisions of the Convention moot in the context of the conflict. This position is consistent with a plain reading of the Fourth Geneva Convention and is supported by the Final Record of the Diplomatic Conference of Geneva of 1949 (Diplomatic Conference) or *travaux préparatoires*.[6]

Surprisingly, few scholars adhere to a plain reading of the Fourth Geneva Convention. Instead, many of their conclusions are rooted in the commentary of Jean Pictet, a director of the International Committee of the Red Cross (ICRC) and a driving force behind the creation of the Convention.[7] As a result of this overwhelming reliance on Pictet, the positions espoused on both sides are largely devoid of primary textual support and focus on Israel's compliance or noncompliance, rather than comprehensively assessing the applicability of the Fourth Geneva Convention in the first instance.[8] Moreover, rather than focusing the applicability debate on the current Occupied Palestinian Territory, commentators analyze the present situation from a pre-1967 historical perspective.[9] This anachronistic interpretation is especially surprising, given that Pictet's study was "based solely on practical experience in the years before 1949, particularly during the period of the Second World War" and, according to Pictet, the "proper perspective [was] lacking" since the Convention had not been applied yet.[10]

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[5] On June 21, 1989, the Swiss Federal Council in Geneva received a letter from the Permanent Observer of Palestine to the United Nations stating: "[T]he Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto." Int'l Comm. of the Red Cross, States Party to the Following International Humanitarian Law and Other Related Treaties as of 19.03.2004, at 7, http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf (last visited Apr. 20, 2004) (quoting from above-mentioned letter). On September 13, 1989, the Swiss Federal Council decided that it could not determine whether the letter amounted to a valid accession "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine." *Id.*

[6] *See generally* 1–3 DIPLOMATIC CONFERENCE FOR THE ESTABLISHMENT OF INTERNATIONAL CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS, FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 (1949) [hereinafter DIPLOMATIC CONFERENCE]; *see also infra* Part III.C–D.

[7] *See* OSCAR M. UHLER ET AL., COMMENTARY—IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE TIME OF WAR (Jean S. Pictet ed., 1958) [hereinafter PICTET COMMENTARY].

[8] *See infra* Part III.D.

[9] *See infra* Part III.C–D.

[10] PICTET COMMENTARY, *supra* note 7, at 2, 9. Pictet, who, as a devoted advocate of the creation of a civilian's convention, certainly shouldered an interpretative bias, made this bias clear by stating that the commentary, though published by the International Committee for the Red Cross (ICRC), was not an official publication but rather "the personal work of its authors." *Id.* at 1. The statement disclaiming the official status of the

Part I of this Note provides a sketch of the relevant history of the conflict. Because the lengthy nature of the conflict implicates the law of belligerent occupation, and thus greatly contributes to confusion over the legal status of the Convention as applied to the conflict, Part II discusses this aspect of international law. Part III offers a comprehensive examination of the *travaux préparatoires* in conjunction with the draft and final version of the Fourth Geneva Convention in order to illuminate the tension between the Convention's humanitarian aim and its state-centric focus. Specifically, Part III.A justifies the use of the *travaux* in interpreting the Fourth Geneva Convention and Part III.B clarifies the nature of the *sui generis* problem presented by the Occupied Palestinian Territory. Part III.C reflects on the interpretive lessons that can be drawn from the Convention's lack of a preamble. Lastly, Part III.D engages in a close reading of Article 2.

I
HISTORICAL BACKGROUND

This Section provides a concise history of the military events that led to the territorial divisions at the heart of the Israeli-Arab conflict.[11]

A. "Colonial" History

When the British conquered the Ottoman Empire in 1917, they gained control of present-day Israel, the West Bank, Jordan, the Gaza Strip, and a portion of southern Syria.[12] Shortly thereafter, the British Government expressed its intention to establish a Jewish homeland in "Palestine" through the famous Balfour Declaration.[13] Britain then

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Pictet Commentary easily may be missed amidst the numerous references to the ICRC's experience with and work on the Convention contained in the Committee's Foreword to the commentary. However, in addition to the disclaimer, the Committee emphasizes that the legal nature of treaties makes its opinion irrelevant since "only the participant States are qualified . . . to give an official and . . . authentic interpretation of an intergovernmental treaty." *Id.* This is consistent with the law of treaty interpretation. *See* BROWNLIE, *supra* note 4, at 602 (noting that absent treaty specifically conferring additional competence in text, parties to treaty are only ones who "obviously" have such interpretive competence).

[11] Due to space considerations only those events absolutely essential to establishing the legal framework of the conflict will be addressed. This brief account cannot do justice to the history of the region. However, for a fascinating and relatively new account of the events leading up to the Six Day War and Israel's capture of the Sinai Peninsula, the Gaza Strip, the Golan Heights, the West Bank, and East Jerusalem, see generally MICHAEL B. OREN, SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST (2002). See also Imseis, *supra* note 3, at 69–79, for a comprehensive synopsis.

[12] ALLAN GERSON, ISRAEL, THE WEST BANK, AND INTERNATIONAL LAW, at xv (1978).

[13] The Balfour Declaration, Letter from Arthur James Balfour to Lord Rothschild (Nov. 2, 1917) [hereinafter Balfour Declaration], *reprinted in* 3 THE ARAB-ISRAELI CONFLICT: DOCUMENTS 31 (John N. Moore ed., 1974).

incorporated the terms of the Balfour Declaration into the British Mandate, which set forth the goals of Britain's trusteeship over the region when the League of Nations charged Britain with governing the area in 1922.[14]

While the Balfour Declaration qualifies the establishment of the Jewish homeland by noting that "nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine,"[15] the statements made in the Declaration and terms included in the Mandate were made without the permission of, or consultation with, the Arab community within Palestine.[16] Subsequent Jewish immigration to Palestine caused a massive Arab uprising in 1936 that led the British effectively to rescind the substance of the Balfour Declaration.[17]

Following World War II and amidst rising hostilities between the Jews, the Arabs, and the British government in Palestine, the British unsuccessfully sought to terminate the mandate and refer the problem to the United Nations.[18] The United Nations General Assembly, pursuant to the advice of the United Nations Special Committee on Palestine, passed Resolution 181, commonly known as the Partition Plan, calling for the partitioning of Palestine into separate Jewish and Arab states with Jerusalem to be an international city, or *corpus sepa-*

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[14] Carol Bisharat, *Palestine and Humanitarian Law: Israeli Practice in the West Bank and Gaza*, 12 HASTINGS INT'L & COMP. L. REV. 325, 328 & n.12, 329 (1989).

[15] Balfour Declaration, *supra* note 13.

[16] Bisharat, *supra* note 14, at 328. At the time the Balfour Declaration was announced, the population of Palestine was roughly 700,000, of which only eight percent was Jewish. *Id.* at 329 (citing HENRY CATTAN, PALESTINE, THE ARABS AND ISRAEL: THE SEARCH FOR JUSTICE 10–13 (1969)). Following a wave of Jewish immigration permitted under the Mandate, the Jewish population increased to nearly one-third of the total population by 1946. *Id.* at 332; John Quigley, *Sovereignty in Jerusalem*, 45 CATH. U. L. REV. 765, 770 (1996). This is not to say that Arab immigration was insubstantial. Indeed, some have posited that close to half of the Arab population of Palestine in 1947 had immigrated to the region in the previous fifty years. *See* JOAN PETERS, FROM TIME IMMEMORIAL: THE ORIGINS OF THE ARAB-JEWISH CONFLICT OVER PALESTINE 221–33, 254–63 (2001).

[17] *See* Palestine Statement of Policy: The British White Paper of May 17, 1939 (The MacDonald White Paper), Command Paper 6019, 2–12 (1939), *reprinted in* 3 THE ARAB-ISRAELI CONFLICT: DOCUMENTS, *supra* note 13, at 213 (placing limits on Jewish immigration and land purchases and declaring that "it is not part of [British government] policy that Palestine should become a Jewish State"); HOWARD M. SACHAR, A HISTORY OF ISRAEL: FROM THE RISE OF ZIONISM TO OUR TIME 199–208 (2d ed. 1996) (explaining connection between Arab rebellion and British policy shift). The tensions between Arabs and Jews arose not just from religious and cultural differences, but from the displacement of Arab laborers and landowners by Jewish immigrants. Christopher C. Burris, Comment, *Re-Examining the Prisoner of War Status of P.L.O.* Fedayeen, 22 N.C. J. INT'L L. & COM. REG. 943, 950–51 & n.46 (1997) (citing SACHAR, *supra*, at 163–67, 171–73 (1979)).

[18] *See United Nations Special Committee on Palestine: Report to the General Assembly*, U.N. GAOR, 2d Sess., Supp. No. 11, at 1–2, U.N. Doc. A/364 (1947); OREN, *supra* note 11, at 4.

ratum.[19] Having violently opposed partition during the U.N.'s deliberation, the Arabs immediately rejected it.[20]

B. The War of Independence

On May 14, 1948, the State of Israel proclaimed its independence.[21] Almost immediately, the Arab nations, led by Syria and Iraq, and including Transjordan and Egypt, attacked the nascent state. The Israelis countered, capturing some thirty percent more territory than originally allotted to them by the U.N.[22] and leaving an estimated 500,000 to 800,000 Palestinians as refugees.[23] The West Bank, the Old City of Jerusalem, and parts of the New City were taken by Jordanian forces. Armistice agreements—not peace treaties—left Transjordan in possession of the West Bank and the Old City, and Egypt in possession of the Gaza Strip.[24] The nonbinding nature of the armistice agreements left them devoid of legal or practical force:

> Under its ambiguous terms, one side, the Arab, claimed full belligerent rights, including the right to renew active hostilities at will, and denied the other side any form of legitimacy or recognition. As a diplomatic document, the [armistice agreements were] *sui generis*. Intended as the basis "for a permanent peace in Palestine"—

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[19] G.A. Res. 181, U.N. GAOR, 2d Sess., Supp. No. 11, at 131, 133, U.N. Doc. A/519 (1947). The proposed division allotted fifty-seven percent of the territory to the Jews even though they comprised only one-third of the population. *See* Bisharat, *supra* note 14, at 332 (citing HENRY CATTAN, PALESTINE AND INTERNATIONAL LAW: THE LEGAL ASPECTS OF THE ARAB-ISRAELI CONFLICT 55 (1973)); Quigley, *supra* note 16, at 769–70. However, the Jewish population was concentrated in urban areas. In 1900, for example, Jewish people constituted half of Jerusalem's population but only ten percent of the total population of Palestine. *Id.* at 769. In addition, despite the rising number of Jews in historic Palestine, Arabs continued to own the majority of the land. *Id.*

[20] Bisharat, *supra* note 14, at 332–33. While some argue that the Arab rejection of the plan created a *terra nullius* capable of acquisition, this view has garnered little support. *See infra* Part III.D.2. Instead, the land remained under the authority of the U.N., which had granted, and continued to grant mandatory control to Britain, despite Britain's desire to end its responsibility.

[21] Declaration of the Establishment of the State of Israel, May 14, 1948, 1 L.S.I. 3–5 (1948).

[22] OREN, *supra* note 11, at 5.

[23] Bisharat, *supra* note 14, at 334.

[24] *See* General Armistice Agreement, Feb. 24, 1949, Isr.-Egypt, 42 U.N.T.S. 252; General Armistice Agreement, Apr. 3, 1949, Isr.-Jordan, 42 U.N.T.S. 304. Armistices also were arranged with Lebanon and Syria. In 1979, Egyptian President Anwar Sadat and Israeli Prime Minister Menachem Begin famously signed the peace treaty known as the Camp David Accords. *See* Framework for Peace in the Middle East Agreed at Camp David, Sept. 17, 1978, Egypt-Isr., 1138 U.N.T.S. 40. A peace treaty with Jordan was not signed until 1994. Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, Oct. 26, 1994, Isr.-Jordan, 2042 U.N.T.S. 393 [hereinafter Isr.-Jordan Peace Treaty]. Despite attempts at establishing formal peace between Israel and both Syria and Lebanon, talks with both have proven unsuccessful.

> according to Ralph Bunche, the UN official who received the Nobel Peace Prize for mediating it—the Armistice in fact perpetuated the conflict and prepared the ground for war.[25]

Egypt maintained control over Gaza as a belligerent occupant[26] from 1948 until it lost the territory to Israel following the 1967 War.[27] Transjordan, however, announced its annexation of the West Bank in 1950 in a move denounced even by the Arab League as a violation of international law.[28] Few states—depending on the account, only Britain, Pakistan, and Iraq, or some combination thereof[29]—recognized the annexation. Jordan renounced its claim for sovereignty over the West Bank,[30] and in the same instance declared its wish for the Palestinian people to secede on July 31, 1988.[31]

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25 OREN, *supra* note 11, at 6.

