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## Scope of the Book

*Our houses are packed with Prussians to feed ... They give us nothing much to complain of, outside of the bitter lament of having to submit to foreigners.*<sup>1</sup>

#### 1.1. INTRODUCTION TO THE USE OF ARMED FORCE IN OCCUPIED TERRITORY

In 2011, the ICRC attempted to attract attention to the issue of the use of armed force in occupied territories, affirming that '[a]nother challenge raised by recent examples of occupation is the identification of the legal framework governing the use of force by an occupying power ... [T]here is a need to clarify how the rules governing law enforcement and those regulating the conduct of hostilities interact in practice in the context of an occupation'.<sup>2</sup> The purpose of this book is to clarify the legal framework regarding the use of armed force in occupied territory. Such a legal analysis appears even more necessary now since, in December 2017, during the very weeks in which this book has been finalised, violence has resumed once again in the OPT<sup>3</sup> as a response to the US decision to recognise Jerusalem as the Israeli capital.<sup>4</sup>

<sup>1</sup> Stéphane Audoin-Rouzeau, *1870: la France dans la Guerre* (Armand Colin 1989) 262, quoted by Karma Nabulsi, *Traditions of War: Occupation, Resistance and the Law* (Oxford University Press 1999) 37.

<sup>2</sup> ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report presented at the 31st International Conference of the Red Cross and Red Crescent, Geneva, 2011, Doc 31IC/11/5.1.2, 28–9.

<sup>3</sup> See Nidal al-Mughrabi, 'Israeli Troops Kill Three Palestinians, Wound Scores in Protests over Jerusalem', *Reuters* (15 December 2017), available at [uk.reuters.com/article/uk-israel-palestinians/israeli-troops-kill-three-palestinians-wound-scores-in-protests-over-jerusalem-idUKKBN1E9iTQ](http://uk.reuters.com/article/uk-israel-palestinians/israeli-troops-kill-three-palestinians-wound-scores-in-protests-over-jerusalem-idUKKBN1E9iTQ)

<sup>4</sup> See 'President Donald J. Trump's Proclamation on Jerusalem as the Capital of the State of Israel', 6 December 2017, [www.whitehouse.gov/briefings-statements/president-donald-j-trumps-proclamation-jerusalem-capital-state-israel/](http://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-proclamation-jerusalem-capital-state-israel/)

In occupied territories, occupying powers frequently employ armed force in order to maintain order or to fight against forces opposing the occupation. Similarly, armed groups – both those affiliated to the ousted sovereign and those not – may attempt to bring the occupation to an end by resorting to armed activities. This book explores the international law framework pertaining to the use of armed force in occupied territories on the basis of a thorough analysis of state practice and *opinio juris*, treaty provisions, international and domestic case law, and other relevant sources.

From a *jus ad bellum* perspective, the fact that a situation of occupation is normally created after an exercise of armed force by one or more states in the process of invading and taking control over another territory<sup>5</sup> renders obvious the link between the use of armed force and occupation. For instance, the Israeli occupation of the OPT commenced with the Israeli invasion of those territories during the international armed conflict with Egypt, Jordan, and Syria – commonly referred to as the ‘Six-Day War’.<sup>6</sup> Similarly, the occupation of Iraq in 2003 by an US-led coalition was triggered by the so-called operation Iraqi Freedom.<sup>7</sup> Accordingly, the use of armed force is often the precursor for an occupation.<sup>8</sup> Moreover, the GA’s definition of aggression,<sup>9</sup> the definition of the crime of aggression embodied in the ICC Statute,<sup>10</sup> and international case law,<sup>11</sup> coupled with state practice,<sup>12</sup> all demonstrate that the occupation of

<sup>5</sup> This is the most widely accepted definition of occupation. The next chapter will clarify further this definition.