26 For a discussion of the law of belligerent occupancy, see *infra* Part II.

27 Egypt never claimed sovereignty over the Gaza Strip. *See* Amnon Rubinstein, *The Changing Status of the "Territories" (West Bank and Gaza): From Escrow to Legal Mongrel*, 8 TEL AVIV U. STUD. IN L. 59, 61 (1988).

28 *See* Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government—The Initial Stage*, *in* 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967–1980: THE LEGAL ASPECTS 13, 36 n.46 (Meir Shamgar ed. 1982) (quoting JULIUS STONE, NO PEACE—NO WAR IN THE MIDDLE EAST 39 (1969)); *see also* EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 108 (1993). Jordan renounced this claim in favor of the Palestinian people on July 31, 1988. *Id.* at 112; *see also infra* note 31 and accompanying text.

29 *See* BENVENISTI, *supra* note 28, at 108 (listing Britain, Iraq, and Pakistan); GERSON, *supra* note 12, at 78 (listing Britain and Pakistan); Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279, 289–90 (1968) (listing Britain and Pakistan).

30 *See* King Hussein bin Talal of Jordan, Address to the Nation (July 31, 1988), http://www.kinghussein.gov.jo/88_july31.html.

31 *Id.* ("Today we respond to the wish of the Palestine Liberation Organization, the sole legitimate representative of the Palestinian People, and to the Arab orientation to affirm the Palestinian identity in all its aspects."). On November 15, 1988, the Palestine National Council proclaimed the independent State of Palestine on behalf of all Palestinian people. *See* Declaration of the Establishment of the State of Israel, May 14, 1948, 1 L.S.I. 3–5 (1948).. The U.N. originally granted the PLO observer status in 1974. *See* G.A. Res. 3237, U.N. GAOR, 29th Sess., Supp. No. 31, at 4, U.N. Doc. A/9631 (1974). The U.N. subsequently identified the PLO as "Palestine," but it would not be until 1998 that the U.N. upgraded Palestine's observer status to that of a nonvoting member. *See* G.A. Res. 52/250, U.N. GAOR, 52d Sess., Supp. No. 49, at 4, U.N. Doc. A/52/49 (1998); *see also* Press Release, Ambassador Bill Richardson, Statement in the General Assembly in Explanation of Vote on Enhanced Status for the Palestine Observer Mission, USUN Press Release #119 (98) (July 7, 1998), *at* http://www.un.int/usa/98_119.htm (calling text "the wrong resolution at the wrong time," and stating that resolution will "undermine our efforts to get the peace process back on track and hurt everyone's interests, including those it is most intended to help. Exchanging momentum toward real progress on the ground for symbolic progress in this chamber does not strike us as a good bargain").

On June 5, 1967, the Six Day War erupted.[32] Israel defeated Egypt, gaining both the Gaza Strip and the Sinai Peninsula, took the Golan from the Syrians, and captured the West Bank and all of East Jerusalem from Jordan. This change in the physical landscape proved important to the legal landscape in a number of ways. It marked the first occupation "since World War II in which a military power ha[d] established a distinct military government over occupied areas in accordance with the framework of the law of occupation."[33] While Israel to this day has imposed its law on the occupied territories, it never annexed the territory despite strong language indicating its sovereign rights over portions thereof, because annexation would require Israel to provide citizenship and its accompanying rights to over one million Palestinians. While the responsibility for caring for such citizens is its own deterrent, Israel is even more reluctant to reduce its Jewish population to minority status.

By taking possession of all of these territories, the Israeli-administered region became larger in size than the entire territory originally apportioned to Israel under the Partition Plan; Israeli-controlled territories now encompass both the Jewish and Arab portions contemplated under the Plan.[34] The continued Israeli occupation of the Occupied Palestinian Territory following the Six Day War, and the subsequent conflict,[35] are precisely why the law of belligerent occupation has been a focal point for legal discussions on Israel's compliance with the Fourth Geneva Convention.

The status of the Occupied Palestinian Territory was not clarified by United Nations Security Council Resolution 242, which sought to provide a basis for a lasting peace by advocating the "[w]ithdrawal of Israel armed forces from *territories* occupied in the recent conflict."[36] The failure of both this initial push for peace and the numerous subse-

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32 While accounts of the war now recognize that Israel fired the first shot in the Six Day War, *see, e.g.*, OREN, *supra* note 11, at 168–70, the debate continues over whether Israel's attack qualified as anticipatory self-defense under Article 51 of the U.N. Charter, which would lend legal legitimacy to the attack. *See generally* Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1 (1972) (examining reprisal/self-defense dichotomy in U.N. Charter through lens of numerous Israeli actions between 1953 and 1970).

33 BENVENISTI, *supra* note 28, at 107.

34 *See* Bisharat, *supra* note 14, at 335.

35 *See* OREN, *supra* note 11, at xiii ("The War of Attrition, the Yom Kippur War, the Munich massacre and Black September, the Lebanon War, the controversy over Jewish settlements and the future of Jerusalem, the Camp David Accords, the Oslo Accords, the *Intifada*—all were the result of six intense days in the Middle East in June 1967.").

36 S.C. Res. 242, U.N. SCOR, 22d Sess., 1382d mtg. at 8, U.N. Doc. S/INF (1967) (emphasis added). For a full analysis of Resolution 242 and its much-debated choice of language, see *infra* Part III.D.2.

quent attempts at peace has perpetuated the unstable situation on the ground for over three decades, prompting repeated calls for the application of the Fourth Geneva Convention in order to clarify Israel's legal responsibilities as occupant.

II

THE LAW OF BELLIGERENT OCCUPATION

This Part outlines the law of occupation, which underlies the applicability analysis that follows in Part III. In particular, this Part focuses on the nature of prolonged occupation and how protracted occupations affect the law of belligerent occupation. Rather than provide a comprehensive review, this Part sketches the definitions and principles of the relevant international law.[37]

Following the 1967 War, Israel occupied the West Bank, the Gaza Strip, East Jerusalem, the Golan Heights, and the Sinai Peninsula. Israel essentially annexed East Jerusalem[38] and the Golan Heights,[39] placing them directly under Israeli law. Israel also constructively annexed the West Bank[40] and Gaza,[41] by extending the Israeli court system to and exerting significant economic influence over the region.[42] These actions, while atypical of the shorter, classic occupation, do not diminish Israel's status as a belligerent occupant.[43]

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[37] For a thorough analysis of the law of occupation, see generally GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY . . . A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION (1957); Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 44–49 (1990) [hereinafter Roberts, *Prolonged Military Occupation*]; Adam Roberts, *What is a Military Occupation?*, 55 BRIT. Y.B. INT'L L. 249 (1985).

[38] *See* Basic Law: Jerusalem, Capital of Israel, 1980, 34 L.S.I. 209 (1979–80) (declaring entire city of Jerusalem Israel's capital); Municipalities Ordinance (Amendment No. 6) Law, 1967, 21 L.S.I. 75 (1966–67).

[39] Golan Heights Law, 1981, 36 L.S.I. 7 (1981–82).

[40] *See* Roberts, *Prolonged Military Occupation*, *supra* note 37, at 58–59, 86–95 (noting Israeli military orders renaming West Bank "Judea and Samaria Region" and discussing permanent economic effects on region); *see also* ISRAEL/PALESTINE: THE BLACK BOOK 3 (Reporters Without Borders ed., 2003) (stating Israel "had a clear goal of annexation and spoke of 'integrating the occupied territories into Israel'").

[41] The 1979 peace treaty between Egypt and Israel returned the Sinai Peninsula to Egyptian control and established the boundary between the two countries as "the recognized international boundary between Egypt and the former mandated territory of Palestine . . . without prejudice to the issue of the status of the Gaza Strip." Treaty of Peace, Mar. 26, 1979, Egypt-Isr., art. 2, 1136 U.N.T.S. 115, 117 [hereinafter Isr.-Egypt Peace Treaty]; *see also* ISRAEL/PALESTINE: THE BLACK BOOK, *supra* note 40, at 3 (noting Israeli goal of annexation in region); James Bennet, *Sharon Coup: U.S. Go-Ahead*, N.Y. TIMES, April 15, 2004 at A1 (demonstrating Israel's continued occupation of Gaza Strip).

[42] *See generally* Roberts, *Prolonged Military Occupation*, *supra* note 37 (discussing effects of Israeli legal and economic policies on Occupied Palestinian Territory and arguing for treatment of Israel as occupant and application of Fourth Geneva Convention).

[43] *Id.*

Indeed, Israel's actions evince "two classic features" of belligerent occupation: 1) "a formal system of external control by a force whose presence is not sanctioned by international agreement" and 2) "a conflict of nationality and interest between the inhabitants . . . and those exercising power over them."[44] According to the Hague Convention of 1907, which codified the rules of war, occupation occurs when territory is actually placed under the authority of a hostile army.[45] There can be little doubt that this definition applied and continues to apply to the West Bank and Gaza following Israel's possession of territory outside the boundaries set by the 1948 "green lines."[46]

Determining whether Israel in fact qualifies as a *belligerent* occupant goes to the heart of the humanitarian concern:

> [B]oth military necessity and humanitarianism, considered as determinants of the competence of a belligerent occupant, may be seen to differ somewhat in their specific requirements and manifestations from those appropriate in combat situations. This variation is reflective of the fact that, while hostilities continue elsewhere, the stage of raging combat has passed and been terminated within the territory belligerently occupied.[47]

The international community hones in on the "occupation during war" versus "prolonged occupation" distinction in order to assess compliance with humanitarian norms.[48] The argument flows from the

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[44] *Id.* at 44.

[45] Fourth Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 42, 36 Stat. 2277, 2306, 1 Bevans 631, 651 [hereinafter Hague Convention].

[46] *See supra* note 40–41. "An armistice suspends hostilities and a capitulation ends them, but neither ends the state of war, and any occupation carried out in wartime is covered by paragraph 1 [of the Fourth Geneva Convention]." PICTET COMMENTARY, *supra* note 7, at 22.

The argument can be made that, following the Oslo Accords of 1993, control over the territories returned to the Palestinian police and Palestinian Authority. *See, e.g.*, SHARM EL-SHEIKH FACT-FINDING COMM., U.S. DEP'T OF STATE, SHARM EL-SHEIKH FACT-FINDING COMM. REPORT 8–12 (2001), *available at* http://www.state.gov/p/nea/rls/rpt/3060.htm (last visited Apr. 7, 2004); John Quigley, *The Israel-PLO Interim Agreements: Are They Treaties?*, 30 CORNELL INT'L L.J. 717, 724–26 (1997). However, the peace process never was completed and the full control anticipated under the Accords never was achieved. *See* Declaration of Principles on Interim Self-Government Arrangements, Isr.-P.L.O., Sept. 13, 1993, 32 I.L.M. 1525 [hereinafter Oslo Accords]. Even if governmental control was at one point returned, Israel's subsequent military and judicial return to the territories again makes it a belligerent occupant. Nor are Israel's statements regarding the need for military action to protect the security of Israel proper and Israeli citizens living in the territories sufficient to avoid the legal title of belligerent occupant.

[47] ESTHER ROSALIND COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES, 1967–1982, at 16 (1985) ("It is, therefore, the very fact of occupation which increases the humanitarian standard of the law of armed conflicts.").

[48] *See, e.g.*, BENVENISTI, *supra* note 28, at 107–14; COHEN, *supra* note 47, at 29; Roberts, *Prolonged Military Occupation*, *supra* note 37, at 47.

traditional notion of belligerent occupation as a "provisional state of affairs," such that actions justified by "raging combat" are no longer permissible once fighting subsides; Israel should be striving under its duties as occupant to reduce its power, not increase it. While the Israeli occupation has no doubt exceeded the notion of a temporary occupation, this does not in itself confer on Israel the legal right to make its stay a permanent one.[49]

However, Israel frequently states that it is at war with elements within the Arab community.[50] Since peace with Jordan was established in 1994, the only entity with whom Israel could be at war is the Occupied Palestinian Territory, which is governed by the Israeli-recognized "government" of the Palestinian Authority. Even if its statements are pure rhetoric, Israel recognizes the applicability of the rules of war to the conflict, but contests the *de jure* applicability of the Fourth Geneva Convention.[51] Of course, this argument seems moot given that Israel accepts *de facto* applicability of the Hague Regulations to the West Bank and Gaza.[52] Yet Israel does not recognize *de jure* application despite the law's so-called customary law status.[53] In

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[49] *See* Roberts, *Prolonged Military Occupation*, *supra* note 37, at 47 (defining "prolonged occupation" as one lasting more than five years and extending to period of sharply reduced hostilities). Israel has occupied the Occupied Palestinian Territory for thirty-five years. Regardless of whether one agrees with the assertion that the period after the Oslo Accords effectively ended the occupation, *see supra* note 46, Israel still has occupied the territory for well in excess of five years. Moreover, setting aside arguments justifying Israel's return to the territory since, having reentered much of the Occupied Palestinian Territory in 1998, Israel has remained for a prolonged period as defined above.

[50] Paul Koring, *Sharon Defies Bush's Call to End 'Storms of Violence'*, GLOBE & MAIL (Toronto, Canada), Apr. 5, 2002, at A1 (noting Sharon's declaration that his country is "at war").

[51] *See* COHEN, *supra* note 47, at 43, 51, & 58 nn.49–50 (stating that "no problem arises in regard to the Hague Regulations," that Israel has accepted applicability of Hague egulations to occupied territories, and citing Israeli Supreme Court cases recognizing Hague Regulations as codifications of applicable customary international law); Roberts, *Prolonged Military Occupation*, *supra* note 37, at 62–63 (citing Cohen's statement, expressing subtle skepticism concerning its accuracy, and discussing certain Israeli Supreme Court decisions questioning *de jure* application of Hague Regulations).

[52] *See* BENVENISTI, *supra* note 28, at 109–11, 114–15.

[53] *Id.* at 111. Benvenisti discusses the 1988 Israeli Supreme Court decision by Justice Meir Shamgar, *Affu v. Commander of the IDF Forces in the West Bank*, 42(2) P.D. 4, 49 (1988), *translated in* 29 I.L.M. 139 (1990), holding that the law of occupation applied *de jure* to the Gaza Strip based solely on Israel's continued control of the territory and despite the 1979 Israel-Egypt peace treaty. *See id.* & nn.10–11. However, Benvenisti ignores Article II of the treaty, which establishes the international border between Israel and Egypt "without prejudice to the issue of the status of the Gaza Strip." Isr.-Egypt Peace Treaty, *supra* note 41, art. 2, 1136 U.N.T.S. at 117.

In recent years, many scholars have attempted to circumvent the question of whether the Convention applies to the West Bank by stating that the Convention has now become part of customary international law. *See, e.g.*, W. THOMAS MALLISON & SALLY V. MALLISON, THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER 261

the context of the Israeli-Palestinian conflict, however, where there is no recognized "state" government exerting sovereignty over a territory, Israel's questioning the applicability of the law of belligerent occupancy may not be unfounded. The Hague Regulations codify customary international law. Therefore Israel is bound to follow them regardless of its opponent's actions or (non)status as a bound signatory.[54] But while the laws of war may apply, the specific laws of war regarding belligerent occupancy may not.[55] The Hague Regulations pertaining to the law of belligerent occupancy speak exclusively in terms of "States."[56] In addition, Article 43 conditions the responsibility of the occupying power upon the presence of a "legitimate power" being displaced.[57] Without a displaced sovereign power and affected citizens of that sovereign government, the laws of belligerent occupation are reduced to extending humanitarian provisions directly to individual persons, an application with which international law continues to wrestle. In addition, the fact that Palestinians lack full citi-

(1986). These scholars justify this statement by noting that 190 states are now parties to the Convention. If the Convention applies as a matter of customary law, then it would be binding on nonsignatories as well, thus eliminating any confusion over how the Convention applies to an unrecognized, essentially nonexistent Palestinian State.

This gap-filler argument, however, ignores an essential component of international law, which holds that states are not bound by instruments to which they have not agreed. In addition, it ignores the fact that universal "observance and implementation" of the Fourth Geneva Convention is absent, and "serious violations of its provisions have become common practice in many conflicts." Hussein A. Hassouna, *The Enforcement of the Fourth Geneva Convention in the Occupied Palestinian Territory, Including Jerusalem*, 7 ILSA J. INT'L & COMP. L. 461, 464 (2001); *see* Jeremy Rabkin, *After Guantanamo: The War Over the Geneva Convention*, NAT'L INT., Summer 2002, at 15 (arguing that repeated willful and wanton violations of Geneva Convention provisions render Conventions obsolete).

[54] *See supra* note 53.

[55] *See, e.g.*, Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 38 (1995); *see also* Hague Convention, *supra* note 45, art. 2, Annex arts. 42–56, 36 Stat. at 2290, 2306–09, 1 Bevans at 640, 651–53. Article 2 of the Hague Convention states: "The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention." *Id.* art. 2, 36 Stat. at 2290, 1 Bevans at 640. However, the limitation provided in this article is no longer applicable under customary international law. *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 40 (7th ed. 1997).

[56] *See* Hague Convention, *supra* note 45, arts. 42–56, 36 Stat. at 2306–09, 1 Bevans at 651–53.

[57] *Id.* art. 43, 36 Stat. at 2306, 1 Bevans at 651 (requiring that occupying power "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, which respecting, unless absolutely prevented, the laws in force in the country").

zenship and a representative sovereign government thus technically strips them of the legal badge of "affected citizens."[58]

Looking at the issue from the opposite angle, in addition to the occupant's duties to the—in this case nonexistent—sovereign, the inhabitants of the occupied territories have a duty to obey the occupying power. The British delegate to the Diplomatic Conference stated, "[Civilians] had a right to respect for their life, and to protection against unlawful and criminal attacks; but in return it was their duty to behave in a peaceful manner and not to take part in hostilities."[59] If the rules of belligerent occupation applied to the Palestinian people, it could be argued that the actions of the terrorist groups and even stone-throwing youths amount to consistent material breaches of the inhabitants' duty of obedience. This, of course, is not intended to disregard Israel's violations, including its settlement activity, its security fence, its incursions into the West Bank and Gaza, and its targeted killing policy. The argument exists on both sides, therefore, that the laws of belligerent occupation are violated on a regular basis, rendering them inapplicable in fact, if not in law.

Thus, the legal and factual loophole into which the Occupied Palestinian Territory falls regarding the laws of war concerning belligerent occupation renders more crucial the determination of the applicability of the purely humanitarian provisions of the Fourth Geneva Convention.

III
INTERPRETING THE CONVENTION

In this Part, I argue that a fundamental treaty misinterpretation has led to the erroneous calls for application of the Fourth Geneva Convention to the Israeli-Arab conflict. Specifically, the failure to construe Article 2(1) and Article 2(2)—governing application of the Convention to parties—independently spawned the misunderstanding surrounding the Convention's application to Israel. Part III.A briefly addresses the law of treaty interpretation and justifies the use of the

[58] For a full discussion of the citizenship issue, see, e.g., PETERS, *supra* note 16 (providing comprehensive history of "Palestinian problem"); John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. INT'L L.J. 171, 216 (1998) (presenting rights of displaced Palestinians and Israel's arguments against recognition; noting that among Arab states, "Jordan alone extended its nationality to displaced Palestinians"); Khalil Shikaki, *The Right of Return*, WALL ST. J., July 30, 2003, at A12 ("Less than 10% of those [Arab refugees] seeking to [return] to Israel—1% of all surveyed refugees—will seek Israeli citizenship upon returning to Israel; the rest want Palestinian, and in some cases Jordanian, citizenship.").

[59] 2A DIPLOMATIC CONFERENCE, *supra* note 6, at 621 (remarks of Brigadier Page, delegate of United Kingdom).

Diplomatic Conference to aid interpretation. Part III.B explains the *sui generis* situation of the Middle East conflict and provides textual support for the proposition that the Geneva Convention is an inherently state-centric treaty.

Because only certain Geneva Convention articles specifically address applicability, the remaining sections will examine these articles in turn. Part III.C discusses what interpretative clues can be gleaned from the absence of a formal preamble. Part III.D examines Article 2 at length.

A. Preface—The Right to Resort to the Travaux

As noted above, Pictet acknowledges in the foreword to his commentary that "only the participant States are qualified . . . to give an official and . . . authentic interpretation of an intergovernmental treaty."[60] The voluminous scholarly debate over compliance and applicability of the Fourth Geneva Convention to the Middle East conflict, and, more importantly, the disagreement among signatories, including Israel, on the issue is strong evidence of a problem in treaty interpretation.[61] Use of the Diplomatic Conference, or *travaux préparatoires*, in interpreting the provisions of the Fourth Geneva Convention is governed by the Vienna Convention on the Law of Treaties.[62] Article 31(1) states: "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."[63] The inapplicability of the Fourth Geneva Convention to the Middle East conflict derives from an "ordinary" reading of the Convention text taken from its context, object, and purpose.[64] However, the use of supplementary means of interpretation are necessary to "confirm" this position, given the anachronistic, erroneous, and strained interpretive arguments promulgated by both sides.[65]

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[60] PICTET COMMENTARY, *supra* note 7, at 1.

[61] *See infra* Part III.D.

[62] *See* Vienna Convention on the Law of Treaties, May 23, 1969, arts. 31–33, 1155 U.N.T.S. 331, 340. Although Iraq, Israel, Jordan, the United States, and the Occupied Palestinian Territory are not signatories to the Vienna Convention, the use of historical materials to ascertain the meaning of debated agreements provides adequate justification to resort to the *travaux préparatoires*.

[63] *Id.* art. 31, 1155 U.N.T.S. at 340.

[64] *See infra* Part III.D.

[65] *See, e.g.*, MALLISON & MALLISON, *supra* note 53, at 252 ("All of the state participants in the recurring hostilities in the Middle East are parties to the four Geneva Conventions . . . ."); Bisharat, *supra* note 14, at 337 ("Israel's argument is framed in terms of an Israeli-Jordanian, Israeli-Egyptian conflict which ignores the independent rights of the Palestinians. The issue is more correctly framed as an Israeli-Palestinian conflict, *but*

"Supplementary means of interpretation" is defined in Article 32 of the Vienna Convention:

> Recourse may be had 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.[66]

Because Article 32 specifically permits use of the drafting record to "confirm" an apparently straightforward interpretation under Article 31 or to determine the correct interpretation where a treaty provision is "ambiguous or obscure," resort to the Diplomatic Conference is allowable to aid interpretation of the Fourth Geneva Convention.[67] Given the disparate interpretations regarding Convention compliance and applicability, the General Provisions section maintains a certain degree of opacity that can be penetrated only by use of the drafting history. With respect to the Israeli-Palestinian conflict, arguing that the Fourth Geneva Convention applies to a nonsignatory that is not a state likely qualifies as an "unreasonable" interpretation deserving of clarification, especially given the clearly expressed reservations of the state parties involved in the Convention's drafting.

B. The Sui Generis *Problem*

It is a fundamental principle of international law that a treaty applies only to states that agree to be bound by its provisions.[68] Equally fundamental is the principle that only subjects of international law can conclude treaties.[69] The Fourth Geneva Convention is no exception, despite assertions by some that it has achieved the status of customary international law.[70] And despite a fascinating debate over Palestine's existence as a subject of international law,

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for purposes of examining the Israeli argument, the conflict will here be framed as Israeli-Jordanian.") (emphasis added).

66 Vienna Convention on the Law of Treaties, *supra* note 62, art. 32, 1155 U.N.T.S. at 340.

67 *See id.* arts. 31–32, 1155 U.N.T.S. at 340.

68 This is equally applicable in the context of agreements that are denoted Conventions. *See* MALANCZUK, *supra* note 55, at 36 ("The word 'convention' means a treaty, and that is the only meaning which the word possesses in international law, and in international relations generally.").

69 *See* BROWNLIE, *supra* note 4, at 57–68.

70 *See supra* note 53 and accompanying text.

especially following the PLO's signing of the Oslo Accords,[71] it is an incontrovertible fact that the Occupied Palestinian Territory does not qualify as a sovereign state.[72] There are no provisions in the Fourth Geneva Convention discussing its application to nonstate entities, and the *travaux préparatoires* reveals no discussion to the contrary.