<sup>6</sup> See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory opinion, 9 July 2004, para. 73; HCJ 393/82 *Jam’iat Iscan Al-Ma’almoun v. IDF Commander*, 37(4) PD 785, 792, para. 10, unofficial English translation available at [www.hamoked.org/items/h6o\\_eng.pdf](http://www.hamoked.org/items/h6o_eng.pdf)

<sup>7</sup> See Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council, 8 May 2003; UNSC Res. 1483 (2003), 22 May 2003, preambular para. 13.

<sup>8</sup> For more on invasion and occupation, see *infra*, Section 2.3.2.

<sup>9</sup> See UNGA Res. 3314 (XXIX), 14 December 1974, Annex: Definition of Aggression, Art. 3: ‘Military occupation, however temporary resulting from [an] invasion or attack’ is considered to be an act of aggression. See also UNSC Res. 674 (1990), 29 October 1990, preambular, which defines the invasion and occupation of Kuwait as a direct threat to international peace and security.

<sup>10</sup> See ICC Statute, 2187 UNTS 90, amendments in A-38544 UNTS, Art. 8 bis(2)(a), which also define the crime of aggression by quoting the aforementioned passage of UNGA Res. 3314 (XXIX).

<sup>11</sup> See EEC, *Partial Award: Jus Ad Bellum – Ethiopia’s Claim 1–8* (19 December 2005) 26 RIAA, 457, 467, para. 16 (‘Eritrea violated Article 2, paragraph 4, of the Charter of the United Nations by resorting to armed force to attack and occupy Badme’).

<sup>12</sup> See Italian Stato Maggiore della Difesa, *Manuale di diritto umanitario* (SMD-SG-014 1991) (‘Italian Military Manual’) section 21.1.

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a territory is constantly considered to be a violation of the prohibition of the use of force embodied in Article 2(4) UN Charter.

However, the use of armed force may be explored also in the context of an existing occupation. Indeed, in times of occupation, it happens quite frequently that the occupying powers or armed groups with or without allegiance to the ousted sovereign resort to armed force. For instance, in recent times, hostilities between Palestinian armed groups and Israel in the Gaza Strip and the West Bank have been commonplace.<sup>13</sup> Similarly, the CPA, the body that administered occupied Iraq between 2003 and 2004, had to use armed force in order to maintain order and address insurgency. If one assumes that these territories are or were under occupation, as it is commonly held, there is room to wonder which are the rules governing these and other episodes in which armed force was employed after the occupation had already been established.

This book explores the use of armed force in occupied territory through the interplay of mainly three branches of international law: *jus ad bellum*, international humanitarian law,<sup>14</sup> and international human rights law. After

<sup>13</sup> The most recent and large-scale events are the so-called operations Cast Lead (December 2008–January 2009), Pillar of Clouds (November 2012), and Protective Edge (June–July 2014) against the Gaza Strip. Facts and figures about these conflicts differ significantly on the basis of the sources employed. For the official Israeli positions, see Israel, *The Operation in Gaza 27 December 2008 –18 January 2009: Factual and Legal Aspects* (July 2009), available at [www.mfa.gov.il/MFA\\_Graphics/MFA%20Gallery/Documents/GazaOperation%20w%20Links.pdf](http://www.mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaOperation%20w%20Links.pdf); IDF, Military Advocate General's Corps, Operation 'Pillar of Defense' (14–21 November 2012), available at [www.law.idf.il/sip\\_storage/FILES/o/1350.pdf](http://www.law.idf.il/sip_storage/FILES/o/1350.pdf); Israel, *The 2014 Gaza Conflict 7 July–26 August 2014: Factual and Legal Aspects* (May 2015), available at [www.mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf](http://www.mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf). For some non-governmental Palestinian views, see Al-Haq, 'Operation Cast Lead': A Statistical Analysis (August 2009), available at [www.alhaq.org/attachments/article/252/gaza-operation-cast-Lead-statistical-analysis%20.pdf](http://www.alhaq.org/attachments/article/252/gaza-operation-cast-Lead-statistical-analysis%20.pdf); Al-Haq, *Voices From the Gaza Strip: A Year After Operation 'Pillar of Defense'* (21 November 2013), available at [www.alhaq.org/documentation/weekly-focuses/757-voices-from-the-gaza-strip-a-year-after-operation-pillar-of-defense](http://www.alhaq.org/documentation/weekly-focuses/757-voices-from-the-gaza-strip-a-year-after-operation-pillar-of-defense); Al-Haq, *Divide and Conquer: A Legal Analysis of Israel's Military Offensive against the Gaza Strip* (2015), available at [www.alhaq.org/publications/DIVIDE.AND.CONQUER.pdf](http://www.alhaq.org/publications/DIVIDE.AND.CONQUER.pdf). The UN HRC dispatched a number of fact-finding missions, which reported on these three conflicts, emphasising both factual and legal aspects: *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, A/HRC/12/48, 25 September 2009 ('Goldstone Report'); Report of the United Nations High Commissioner for Human Rights on the Implementation of Human Rights Council Resolutions S-9/1 and S-12/1 – Addendum: Concerns Related to Adherence to International Human Rights and International Humanitarian Law in the Context of the Escalation Between the State of Israel, the De Facto Authorities in Gaza and Palestinian Armed Groups in Gaza that Occurred from 14 to 21 November 2012, A/HRC/22/35/Add.1, 4 July 2013; Report of the Detailed Findings of the Commission of Inquiry on the 2014 Gaza Conflict, A/HRC/29/CRP.4, 24 June 2015 ('2014 Gaza Report').