Although the state-party delegates paid lip service to the idea of a civilian's convention, they designed the Fourth Geneva Convention to deal with a post–World War II, state-centric world.[73] The chairman of one Diplomatic Conference drafting committee summarized the true nature of the Convention:

> In view of the high hopes to which the Convention had given birth throughout the world, it was necessary to explain the intention of the nations which had drawn it up. That was to put an end to the horrors of the 1939–1945 war and to condemn forcefully and finally all the atrocities which had revolted the conscience of mankind.[74]

Of course, there are numerous references to the importance of protecting civilians. For example, the delegate of the Holy See stated: "What was the main purpose of the Civilians Convention? It was to protect civilian populations against the horrors of war by means of rules based on natural law, the rights of man, love of one's neighbor, charity and respect of the human person."[75] But this comment, and numerous similarly lofty statements, were made in discussions regarding the inclusion of God's name in the Preamble.[76] Indeed, the Diplomatic Conference is inundated with contrary comments. For example,

> In reply to a remark by Miss Jacobs (France) to the effect that the object of the Convention was to provide for the protection of persons, and not to safeguard the rights of States, Colonel Hodgson

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[71] *See, e.g.*, GEOFFREY R. WATSON, THE OSLO ACCORDS 91–102 (2002); Quigley, *supra* note 46, at 722–30; Tal Becker, *International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas* (2001), *at* http://jcpa.org/art/becker2.htm.

[72] *See supra* note 4 and accompanying text. This is true even though the Occupied Palestian Territory maintains a unique presence in international politics. *See e.g.*, G.A. Res. 3236, U.N. GAOR, 29th Sess., Supp. No. 31, at 4, U.N. Doc. A/9631 (1974) (declaring U.N. General Assembly's recognition of Palestinian people's right to self-determination and of PLO as their legitimate representative); Kassim, *supra* note 4, at 19 (noting that "[t]he PLO has entertained more recognition in public law than any territorial public body yet to exist" and that PLO has been recognized by over 100 states and has diplomatic-style offices in over 60 states).

[73] *See infra* notes 82–86 and accompanying text.

[74] 2A DIPLOMATIC CONFERENCE, *supra* note 6, at 696 (remarks of Chairman Cahen-Salvador, delegate of France). Delegate intentions reflecting the state-centric ideals incorporated into the Fourth Geneva Convention are discussed further *infra* Part III.D.1.

[75] 2A DIPLOMATIC CONFERENCE, *supra* note 6, at 692 (remarks of Monsignor Bertoli, delegate of Holy See).

[76] *Id.* at 692–96.

> (Australia) said that the rights, duties and obligations of States had to be taken into account no less than those of individuals.[77]

The delegate from France voiced the sovereignty concerns even more forcefully when he stated, "It was impossible to carry the protection of individuals to the point of sacrificing the rights of States."[78]

However, scholars singularly have seized on Pictet's words to champion their humanitarian hopes. According to Pictet, the Convention presented "*the first time* that a set of international regulations has been devoted not to State interests, but solely to the protection of the individual."[79] Yet, even Pictet contradicts himself regarding the primacy and uniqueness of the Convention's humanitarian concerns:

> [The Convention] does *not put forward any new ideas*. But it reaffirms and ensures . . . the general acceptance of the principle of respect for the human person in the very midst of war—a principle on which too many cases of unfair treatment during the Second World War appeared to have cast doubt.[80]

As this last example illustrates, the much–relied upon Pictet Commentary glosses over the states' true concern with traditional sovereign rights. The Diplomatic Conference examples demonstrate that humanitarian sentiments were expressed mostly for their rhetorical value, rather than as sincere statements of an achievable goal. This is not to say that the delegates acted disingenuously, but does reflect that the delegates were more concerned with the Convention's implications with regard to state sovereignty than with how to best protect civilians or handle humanitarian events, especially in *sui generis* situations such as the Middle East conflict.

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[77] *Id.* at 622 (remarks of Colonel Hodgson, delegate of Australia). A delegate member of the ICRC proposed that internment of civilians should end at the same time as that of prisoners of war, reflecting perhaps a sense of administrative practicality, but certainly failing to protect "innocent bystanders" in a manner different from participant soldiers. *Id.* at 624 (remarks of Mr. Pilloud, member of ICRC).

[78] 2B DIPLOMATIC CONFERENCE, *supra* note 6, at 10 (remarks of Mr. Lamarle, delegate of France). The French delegate later attempted to retract this statement: "[Mr. Lamarle] had not thought for one moment of placing the State above humanitarian laws, but on the contrary, of conceiving the State as the servant of these laws and of the common rights." *Id.* at 12–13.

[79] MALLISON & MALLISON, *supra* note 53, at 258 (quoting PICTET COMMENTARY, *supra* note 7, at 77) (emphasis added).

[80] PICTET COMMENTARY, *supra* note 7, at 9 (emphasis added).

C. *The Problem of the Preamble*[81]

The first plenary meeting of the 1949 Diplomatic Conference opened with remarks invoking the horrors of war, vivid in everyone's minds following World War II.[82] The Diplomatic Conference delegates were expressly charged with remedying the applicability-related deficiencies that plagued the 1929 Geneva Convention and left so many civilians without protection:[83] "From the humanitarian point of view, which is ours, the application of the Conventions should be as wide as possible. They should be able to exercise their influence whenever circumstances require."[84] The President of the Conference, recognizing the influence that state politics would play in the drafting, tried to dissuade the delegates from succumbing to sovereign concerns: "I trust, therefore, that the countries which are not represented here will adhere to the Conventions which we hope to establish, and will join us on *that higher impartial plane of pure humanity where differences of a political nature should have no place*."[85] But at the same time, he recognized the pervasive influence of state concerns coupled with problems of practical application: "If our work is to be of value, we must always keep realities in view, and avoid laying down rules which cannot be applied. We must go as far as possible, and yet never transgress the bounds beyond which the value of the new Convention will become an illusion."[86]

With the competing nature of these aims in mind, the delegates began to tackle the drafting. When one looks at the Convention itself,

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[81] This language is borrowed from a subhead title in the English translation of 2A DIPLOMATIC CONFERENCE, *supra* note 6, at 813.

[82] Noting the advances in modern warfare, the Conference was called upon to create "a special convention" to shield innocent civilians from the ravages of war: "The relief of suffering must spread with the spread of the effects of war." 2A DIPLOMATIC CONFERENCE, *supra* note 6, at 11; *see also* INT'L COMM. OF THE RED CROSS, REPORT ON THE WORK OF THE CONFERENCE OF GOVERNMENT EXPERTS FOR THE STUDY OF THE CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS 10 (1947) [hereinafter FIRST EXPERTS CONFERENCE] ("It is a fact that modern warfare conditions increase the liability of civilians and military personnel to suffer casualties in the same places and thus to be cared for together."); PICTET COMMENTARY, *supra* note 7, at 3 (noting that "total" warfare of World War II found civilians directly exposed to hostilities).

[83] 2A DIPLOMATIC CONFERENCE, *supra* note 6, at 9 (remarks of Max Petitpierre, Diplomatic Conference President) ("There are many such deficiencies. It would be impossible for me to enumerate them all here. Yet there are some whose importance is such that I wish to call attention to them now . . . . Firstly, the bearing of the Conventions and their field of application have not yet been sufficiently clearly defined.").

[84] *Id.*

[85] *Id.* at 10 (emphasis added). He also requested that the delegates "not betray the trust placed" in their hands. *Id.*

[86] *Id.*

the lack of any substantive preamble is glaringly apparent.[87] The delegates argued over both the general content and specific language of the preamble, including, for example, whether it should be phrased in terms of general principles or should enumerate substantive goals,[88] whether to make pleas for peace as opposed to protests against war,[89] and whether or not to reference a supreme being.[90] Unable to come to any agreement on the motives or general purpose of the Convention, the original draft of the preamble was reduced to nothing more than a one-sentence introduction.[91]

Although a preamble is normally devoid of legal force, it can serve as a powerful interpretative device "by its indication of the general idea behind [treaty provisions] and the spirit in which they should be applied."[92] Thus, its absence not only leads to interpretative difficulties, but also is indicative of the competing concerns present during drafting. Its absence presents the disturbing notion that the state parties may have had no common goals at all.

D. Assessing Article 2 Applicability

The crux of the applicability debate rests, appropriately, with Geneva Convention Article 2, the article that dictates to whom the Convention applies. This article, common to all four Conventions, reads:

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87 The Preamble reads simply: "The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of establishing a Convention for the Protection of Civilian Persons in Time of War, have agreed as follows." Fourth Geneva Convention, *supra* note 2, pmbl., 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

88 *See* 2A DIPLOMATIC CONFERENCE, *supra* note 6, at 691–93.

89 *See id.* at 620 (remarks of Mr. de Alba, delegate of Mexico); *id.* at 693 (remarks of Mr. Pilloud, delegate of ICRC).

90 *See id.* at 694–97, 778–79 (remarks of various delegates).

91 *See supra* note 87. In stark contrast, the Draft Convention enumerated four separate general rules and consisted of 142 words. *See* 1 DIPLOMATIC CONFERENCE, *supra* note 6, at 113 (containing text of "Draft Convention for the Protection of Civilian Persons in Time of War" and citing preamble). More time at the four-month-long Diplomatic Conference was devoted to debating the preamble than any other article. The Bulgarian delegate intuited that without a preamble the Convention would become nothing more than a technical manual on the rules of war. 2A DIPLOMATIC CONFERENCE, *supra* note 6, at 695–96 (remarks of Mr. Mevorah, delegate of Bulgaria); *see id.* at 780 (registering Australian delegate's point that preamble should be "clarion call to the world proclaiming the aims which the Diplomatic Conference had sought to attain," not "bad digest of certain principles already formulated in the declaration of Human Rights—a Declaration which the Conference was not called upon to re-write").

92 PICTET COMMENTARY, *supra* note 7, at 12; *see* Vienna Convention on the Law of Treaties, *supra* note 62, art. 32, 1155 U.N.T.S. at 340 (providing that preparatory work of treaty and circumstances of conclusion may be used as supplementary interpretive tools in certain instances).

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.[93]

The bulk of the literature finds the application of the Fourth Geneva Convention to the Israeli-Arab conflict to be relatively straightforward: The provisions and intent of the Fourth Geneva Convention are designed to protect the lives of civilians by requiring belligerents uniformly to yield to humanitarian principles.[94] Because Israel is considered a belligerent occupant of territory possessed as a result of armed conflict with another signatory—Jordan—the Convention applies.

Most scholars, based on this "common sense" reading of Article 2, separate questions of sovereignty from the humanitarian intent of the Convention.[95] But this approach conflicts with the stress placed on state-centric concerns by delegates during the drafting.[96] This confusion stems from the formalistic, state-centric language used to

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[93] Fourth Geneva Convention, *supra* note 2, art. 2, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

[94] *See, e.g.*, Bisharat, *supra* note 14, at 338 ("The Israeli interpretation of the Convention serves to frustrate the Convention's very purpose: the protection of civilians . . . ."); Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT'L L.J. 129, 143–47 (1991) (claiming Israel is "unequivocally bound" by provisions of Fourth Geneva Convention); *see also supra* Part III.C (discussing failure of Convention to enact substantive preamble).

[95] *See, e.g.*, BENVENISTI, *supra* note 28, at 110 ("But when it comes to the interests of *individuals* under occupation, the application of the Fourth Geneva Convention is warranted, notwithstanding conflicting claims of sovereignty.") (emphasis in original); Stephen M. Boyd, *The Application of International Law to Occupied Territories*, 1 ISR. Y.B. ON HUM. RTS. 258, 260 (1971) ("[T]he Fourth Geneva Convention was intended to be, and should be interpreted as, a people-oriented Convention, and not a territory-oriented Convention."). According to the Rumanian delegate, "Humanitarian considerations should prevent the Conference from introducing restrictions in the text, the whole object of which was to extend the protection of the Convention to the greatest possible number of persons." 2B DIPLOMATIC CONFERENCE, *supra* note 6, at 11. Pictet announced that "the main object of the Convention is to protect a strictly defined category of civilians from arbitrary action on the part of the enemy." PICTET COMMENTARY, *supra* note 7, at 10.

[96] *See supra* Part III.C.

define treaty applicability, specifically, and from an unwillingness to recognize the failure of international law to protect innocent persons, generally.

1. *The "High Contracting Party" Confusion*

The Fourth Geneva Convention employs the highly formalistic term "High Contracting Party"—a term not uncommon in treaties, but which does not encompass nonsignatory, nonstate entities like the Occupied Palestinian Territory. The use of "High Contracting Party" is notably absent from an early version of the Fourth Geneva Convention drafted at the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims in April 1947.[97] That draft uses only "contracting Parties."[98] The ICRC Commentary on Additional Protocol I, clarifying the full importance of the definition in an attempt to solve the application problems inherent in the original Convention, states that "High Contracting Party" is synonymous with the term "Party" as understood by the Vienna Convention on the Law of Treaties:[99] "a State which has consented to be bound by the treaty, and for which the treaty is in force."[100] The Commentary on Additional Protocol I stresses the necessity of the latter part of this definition;[101] the entry into force separates a High Contracting Party from the normal "contracting State," which is bound by its consent *regardless of whether the treaty has entered into force*.[102] The Commentary on Additional Protocol I goes on to note the strict confines of the applicability only to "Parties."[103] Yet, it carves a narrow exception for parties to a conflict

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97 *See* FIRST EXPERTS CONFERENCE, *supra* note 82, at 270–77.

98 *Id.* at 272 ("The present Convention is applicable between the contracting Parties . . . .").

99 *See* INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 25 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

100 Vienna Convention on the Law of Treaties, *supra* note 62, art. 2(1)(g), 1155 U.N.T.S. at 333.

101 COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 99, at 25.

102 Vienna Convention on the Law of Treaties, *supra* note 62, art. 2(1)(f), 1155 U.N.T.S. at 333 ("'Contracting State' means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force . . . ."). Article 18 of the Vienna Convention imposes an affirmative obligation on States to refrain from acts (including statements) that would defeat the object and purpose of a treaty to which it has consented to be bound but which has not yet entered into force. *Id.* art. 18, 1155 U.N.T.S. at 336.

103 COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 99, at 25, 35 ("For the meaning of the expression 'High Contracting Party,' which, in the present context, differs from the usual meaning, reference should be made to the commentary on this expression in the Preamble.").

that are not bound by the Convention but still accept and apply the treaty.[104]

This is curious for two reasons. First, the Commentary on Additional Protocol I uses "Party" in a paradoxical manner, defining it as a state bound by the Convention and for which the treaty is in force, but also—in its narrow exception category—as a state not bound by the Convention.[105] Second, the Commentary on Additional Protocol I cites Article 2(3) of the Convention, which makes no use of the term "Party" or "High Contracting Party."[106] Rather, it employs the term "Powers," a distinct term used in later articles but generally qualified by other terms like "Protecting Power," "Occupied Power," or "neutral Power."[107] "Power" is legally distinct from "Party" in that "Power" specifically refers to an entity not necessarily bound by the Convention.[108]

Pictet implies that the special nature of the Convention requires such formality: "It is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties."[109] But the Diplomatic Conference belies the universal humanitarian application of the Convention—what Pictet refers to as an "imperative call of civilization"—such that the Convention's protections would extend to the Occupied Palestinian Territory.[110] After all, "[l]ittle attention seems to have been paid at

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104 *Id.*

105 *Id.*

106 *See* text accompanying note 93.

107 *See, e.g.*, Fourth Geneva Convention, *supra* note 2, art. 11, 6 U.S.T. at 3524–26, 75 U.N.T.S. at 294–96 (employing use of "High Contracting Party" in manner distinct from "Power," revealing that "Power" does not refer to signatories). *But see* G.I.A.D. DRAPER, THE RED CROSS CONVENTIONS 16 (1958) ("It is suggested that in the context of Article 2, para. 3, 'Powers' means States capable then and there of becoming Contracting Parties to these Conventions either by ratification or accession."). But since the Occupied Palestinian Territory is not a state, it is not capable "then and there" of becoming a "contracting Party," which by definition means a state that consented to be bound by the treaty and for which the treaty is in force. *See supra* notes 4, 99–102 and accompanying text.

108 However, at the 1971 Experts Conference, the delegates discussed the idea that "Power" only refers to states: "[A] generally accepted principle of international law" holds that High Contracting Parties did not necessarily refer to a "constituted State." INT'L COMM. OF THE RED CROSS, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEV. OF INT'L HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, REPORT ON THE WORK OF THE CONFERENCE 53–54 (1971) [hereinafter SECOND EXPERTS CONFERENCE]. In such a context, there would be no doubt surrounding the ability of the Occupied Palestinian Territory, having a people with a recognized right to self-determination, to become a Party to the Fourth Geneva Convention.

109 PICTET COMMENTARY, *supra* note 7, at 15.

110 *Id.* at 15. *But see supra* note 78 and accompanying text.

the Diplomatic Conference to the legal difficulty involved in binding an entity that is not only not a party to the Convention but does not exist."[111] Moreover, the idea of reciprocity runs through the heart of the Convention. The Canadian delegate noted "that there should be an addition to Article 2 providing for a reciprocal basis in the case of international war, for the application of the Convention between a party signatory and a party which was not signatory to the Convention."[112] The Belgian delegate, in proposing an amendment to Article 2(3),[113] stated:

> Nothing is stated regarding the position of a Power which is Party to the Convention as opposed to a Power not Party to the Convention. It must be infereed [sic] from this silence that no obligation exists between the Parties to the conflict. The intentions of the High Contracting Parties would not be entirely met if the manner in which certain obligations might arise between Parties concerned was not provided for.[114]

Ultimately, and partly as a result of this proposal, an amendment clarifying the obligations due to nonparties was added to Article 2(3) of the Fourth Geneva Convention, currently in force. It reads, "They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."[115] Notably, this paragraph employs the term "Power," distinct from the previous paragraphs of Article 2 that explicitly use only the term "High Contracting Party."[116] A plain reading of paragraph 3 in the context of the entire Article reveals that "Power" specifically refers to an entity not bound by the Convention.

An argument could be made that "Power," therefore, includes nonstate entities like Palestine, and therefore Israel's actions toward such a "Power" would be covered by the Fourth Geneva Convention *de jure*. The typical argument is that Israel is bound by the Convention via its relationship with Jordan, because the High Contracting Parties remain bound by the Convention in relation to one another even if a third power is involved in the conflict: "Israel is

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111 DRAPER, *supra* note 107, at 17.

112 2B DIPLOMATIC CONFERENCE, *supra* note 6, at 13 (remarks of Mr. Wershof, delegate of Canada).

113 The Draft Convention read: "If one of the Powers in conflict is not party to the present Convention, the Powers who are party thereto shall notwithstanding be bound by it in their mutual relations." 1 DIPLOPMATIC CONFERENCE, *supra* note 6, at 113 (citing Article 2, paragraph 3 of Draft Convention).

114 3 DIPLOMATIC CONFERENCE, *supra* note 6, at 27 (Annex 9).

115 Fourth Geneva Convention, *supra* note 2, art. 2, para. 3, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

116 *Id.* art. 2, paras. 1–2, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

bound to follow the Convention because both Israel and Jordan are [High Contracting Parties]."[117] Even if that proposition were true, application of the Convention would have expired following the Israel-Jordan Peace Treaty of 1994 in accordance with Article 6 of the Fourth Geneva Convention.[118] Article 6(2) states: "In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations."[119] The next paragraph, Article 6(3), reads:

> In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory . . . .[120]

Taking the reading encouraged by the Pictet Commentary, Articles 6(2) and 6(3) would not warrant different applications, since, according to Pictet, occupation applies only where territory is taken over without hostilities.[121] Because there clearly were hostilities between Israel and Jordan, Article 6(2) and its "general close of military operations" language would apply.[122] This means that the Convention's applicability ceased upon the signing of the peace treaty, if not earlier.

Assuming, as this Note argues, that the paragraphs operate independently as a result of the distinction between Article 2(1) and 2(2),[123] then Article 6(3) would seem to apply. Indeed, the independence of Articles 2(1) and 2(2) is necessary in order to avoid reading Article 6(3) out of existence. Alas, the explicit reference in Article 6(1) to the "conflict or occupation" language defined in Article 2 thus means that the "occupied territory" referred to in Article 6(3) must be "the territory of a High Contracting Party."[124] While Jordan may be a "High Contracting Party" (i.e., a signatory), the territory occupied by Israel is not Jordan's sovereign territory.[125] Therefore, Article 6(3)

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117 Bisharat, *supra* note 14, at 339.

118 Fourth Geneva Convention, *supra* note 2, art. 6, 6 U.S.T. at 3522, 75 U.N.T.S. at 292.

119 *Id.* art. 6, para. 2, 6 U.S.T. at 3522, 75 U.N.T.S. at 292.

120 *Id.* art. 6, para. 3, 6 U.S.T. at 3522, 75 U.N.T.S. at 292.

121 *See* PICTET COMMENTARY, *supra* note 7, at 21; *see also infra* text accompanying notes 203–04.

122 Fourth Geneva Convention, *supra* note 2, art. 6, para. 2, 6 U.S.T. at 3522, 75 U.N.T.S. at 292.

123 *See infra* Part III.D.2.b.

124 Fourth Geneva Convention, *supra* note 2, art. 2, para. 2 & art. 6, paras. 1, 3, 6 U.S.T. at 3518, 3522, 75 U.N.T.S. at 288, 292. Article 6(1) reads: "The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2." *Id.* art. 6, para. 1, 6 U.S.T. at 3522, 75 U.N.T.S. at 292.

125 *See infra* Part III.D.2.

would not apply either, meaning that Israel is not bound to apply the Convention.

It is obvious from the Diplomatic Conference, however, that the term "Power" is synonymous with "State."[126] The French delegate thought it necessary to include a time limit after which the application of the Convention to a "*non-contracting State*" would expire.[127] Also, a United States delegate, referring to Article 2(4) of the Draft Convention, cautioned that the Convention must remain within the bounds of international law: "The Convention would therefore be applicable in all cases of declared or undeclared war between States, parties to the Convention, and to certain armed conflicts within the territory of a State party to the Convention."[128] Even the term "Occupying Power" was used to convey the idea of an occupying *state*.[129] Commenting on the Belgian amendment described above, which dealt with a portion of the Draft Convention using only the term "Power," a U.S. delegate stated his preference for the Belgian amendment, "which placed an obligation on the Contracting Party to invite the *non-Contracting Party* to apply the Convention."[130]

Most notably, the Diplomatic Conference explicitly reveals the state-centric attitude held by the delegates, including those of the ICRC: "Further, the I.C.R.C. in its 'Remarks and Proposals,' had suggested the addition in paragraph 3 of a provision with regard to the case of two *States* at war, one of which was not a Party to the Convention."[131] This is more evident in the discussions relating to

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126 *See* SECOND EXPERTS CONFERENCE, *supra* note 108, at 53 (noting that "Power" only refers to "States"); DRAPER, *supra* note 107, at 16 (suggesting that "Powers means States capable then and there of becoming Contracting Parties to [the] Conventions").

127 2B DIPLOMATIC CONFERENCE, *supra* note 6, at 53 (remarks of Mr. Lamarle, delegate of France) (emphasis added).

128 *Id.* at 12 (remarks of Mr. Harrison, delegate of United States).

129 2A DIPLOMATIC CONFERENCE, *supra* note 6, at 623 (remarks of Mr. Clattenburg, delegate of United States) (discussing obligations of "Occupying Powers" and using analogy of duties owed by Allied powers to Japan and Germany).

130 2B DIPLOMATIC CONFERENCE, *supra* note 6, at 53 (remarks of Mr. Yingling, delegate of United States) (emphasis added).

131 *Id.* at 10 (remarks of Mr. Pilloud, delegate of ICRC) (emphasis added). See also *id.* at 108, where it is explained that the considerations governing the drafting of Article 2(3) focused on conflicts between *states*, some of whom might be parties to the Convention and others not:

> In the instance of war of this character, the Convention could not directly govern the relations between a State Party to the Convention and an adverse State not Party to the Convention. As a general rule, a Convention could lay obligations only on Contracting States. But, according to the spirit of the four Conventions, the Contracting States shall apply them, in so far as possible, as being the codification of rules which are generally recognized.