<sup>14</sup> In this work, the expressions 'international humanitarian law', '*jus in bello*', and 'law of armed conflict' are employed interchangeably as synonyms. On this terminology, see Robert Kolb, 'Human Rights and Humanitarian Law' in *MPEPIL online* (2013) para. 1.

an overview of the law of occupation and the inherent hostile character of situations of occupation (Chapter 2), this book assesses the relevance of *jus ad bellum* with regard to the use of armed force in occupied territory (Chapter 3), and the legitimacy of armed resistance against the occupying power (Chapter 4). This book goes on to analyse the use of armed force under the law of occupation: after having described the interplay of law enforcement and conduct of hostilities in occupied territory (Chapter 5), the book addresses the regulation of the use of armed force in light of the right to life in occupied territory (Chapter 6). At the end, the book provides some general conclusions (Chapter 7).

#### 1.2. AN OVERVIEW ON INTERNATIONAL SCHOLARSHIP REGARDING THE USE OF ARMED FORCE IN TIMES OF OCCUPATION

Although the broader topic of the law of occupation has attracted significant attention in international law scholarship, particularly in the aftermath of occupations around the world that have made this issue increasingly relevant, post-WWII international scholarship has overlooked the issue of the regulation of the use of armed force in occupied territories for many years. Only in the last decade had some scholarship on this specific topic appeared. However, a comprehensive study on the use of armed force in occupied territory has not been published yet.

It is possible to divide contributions of international scholarship on the law of occupation into different phases, which follow the developments of the existing law and the main challenges in state practice. Although such a partition is inevitably imprecise, it serves as a helpful framework for the existing scholarship on occupation. The first phase of international scholarship on occupation started during the nineteenth century, when a number of classical authors began to outline the main features of the law of occupation,<sup>15</sup> contributing to the development of this branch of law and to its first international codification in 1899 and 1907.<sup>16</sup> This phase lasted until the end of WWII – even if, between the two world wars, many scholars appeared particularly concerned with providing legal justification for the acts of some occupying powers,<sup>17</sup> or to

<sup>15</sup> See, e.g., August W. Heffter, *Das Europäische Völkerrecht der Gegenwart* (Schroeder 1844), French translation by Jules Bergson, *Le droit international de l'Europe* (Cotillon 1873) 304–5; Pasquale Fiore, *Trattato di diritto internazionale pubblico* vol. III (3rd edn, Unione Tipografica Editrice 1891) 258–87; Antoine Pillet, *Les lois actuelles de guerre* (Rousseau 1898) 237–72.