Although attempting to expand application of the Geneva Conventions by calling on the good will of all nations, this comment clearly illustrates that the Conference members were

modern Article 3,[132] which pertains to conflicts of a noninternational nature (i.e., civil wars). The delegates unanimously refused to be bound by the terms of the Convention in this context:

> Will we not endanger very seriously the strength and structure of a High Contracting Party by binding it to a one-sided agreement—why should we embarras [sic] or weaken it because it has signed the Convention? It would be far better if we did not become one of the contracting parties, as by doing so we will be bound by the Conventions in our internal affairs.[133]

The concerns over "serious danger to sovereignty"[134] seem no less grave or one-sided when applied to an international conflict like that present in the Middle East, where a nonstate, nonsignatory squares off against a High Contracting Party. Thus, the Fourth Geneva Convention does not apply between Israel as a High Contracting Party and the Occupied Palestinian Territory.[135]

Even if Article 2(3) applied to the conflict under a broad interpretation of "Power" and the Palestinian Authority consented to be bound—it deposited a letter with the Swiss accepting and agreeing to abide by the Fourth Geneva Convention[136]—there is still the very serious and complex issue of whether the Palestinian Authority actually is applying the provisions. Israel maintains that the Palestinian Authority supports terrorist organizations and refuses to exert proper police control over its territory, nullifying any acceptance of the provisions on the basis of bad faith, if not material breach.[137] On the other hand, Israel repeatedly attacks Palestinian security forces and their infrastructure, restricts movement of Palestinians and Palestinian Authority leaders, and has reoccupied much of the West Bank and Gaza in the name of self-defense.[138] Nevertheless, whether the

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focused only on state actors and not the *sui generis* situation presented by the nonstate entity of Palestine.

132 Fourth Geneva Convention, *supra* note 2, art. 3, 6 U.S.T. at 3518–20, 75 U.N.T.S. at 288–90. Article 3 does not apply to the Middle East conflict, nor has Israel ever attempted to argue its applicability.

133 2B DIPLOMATIC CONFERENCE, *supra* note 6, at 328 (remarks of Gen. Oung, delegate of Burma).

134 *Id.* at 327.

135 For discussion on the state-like qualities possessed by Palestine, see sources cited in *supra* note 71.

136 *See supra* note 5.

137 *See, e.g.*, John Ward Anderson, *Mideast Parties Now Look to U.S.: Sharon-Abbas Meeting Stalls Over 'Road Map,'* WASH. POST, July 21, 2003, at A18 (detailing ineffectiveness of Palestinian Authority security forces).

138 *See, e.g.*, Dan Ephron, *Two Attacks Break a Lull in Mideast; Suicide Blast in Israel Follows Strike in Gaza*, BOSTON GLOBE, Dec. 26, 2003, at A1 ("Israel has killed over 120 Palestinians in targeted strikes since the uprising began in September 2000 but also has killed about 90 civilians in such operations, according to human rights groups."); Joel

Palestinian Authority—or Israel for that matter—is applying the provisions of the Fourth Geneva Convention is not a legal question, but an empirical one outside the scope of Convention applicability in the first instance.[139]

2. *The Disputed "Territory"*

Following the Israeli victory in the 1967 War, the United Nations Security Council passed Resolution 242, which sought to provide a basis for a lasting peace through the "[w]ithdrawal of Israeli armed forces from *territories* occupied in the recent conflict."[140]

Much controversy surrounds the absence of a definite article preceding the word "territories." Although arguably contained in the Arabic and French versions of the text,[141] it is not present in the English text. This leads many to believe that Resolution 242 did not require a complete withdrawal from the West Bank and Gaza even though that was the meaning orally conveyed by the United States to Egypt during armistice negotiations.[142]

Regardless, the legal nature of the territories at issue, specifically the sovereign rights over those territories, is fundamental to determining the applicability of the Fourth Geneva Convention to the Israeli-Arab conflict. Israel argues that it is not an occupying power subject to the provisions of the Fourth Geneva Convention because, according to Article 2(2), the Convention only applies to "the terri-

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Greenberg, *Israeli Settlers' Zeal Forces Palestinians to Flee Their Town*, N.Y. TIMES, Oct. 21, 2002, at A1 (describing attack by Jewish settlers on Palestinian town and noting Israel's failure to take action against illegal settlements).

[139] *See* 2B DIPLOMATIC CONFERENCE, *supra* note 6, at 108 ("The Contracting State was therefore not bound to apply the Convention in its relations with the adverse non-Contracting State if the latter declared that it did not recognize itself bound by the Convention *or while making such a statement, it did not abide by it in practice.*") (emphasis added). This statement applies to both Israel's statement of *de facto* application as well as the PLO's apparent acceptance of the Fourth Geneva Convention.

Who should make the determination regarding compliance is another matter of serious concern:

> The effectiveness of the provision is open to serious doubt for it appears to leave to the belligerent who is a Contracting Party the right to determine whether or not its adversary, who is not such a party, is applying the Convention. There can be little doubt that good faith is a legal requirement in any such determination.

DRAPER, *supra* note 107, at 12.

[140] S.C. Res. 242, U.N. SCOR, 22d Sess., 1382d mtg. at 8, U.N. Doc. S/INF (1967) (emphasis added).

[141] The French version reads "*des territories*," which is ambiguous as to whether the article is actually read into the text as a modifier. *Id.*

[142] *See, e.g.*, OREN, *supra* note 11, at 326 (noting that Egyptians, concerned about scope of withdrawal, were persuaded by U.S. Ambassador to U.N., Arthur Goldberg, and British Ambassador to U.N., Lord Caradon, that "territories" meant "all the territories").

tory *of* a High Contracting Party,"[143] and the West Bank was, as Professor Yehuda Blum has championed,[144] a land void of a legitimate sovereign. Since Jordan was not a legitimate sovereign over the West Bank territories when it occupied them in 1948,[145] nor gained that status by the time it became a High Contracting Party to the Convention in 1951—even despite its unrecognized annexation[146]—the West Bank could not qualify as "the territory of a High Contracting Party."[147] Israel further contends that implicit in acknowledging the applicability of the Fourth Geneva Convention under Article 2(2) is recognition by Israel of the sovereign rights of Egypt and Jordan over Gaza and the West Bank, respectively.[148] And while the ICRC asserted that the Fourth Geneva Convention applies to every occupation of territory regardless of the legal status in the territory occupied,[149] Israel believed, "as a *prima facie* corollary, that not each and every occupation of territory turns it into territory to which the Convention applies."[150]

a. Four Erroneous Arguments

Before analyzing the nuances of these statutory arguments, the international community's condemnation of them, and how the Diplomatic Conference sheds light on the topic, it is necessary first to outline four of the main arguments regarding Convention inapplica-

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[143] Fourth Geneva Convention, *supra* note 2, art. 2, para. 2, 6 U.S.T. at 3518, 75 U.N.T.S. at 288 (emphasis added); Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. ON HUM. RTS. 262, 262–66 (1971); Shamgar, *supra* note 28, at 37–40. Somewhat comically, this appears to degenerate into an argument over emphasis—"*the* territories of" versus "the territories *of*."

[144] See *infra* Part III.D.a.i for the complete analysis of Professor Blum's position.

[145] *See supra* note 20 and accompanying text (referencing rejection by Arabs of Partition Plan).

[146] *See supra* notes 28–30 and accompanying text.

[147] Despite seeing "no need to fully appraise the relative value and merit of the rights of the parties," Meir Shamgar, whose 1971 article, written while the Attorney General of Israel, serves as the definitive Israeli position on the applicability of the Fourth Geneva Convention, nevertheless spends a portion of his article quoting Security Council statements decrying the 1948 Jordanian invasion of "Palestine." Shamgar, *supra* note 143, at 264–66. He asserts: "None of the states whose troops have entered Palestine can claim that Palestine forms part of its territory. It is an altogether separate territory without any relationship to the territories of the states which have sent their troops into Palestine." *Id.* at 264–65 (citing remarks of Mr. Tarasenko, Ukrainian representative to Security Council). Of course, this statement applies equally to Israel's occupation of "Palestine" following the 1967 War.

[148] *See, e.g.*, BENVENISTI, *supra* note 28, at 109 (citing Shamgar, *supra* note 28, at 34); Boyd, *supra* note 95, at 260.

[149] *See* Shamgar, *supra* note 28, at 32; *see also* BENVENISTI, *supra* note 28, at 109–10; Boyd, *supra* note 95, at 260.

[150] Shamgar, *supra* note 28, at 38.

bility that have been widely condemned by the international legal community. The description of these four theories provides the necessary background for the reinterpretation that this Note urges.

i. The Missing Reversioner

The theory of the missing reversioner, promulgated in 1968 by Professor Yehuda Blum, rests on an implicit assumption that a belligerent occupant must oust a legitimate sovereign from the territory in question in order for the laws of occupation to apply.[151] This supposition is derived from the articles of the 1907 Hague Regulations setting forth provisions designed to protect the sovereign rights of the government of the occupied territory while simultaneously protecting the inhabitants from exploitation, persecution, and the ravages of war.[152] Underlying this interpretation is the belief that occupation—insofar as territory is actually placed under the authority of a hostile army[153]—is a "provisional state of affairs."[154] Indeed, this restriction is explicit in Article 2(4) of the U.N. Charter, which has barred the right to "threat[en] or use . . . force against the territorial integrity or political independence of any state."[155]

However, the missing reversioner theory turns this military conquest wrinkle back on its head by claiming that a void of sovereignty prevented any acquisition by conquest.[156] Israel only ousted Jordan (from the West Bank) and Egypt (from Gaza), two states that were themselves belligerent occupants occupying territory taken through illegal use of force in the 1948 war.[157] Since neither Jordan nor Egypt possessed a sovereign right to the respective territories, their expul-

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151 *See* Blum, *supra* note 29, at 293.

152 Hague Convention, *supra* note 45, arts. 42–56, 36 Stat. at 2306–09, 1 Bevans at 651–53; Roberts, *Prolonged Military Occupation*, *supra* note 37, at 45–48 (1990) (summarizing purposes of law of occupation, which includes encouragement of permanent peace agreements).

153 Hague Convention, *supra* note 45, art. 42, 36 Stat. at 2306, 1 Bevans at 651.

154 Roberts, *Prolonged Military Occupation*, *supra* note 37, at 47; *see supra* notes 47–49 and accompanying text (discussing effect of prolonged occupation on Middle East situation).

155 U.N. CHARTER art. 2, para. 4. Thus, whether the restriction on annexation under Article 47 of the Fourth Geneva Convention applies is irrelevant. Fourth Geneva Convention, *supra* note 2, art. 47, 6 U.S.T. at 3548, 75 U.N.T.S. at 318.

156 Blum, *supra* note 29, at 281–94 (quoting Security Council and Arab League member comments on (il)legality of 1948 "invasion" and discussing international law of belligerent occupation).

157 *See id.* at 283–95; *see supra* note 147 and accompanying text. *But see* GERSON, *supra* note 12, at 80 (noting possibility that Jordan's entry into West Bank in 1948 was only act of aggression vis-à-vis Israel but not against indigenous Arab population).

sion did not displace any legitimate sovereign.[158] It did, however, leave a void of sovereignty over which Israel, the theory asserts, has best title.[159] Therefore, Israel's possession of the West Bank and Gaza could not be considered the "partial or total occupation of the territory of a High Contracting Party"[160] because Jordan can show no reversionary title to the West Bank protected by the rules of belligerent occupation.[161]

Not surprisingly, Blum's view thus skirts reference to the Fourth Geneva Convention: Given the lack of Jordanian sovereignty, "answers to the remaining questions, concerning the compatibility of . . . the Fourth Geneva Red Cross Convention . . . , are strictly unnecessary, if not irrelevant."[162] Since Blum's article focuses on the legality of imposing Israeli law in the West Bank, Blum dismisses the application of the Fourth Geneva Convention on the grounds that Article 64[163] "deals merely with the *penal* legislation in occupied territory—which is not relevant to the matter here under consideration."[164] Instead, Blum focuses on Article 43 of the Hague Regulations of 1907.[165] However, neither of these provisions governs the respective Conventions' applicability to the conflict in the first place. Blum's article evades the real issue and provides only a now-outdated assessment of the situation in the Middle East.[166]

ii. De Jure *or* De Facto *Applicability*

Blum's argument gained credibility—and lost it—when it essentially became the official Israeli position. In a 1971 article, Meir Shamgar, then Attorney General of Israel, announced that "[t]erritory conquered does not always become occupied territory to which the rules of the Fourth Convention apply."[167] Shamgar more fully explicated his position in a later work:

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158 *See* Blum, *supra* note 29, at 294 (denying that Jordan possesses entitlement to legitimate sovereignty).