<sup>16</sup> On the origin and evolution of the law of occupation, see *infra*, Section 2.2.

<sup>17</sup> This is the case with several Italian authors who tried to justify the Italian annexation of Ethiopia and Albania between WWI and WWII (e.g., Riccardo Monaco, 'Le recenti annessioni

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assess the legality of some specific occupations.<sup>18</sup> In this phase, some authors focused on the use of armed force in the occupied territory, in particular with reference to the legality of armed resistance against the occupying power.<sup>19</sup> However, after the end of this phase, academic interest in the use of armed force in occupied territory progressively dwindled.<sup>20</sup>

A second phase started after WWII, when a renewed interest in the law of occupation brought a number of authors to write interesting analyses of the law of occupation in light of the most recent practice; these pieces of scholarship are still very important in order to understand the law of occupation.<sup>21</sup> Despite their significance, general works on the occupation in this

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territoriali al Regno d'Italia e il problema del diritto interlocale' (1941) 2 *Stato e diritto* 188, 190–2; Manlio Udina, 'Lo smembramento della Jugoslavia' (1941) 5 *Diritto internazionale* 3, 6–13). For an accurate analysis of these positions, see Giulio Bartolini, 'The Impact of Fascism on the Italian Doctrine of International Law' (2012) 14 *Journal of History of International Law* 237, 255 and 271–2.

<sup>18</sup> See, e.g., Ernst H. Feilchenfeld, *The International Economy Law of Belligerent Occupation* (Carnegie Endowment for International Peace 1942); Ernst Fraenkel, *Military Occupation and the Rule of Law: Occupational Government in the Rhineland 1918–1923* (Oxford University Press 1944).

<sup>19</sup> See, e.g., Platon De Waxel, *L'armée d'invasion et la population* (Kruger 1874); Bartholomew Sherston Baker, *Halleck's International Law* vol. II (C. K. Paul & Co. 1878) 444–79; Lassa Oppenheim, 'The Legal Relations between an Occupying Power and the Inhabitants' (1907) 37 *LQR* 363, and 'On War Treason' (1917) 33 *LQR* 266; Charles De Visscher, 'L'occupation de guerre' (1918) 34 *LQR* 72.

<sup>20</sup> On the decline of scholarly attention to this topic, see Frédéric Mégret, 'Grandeur et déclin de l'idée de résistance à l'occupation: réflexions à propos de la légitimité des "insurgés"' (2008) 41 *RBDI* 382.

<sup>21</sup> Some of these works are specifically devoted to the law of occupation. See Francesco Capotorti, *L'occupazione nel diritto di guerra* (Jovene 1949); Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863–1914: A Historical Survey* (Columbia University Press 1949); Alessandro Migliazza, *L'occupazione bellica* (Giuffrè 1949); Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (University of Minnesota Press 1957); Giorgio Cansacchi, 'Occupazione bellica' in *Novissimo Digesto Italiano* vol. XI (UTET 1965) 744. See also, from a wider geopolitical perspective, Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Duncker & Humblot 1950), English translation by G. L. Ulmen, *The Nomos of the Earth* (Telos Press 2006). Extensive analyses of the law of occupation are present in the most important treatises such as Hersch Lauterpacht, *Oppenheim's International Law. A Treatise*, vol. II: *Disputes, War and Neutrality* (7th edn, Longmans 1952) 432–56; Giorgio Balladore Pallieri, *Diritto bellico* (2nd edn, Cedam 1954) 300–41; Paul Guggenheim, *Traité de Droit international public* vol. II (Georg & Cie 1954) 460–92; Julius Stone, *Legal Controls of International Conflict* (Rinehart and Co. 1954) 651–732; Myres S. McDougal & Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (Yale University Press 1961) 731–832; Angelo Piero Sereni, *Diritto internazionale*, vol. IV: *Conflitti internazionali* (Giuffrè 1965) 2000–37; Hans Kelsen, *Principles of International Law* (2nd edn, Holt, Rinehart and Winston 1966) 139–49; Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals* vol. II (Stevens & Sons 1968) 163–358.