159 *Id.*

160 Fourth Geneva Convention, *supra* note 2, art. 2, para. 2, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

161 Blum, *supra* note 29, at 294–95.

162 *Id.*

163 Fourth Geneva Convention, *supra* note 2, art. 64, 6 U.S.T. at 3558, 75 U.N.T.S. at 328.

164 Blum, *supra* note 29, at 295.

165 *Id.* Article 43 requires that the occupying power "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Hague Convention, *supra* note 45, art. 43, 36 Stat. at 2306, 1 Bevans at 651.

166 *See supra* notes 10, 65 and accompanying text.

167 Shamgar, *supra* note 143, at 263; *accord* Shamgar, *supra* note 28, at 32.

> The applicability presupposes the existence of a factual situation which corresponds to the one defined in the Convention. One has to distinguish therefore, . . . between the binding power of a Convention as such, on the one hand, and its applicability to the factual situation under consideration, on the other.[168]

Accordingly, Israel refused to recognize *de jure* application of the Fourth Geneva Convention.[169] It did, however, state that it would apply the Convention's humanitarian provisions under *de facto* status.[170]

This concession represents a failed attempt at placating the international community, while doing nothing to protect the innocents among the inhabitants of the nonstate entity of Palestine. "General propositions about the distinction between *de jure* and *de facto* recognition are to be distrusted, since, as it was emphasized earlier, everything depends on the intention of the government concerned and the general context of fact and law."[171] Israel's intentions are insufficient because, although Israel agreed to observe *de facto* the Convention's humanitarian provisions, it has "never officially enumerated the provisions it regarded as 'humanitarian.'"[172]

However, while Shamgar's initial work[173] has been condemned by most scholars for its ultimate conclusion[174]—rather than for the fact that it arrives at that end through a series of bold, unsupported statements—his later work undertakes a close examination of the Convention text.[175] Shamgar reads Article 2(1) and Article 2(2)[176] independently, the former referring to cases of armed conflict and the latter to cases of occupation.[177] This seems to result from a plain reading of Article 2(2) given the use of the word "also" and the "even if" clause, which connotes an independent meaning distinct from

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168 Shamgar, *supra* note 28, at 33.

169 Shamgar, *supra* note 143, at 266.

170 *Id.*

171 BROWNLIE, *supra* note 4, at 91.

172 BENVENISTI, *supra* note 28, 109 n.3. It does not appear that Israel has abided by its declaration. One need only look to the numerous U.N. General Assembly and Security Council Resolutions calling for application of the Convention provisions, as well as the host of human rights organization reports identifying alleged breaches of the Convention for evidence of this fact. *See, e.g.*, Imseis, *supra* note 3, at 97–98 & nn.283–88 (listing resolutions); Roberts, *Prolonged Military Occupation*, *supra* note 37, at 69 & nn.86–88 (same). *See also* ISRAEL/PALESTINE: THE BLACK BOOK, *supra* note 40 (compiling reports from various agencies on human rights abuses committed by both sides).

173 *See* Shamgar, *supra* note 143.

174 Bisharat, *supra* note 14, at 338.

175 *See* Shamgar, *supra* note 28.

176 See *supra* text accompanying note 93 for the full text of Article 2.

177 Shamgar, *supra* note 28, at 38.

Article 2(1).[178] Shamgar buttresses his interpretation by asserting that even if the second paragraph flows from Article 2(1), rather than operating independently of it, Article 2(2) is nevertheless restricted in its applicability to "the territory of a High Contracting Party."[179]

iii. The Continued Mandate

Professor Eugene V. Rostow, former Under Secretary of State in the Johnson Administration, propounded the third argument favoring the Israeli interpretation.[180] His "continued mandate" theory holds that the so-called "Arab territories" continue to be controlled under the auspices of the "Palestine Mandate."[181] Since neither Israel nor Jordan can rightly claim sovereignty over the region,[182] the Mandate must remain in effect until peace is made in accordance with the terms of Resolution 242.[183] Therefore, neither the Fourth Geneva Convention nor the law of belligerent occupation applies.[184] Instead, the intent of the 1917 Balfour Declaration to establish a national homeland for the Jewish people, reiterated in the Palestine Mandate, is the controlling law.[185]

Rostow concludes that Israel is under no obligation to withdraw from the West Bank or Gaza—"allocated parts of the Palestine Mandate"[186]—until Jordan makes peace with Israel. While peace has been made with Jordan, the treaty (a) was signed some years after Jordan renounced all rights to the West Bank[187] and (b) controls the peace "without prejudice" to the issue of the Occupied Palestinian Territory.[188] Thus, Rostow's reliance on "unallocated parts" cannot be completely discredited simply as an anachronism. It does, however, raise the question why Israel holds better title to the land in Rostow's eyes than the "Arabs" to whom the Partition Plan intended

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178 *See* Fourth Geneva Convention, *supra* note 2, art. 2, para. 2, 6 U.S.T. at 3518, 75 U.N.T.S. at 288; *see also* Shamgar, *supra* note 28, at 39.

179 *See* Shamgar, *supra* note 28, at 40.

180 *See* Eugene V. Rostow, *"Palestinian Self-Determination": Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 YALE J. WORLD PUB. ORD. 147 (1980) (dubbing British Mandate "Palestine Mandate").

181 *Id.* at 152–53.

182 *See supra* note 158 and accompanying text.

183 *See* Rostow, *supra* note 180, at 154–60 (providing history of Mandate system).

184 *See id.* at 160.

185 *Id.* at 158–59 (drawing parallel between instant case and mandatory system discussed by ICJ in *South West Africa Case*). Never mind that Britain in effect nullified the Balfour Declaration through its White Paper prior to the Palestine Mandate. Rostow's theory rests on the fact that Britain's "official" withdrawal as the mandatory power occurred after the 1948 War. *See* Rostow, *supra* note 180, at 158–59.

186 *See* Rostow, *supra* note 180, at 153.

187 *See supra* notes 30–31 and accompanying text.

188 *See* Isr.-Jordan Peace Treaty, *supra* note 24, art. 3, para. 2, 2042 U.N.T.S. at 394.

to grant their own state. Even though the Arabs rejected the plan, the very nature of a mandate permits the mandatory power to make decisions affecting the area even in the absence of the inhabitants' consent; that is the very *raison d'être* of a mandate.[189] If consent were required, then the Arabs' animosity toward the establishment of a Jewish state would have foreclosed its very creation. Thus, the Palestinians, based on the principles of self-determination and the power of the U.N., appear to hold better title to the territory.[190] Ultimately, Rostow's theory is premised on false logic; while the mandate theory relies on the principle of self-determination to support the sustained existence of the Palestine Mandate until peace is made, Rostow delegitimizes the fundamental right of self-determination under international law in order to champion the property rights of Israel.[191]

iv. The Middle Ground—The Trustee-Occupant

The "trustee-occupant" theory refutes the idea that Jordan was a mere belligerent occupant of the West Bank. According to Professor Allan Gerson, Jordan's occupation was "something more than that of a belligerent-occupant" but not quite that of a legitimate sovereign.[192] While belligerent occupancy presumes a hostile incursion in time of war against an enemy government, Gerson believes that Jordan entered the West Bank with "the consent, if not at the request, of the indigenous Arab population" in order to protect their sovereign right to the territory granted under the Partition Plan.[193] Acting as a protector of sorts, Jordan attained the status of a trustee-occupant. In the interests of fostering self-rule by the Palestinians, this trustee-occupant status bestowed more power than granted by the Hague Conventions or the Fourth Geneva Conventions. As a trustee-occu-

189 *See* Advisory Opinion No. 53, Legal Consequences for States for the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 52–53 (June 21); *see also* Rostow, *supra* note 180, at 154–58.

190 While the argument could be made that the creation of modern-day Jordan produced the intended Arab state, that belief is not widely held, has not been recognized as such by the United Nations, and, more importantly, fails to qualify as a state the *sui generis* territory of the Occupied Palestinian Territory under existing understandings of international law.

191 Interestingly, Rostow implies that a dual existence is possible for Arabs living in the lawfully Israeli-controlled West Bank. *See* Rostow, *supra* note 180, at 153. He curiously goes on to list the Basques and Catalans and the Walloons and Flemish as examples of states where self-determination has proven unnecessary; clashes among these groups over autonomy have been, and, in the case of the Basque separatists continue to be, especially bloody.

192 GERSON, *supra* note 12, at 78.

193 *Id.* at 78–79.

pant, but unlike a belligerent occupant, Jordan could make "changes in the existing laws or institutions provided such amendments were in the best interests of the inhabitants."[194]

Gerson recognizes that Jordan clearly violated this custodial relationship when it attempted to annex the West Bank, thus suppressing the emergence of an independent Palestinian identity and stifling the capacity for self-rule.[195] Yet, in Gerson's view, these offenses were rectified by Jordan's renunciation of sovereignty over the West Bank and its support for Palestinian self-determination.[196] With Jordan having abandoned its role as trustee (although, when Britain attempted abandonment of its role as mandatory power of the region in 1922, the United Nations rejected it), Gerson sees little difficulty in substituting Israel as the trustee-occupant. Although exploitation, annexation, and consolidation of control are recognized dangers to both self-determination and ultimate peace, Gerson believes Israel should still be allowed the responsibility for "fostering the political and economic self-determination of the region, unburdened by the traditional restraints imposed by the law of belligerent occupation."[197] This authority is necessary given the detriment of maintaining the *status quo ante* and its accompanying political and economic stagnation during the wait for peace.[198]

Gerson, however, fails to see that extending the trustee-occupant rule to Israel destroys the very reason Gerson considered Jordan "more than . . . a belligerent-occupant."[199] Israel was at war with Jordan, so the substitution of Israel for Jordan in the context of the trustee-occupant replaces an accepted, possibly invited protector with a hostile enemy. It is in precisely this situation that the laws of belligerent occupancy and the Fourth Geneva Convention must act to restrict the actions of the hostile occupying power.

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194 *Id.* at 79 (citing to his previous article, Allan Gerson, *Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 HARV. INT'L L. J. 1, 40 (1973), establishing trustee-occupant phrase).

195 *Id.* at 79–80 (noting Jordan's discriminatory economic development policies and suppression of PLO political activities).

196 *Id.* at 80–81. Gerson likely is referring to a pre-1988 declaration by Jordan, though he provides no citation or factual indication of any official Jordanian statement of this position. *See supra* notes 28–30 and accompanying text.

197 *Id.* at 81.

198 *Id.*

199 *Id.* at 78.

b. Paragraph Puzzle—Which Really Applies

In an effort to dispatch these pro-Israel positions,[200] the international community asserts that the Convention in no way conditions application on the existence of a legitimate sovereign.[201] The main objection to Israel's position is that Israel erroneously bases applicability on Article 2(2) when in fact Article 2(1) governs belligerent occupancy arising as a result of war.[202] Under this line of argument, originally propounded in the Pictet Commentary, Article 2(2) is irrelevant to the Israeli occupation because, under Article 2(1), application of the Fourth Geneva Convention is triggered by the outbreak of hostilities, regardless of whether war was declared or not; the factual existence of armed conflict is sufficient.[203] Accordingly, Article 2(2) does not pertain at all to territory occupied during hostilities, but rather is strictly limited to the particular circumstance where occupation occurs "without a declaration of war and without hostilities."[204]

The Pictet Commentary provides two justifications for its interpretation. First, it attributes the wording of Article 2 to the experi-

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200 This Note will not present the express views of the Palestinian Authority because its views are varied and often contradictory. For a summary of the Palestinian Authority's views, and the problems it faces in explicating them, see Roberts, *Prolonged Military Occupation*, *supra* note 37, at 66–68.

201 *See, e.g.*, BENVENISTI, *supra* note 28, at 110 ("But when it comes to the interests of *individuals* under occupation, the application of the Fourth Geneva Convention is warranted, notwithstanding conflicting claims of sovereignty."); Roberts, *Prolonged Military Occupation*, *supra* note 37, at 69 & nn.86–88 (listing numerous U.N. General Assembly Resolutions calling for application of Fourth Geneva Convention); *see also* Falk & Weston, *supra* note 94, at 139–41 (calling Blum's, Rostow's, and Gerson's theories "strained and artificial" in addition to employing additional invectives in condemnation of Israel's position).

But according to Shamgar:

> [T]he difference of views did not extend to the question whether a party signatory to the Convention is obliged to fulfill its commitments, a question which may generally be regarded rhetorical and superfluous but to the more limited question whether the actual words and context of the Convention involve its applicability to each and every factual situation of military occupation or only to the occupation of territory which was under the sovereignty of another High Contracting Party prior to its occupation.

Shamgar, *supra* note 28, at 33. And while many rely on the numerous General Assembly and several Security Council Resolutions acknowledging applicability of the Fourth Geneva Convention, an article in *The Economist* correctly pointed out that all resolutions were passed under Chapter VI, rather than the more powerful Chapter VII, which would enable enforcement action. *See Double Standards*, ECONOMIST, Oct. 12, 2002, at 22, 22; *see also* U.N. CHARTER chs. VI–VII.

202 *See, e.g.*, Roberts, *Prolonged Military Occupation*, *supra* note 37, at 64–65 (listing three other "principal" and "serious objections" to Israeli position).

203 PICTET COMMENTARY, *supra* note 7, at 20–21. *But see* Shamgar, *supra* note 28, at 37–38.

204 PICTET COMMENTARY, *supra* note 7, at 21.

ence of World War II, "which saw territories occupied without hostilities, the Government of the occupied country considering that armed resistance was useless."[205] Second, the Pictet Commentary relies upon a draft from the First Experts Conference to lend clarity to the wording of Article 2(3), which is, Pictet admits, "not very clear."[206] That version would have applied the Convention to "cases of occupation of territories in the absence of any state of war."[207] Pictet apparently derives his interpretation from one statement made by the Swiss Rapporteur during the Diplomatic Conference stating that it was "understood that the term 'occupation' meant occupation without war, as provided for in the second paragraph of Article 2."[208]

However, while the Pictet Commentary references a draft article from the First Experts Conference, which recommended a common article for all four Conventions, the commentary ignores the comments specifically made with regard to the Fourth Geneva Convention finding that the Convention should apply to "all cases of armed conflict . . . *and* to every occupation of territories, *even should* this occupation not be forcible."[209] This dual meaning is supported by language from the Final Report of Committee III[210] summarizing the discussions and stating the committee's conclusions: "It was perfectly well understood that the word 'occupation' referred *not only to occupation during war itself, but also to sudden occupation without war*, as provided in the second paragraph of Article 2."[211] This statement reflects a plain reading of Article 2(2): "The Convention shall *also* apply to all cases of partial or total occupation of the territory of a High Contracting Party, *even if* the said occupation meets with no resistance."[212] As Shamgar cogently argues in his 1992 analysis—one of the few so closely to analyze the text itself—the dual meaning of the word "occupation"—during war *and* without war—coupled with the fact that the word appears only in Article 2(2), and not Article 2(1), implies that the paragraphs are indeed independent.[213] The use

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205 *Id.*

206 *Id.* at 21–22 (citing FIRST EXPERTS CONFERENCE, *supra* note 82, at 8).

207 FIRST EXPERTS CONFERENCE, *supra* note 82, at 8.

208 2A DIPLOMATIC CONFERENCE, *supra* note 6, at 775.

209 FIRST EXPERTS CONFERENCE, *supra* note 82, at 272 (emphasis added).

210 Committee III was tasked with debating the provisions of the Fourth Geneva Convention. *See* 2A DIPLOMATIC CONFERENCE, *supra* note 6, at 619. Three other committees simultaneously debated (a) the First and Second Geneva Conventions; (b) the Prisoners of War Convention; and (c) the provisions common to all four conventions. *See* PICTET COMMENTARY, *supra* note 7, at 7.

211 2A DIPLOMATIC CONFERENCE, *supra* note 6, at 815 (emphasis added).

212 Fourth Geneva Convention, *supra* note 2, art. 2, para. 2, 6 U.S.T. at 3518, 75 U.N.T.S. at 288 (emphasis added).

213 Shamgar, *supra* note 28, at 38.

of the word "also" bolsters the idea of an operationally independent paragraph by stating that the Convention not only applies to hostilities, but *also* to occupations lasting after hostilities have ended.[214]

This position is supported by Article 6,[215] which maintains separate paragraphs setting different timeframes for termination of Convention applicability for hostilities *and* occupation, the latter extending past the close of military operations.[216] If the interpretation urged by the Pictet Commentary were adopted, Article 6(2) and 6(3) would not create different timetables for the termination of the application of the Fourth Geneva Convention to armed conflict or occupation.[217] Such an interpretation would lead to the absurd result that the Convention's applicability ceased upon the signing of the Israeli-Jordanian peace treaty even though the conflict still rages between Arabs and Israelis.[218]

Support for such separate interpretations of Article 2(1) and 2(2) is found in basic international law concepts, as well as in the Diplomatic Conference. Central to the understanding of the independent nature of Article 2(2) is that "[o]ccupation does not extend to invaded enemy territory in which fighting still takes place or other parts which the territorial sovereign may have abandoned but in which the invader has not yet established his own authority."[219] This position was derived from Oppenheim's statement that belligerent occupation is "invasion *plus* taking possession of enemy country for the purpose of holding it, at any rate temporarily."[220] In *The Hostages Case*, the United States military tribunal noted that "[t]he term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and

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214 Shamgar does not comment on the impact of the word "also." He simply observes that this word sparked the opposite idea that paragraph 2 was only supplementary to paragraph 1. *See id.* at 39.

215 For the relevant text of Article 6, see *supra* text accompanying notes 119–20.

216 2A DIPLOMATIC CONFERENCE, *supra* note 6, at 623–24 (noting considerable amount of time that can elapse before an occupation ends even though hostilities may have terminated); *see supra* notes 119–21 and accompanying text.

217 *See supra* notes 119–21 and accompanying text.

218 It is surprising that Pictet would have promoted an interpretation that leads to such a conclusion, given his overwhelming desire to encourage the application of the humanitarian provisions above all else.

219 COHEN, *supra* note 47, at 16.

220 *Id.* (citing L. OPPENHEIM, 2 INTERNATIONAL LAW, § 167, at 434 (H. Lauterpacht ed., 7th ed. 1952)).

order."[221] The date of this tribunal falls around the time of the Experts Conference and the Diplomatic Conference, so surely these well-known principles of international law could not have been so blatantly ignored. These statements make it clear that occupation is a term connoting the period of rule by the invading state after hostilities have ceased. It is not limited to a situation where effective control has been established without recourse to force. Moreover, it seems highly unlikely that a state would occupy and assume control over a country absent the presence of its troops on the ground as, at a minimum, a show of force.

The Diplomatic Conference reflects this interpretation. The delegation from the United States expressed concern over potential confusion arising from a failure to define terms more precisely:

> It would be noted that the Convention did not define the terms "occupied territory" or "military occupation." It was the view of the United States Delegation that the obligations imposed by the Convention on an Occupying Power should be applicable to the period of hostilities and to the period of disorganization following on the hostilities; these obligations would vary according to the nature and duration of the occupation.[222]

This statement comports with the statements of the international legal scholars in the previous paragraph. In reference to Article 6, a delegate for the ICRC, in contradistinction to Pictet's statement, noted: "The Stockholm Conference had suggested that the word 'hostilities' should be qualified by 'active,' although the adjective did not seem necessary for the clarity of the text."[223] The fact that the ICRC delegate sought to delineate more clearly between hostilities and occupation only further establishes the independence of these two concepts.

Moreover, Article 2(2) states that the Convention shall apply to "*all* cases of partial or total occupation," supporting an interpretation that includes both occupations with and without hostilities. Finally, the last clause of Article 2(2) begins with "even if," indicative of a

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[221] *United States v. Wilhelm List et al.*, *in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL ORDER NO. 10, at 1230, 1243 (1950).

[222] 2A DIPLOMATIC CONFERENCE, *supra* note 6, at 623 (remarks of Mr. Clattenburg, delegate of United States).

[223] *Id.* at 624. This comment was made in reference to Article 4 of the Draft Text, or modern Article 6, which states: "The present Convention shall apply from the outset of any conflict covered by Article 2. The application thereof shall cease on the close of hostilities or of occupation . . . ." 1 DIPLOMATIC CONVENTION, *supra* note 6, at 114 (citing Article 4 of Draft Convention).

more general interpretation of the second paragraph;[224] the use of "even" would otherwise be superfluous if the entirety of the preceding paragraph referred only to occupation without hostilities.[225] More obviously, the common sense use of "even if," as any lawyer is aware, indicates an alternative to which the main proposition equally applies.

Nor can Pictet's interpretation be saved by relying on a broad interpretation of the word "territory" in Article 2(2). Territory in that context is qualified by the phrase "of a High Contracting Party." Scholars have been too quick to point out the illegitimacy of Jordan's status as sovereign over the territories to depend suddenly on the validity of Jordanian sovereign rights to support a purely semantic interpretation. Additionally, one delegation pointed out during the First Experts Conference that "the humanitarian obligations stipulated by the present Article should entail no juridical consequences in respect of the legal status of any body claiming governmental authority, but not recognized by another Government as enjoying such authority."[226]

Thus, it is clear that Article 2(2) operates independently of Article 2(1) and governs the application of the Fourth Geneva Convention to issues arising out of belligerent occupation. But as stated above, the use of "High Contracting Party" and "the territory of a High Contracting Party," as well as the comments made by the delegates at the Diplomatic Conference, establish the state-centric focus of the Convention that renders it inapplicable to the *sui generis* situation presented by the Middle East conflict.

Ultimately, the international community ignores interpretations that do not comport with its perceived interpretation that the "overrid[ing] imperative concern" of the Convention was the protection of civilians. What drives much of the literature surrounding application of the Fourth Geneva Convention to the Middle East is the need to frame arguments that avoid "an unacceptable result,"[227]

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224 Shamgar, *supra* note 28, at 39.

225 *Id.*

226 FIRST EXPERTS CONFERENCE, *supra* note 82, at 9.

227 *See* Jean-Marie Henckaerts, *Deportation and Transfer of Civilians in Time of War*, 26 VAND. J. TRANSNAT'L L. 469, 505–06 (1993). In an attempt to defeat Israel's argument and avoid an "unacceptable result," Henckaerts argues that during Iraq's invasion of Kuwait, Iraq could have avoided applying the Fourth Geneva Convention since Iraq believed it and not Kuwait had sovereign rights over the Kuwaiti land. This argument is flawed in several respects, the most important of which is that Kuwait was a recognized State, a full voting member of the United Nations, and a High Contracting Party to the Fourth Geneva Convention. It possessed established and recognized sovereignty over its territory irrespective of Iraq's "competing" claim on it. This erroneous example perfectly pinpoints the nature of the problem with the Occupied Palestinian Territory: How does the Convention apply to a nonstate entity?

which these writers take to mean the inapplicability of the Convention and a resulting denial of rights to the Palestinian people.

CONCLUSION

The events of World War II clearly demonstrated the need to protect civilians from the horrors of war. Yet, even the catastrophic atrocities committed by states in that war were not enough to shed the skin of sovereignty in favor of the "impartial plane of pure humanity."[228] While the Diplomatic Conference reflects the concerns over attempting to include noncontracting states within the Convention's protections, even in the case of internal armed conflict, the drafters failed to anticipate and account for an international armed conflict involving nonstate entities. Indeed, the Israeli-Arab conflict is one of profound complexity. It presents a unique situation where occupation occurred as a result of hostilities between High Contracting Parties but has since developed into a situation that was simply not within the contemplation of the Convention's drafters. And, while the uniqueness of the situation is recognized by all, contemporary scholars still apply the traditional understanding of the Convention to justify its application and enforcement rather than admit that the situation is utterly outside the Convention's scope.

Certainly this result—the acknowledgment that the Fourth Geneva Convention does not apply—could be viewed as having negative ramifications for the Palestinian people. But, despite all the arguments touting the Convention's applicability and decrying Israel's actions in apparent violation of the Convention, little benefit has accrued to the Palestinian people under the traditional interpretation of the Convention. There is simply no legal argument that can create an accommodation for a nonstate actor in a Convention restricted by the fundamental international law doctrine of sovereign rights—only states can be bound to treaties, and belligerent occupation rules only apply vis-à-vis the territory of another state. Given the failure of the numerous legal arguments put forth to affect the Middle East conflict, using a misinterpretation of the Fourth Geneva Convention's applicability to lend international legal legitimacy to warranted attacks on Israeli policies only further strains the practical situation while adding no tangible analytical benefit. The elimination of incorrect assumptions about Fourth Geneva Convention applicability is ultimately crucial to making progress toward the achievement of political and legal resolution in the Middle East conflict.

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228 2A DIPLOMATIC CONFERENCE, *supra* note 6, at 10.