phase focus on the use of armed forces in occupied territory only under the umbrella of the relation between the occupying power and the inhabitants of the occupied territory; references to the use of armed force in these works usually focus on the legality of the atrocities committed during the Nazi occupation, such as collective punishment, the taking of hostages, and retaliations against civilians.<sup>22</sup>

The third phase began with the Israeli occupation of the OPT in 1967 and lasted until 2003. During this period, the law of occupation was at the centre of a number of new studies, with both a general focus as well as a specific concern with particular occupations – e.g., the Israeli occupation of the OPT and the Iraqi occupation of Kuwait.<sup>23</sup> Notwithstanding the ongoing relevance of some of these studies to a full appreciation of the law of occupation, they generally neglected to address the issue of the use of armed forces during occupations. Although some writers touched upon this topic in relation to the so-called Palestinian intifadas in 1987 (First Intifada) and 2000 (Second Intifada), they tended to focus specifically on the boundaries of the right to fight for national self-determination<sup>24</sup> and on the consequences of the measures undertaken by the occupying powers for the involved individuals,<sup>25</sup> rather

<sup>22</sup> E.g., these aspects are addressed by Capotorti, *L'occupazione*, 114–18; Lauterpacht, *Oppenheim's International*, 448–51; Stone, *Legal Controls*, 702–4; McDougal & Feliciano, *Law*, 790–808.

<sup>23</sup> See, e.g., Yoram Dinstein, 'The International Law of Belligerent Occupation and Human Rights' (1978) 8 *IYBR* 104; Carlo Curti Gialdino, 'Occupazione bellica' in *Enciclopedia del Diritto*, vol. XXIX (Giuffrè 1979) 720; Michael Bothe, 'Occupation, Belligerent' in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* vol. IV (North-Holland 1982) 64; Adam Roberts, 'What Is a Military Occupation?' (1984) 55 *British YIL* 251; Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press 1993). Among the works specifically addressing the occupation of the OPT, see Allan Gerson, *Israel, the West Bank and International Law* (Frank Case 1978); Esther Cohen, *Human Rights in the Israeli-Occupied Territories, 1967–1982* (Manchester University Press 1985); Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories since 1967' (1990) 84 *AJIL* 44; Emma Playfair (ed.), *International Law and the Administration of Occupied Territories* (Clarendon Press 1992); David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press 2002). On the situation of occupied Kuwait, see Walter Kälin, *Human Rights in Times of Occupation: The Case of Kuwait* (Law Books of Europe 1994).

<sup>24</sup> See Natalino Ronzitti, *Le guerre di liberazione nazionale e il diritto internazionale* (Pacini Editore 1974) 48–9, 125–6; 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' (1991) 32 *Harvard ILJ* 129; Michael Curtis, 'International Law and the Territories' (1991) 32 *Harvard ILJ* 457; John Quigley, *The Case for Palestine: An International Law Perspective* (2nd edn, Duke University Press 2005) 189–205.

<sup>25</sup> See James A. Demotes, 'Israeli Actions in Response to the Intifada: Necessary Security Measures or Violations of International Law?' (1992) 16 *Suffolk Transnational Law Review* 92; Amy J. Koreen, 'The Palestinian Uprising of December 1987: An Examination under International Humanitarian Law' (1992) 37 *Touro Journal of Transnational Law* 197; Shane Darcy, 'Punitive

than on the issue of the use of armed force within occupied territory from a broader perspective.

However, the majority of scholarship addressing the law of occupation has been published since 2003, when the US and UK occupation of Iraq inspired new interest in the law of occupation<sup>26</sup> – a group of rules which were previously considered by some commentators a sort of relic of another time, only applicable to the very specific case of the OPT.<sup>27</sup> In this last phase, even the specific topic of the use of armed force in occupied territory attracted some attention, both in specific articles<sup>28</sup> and in the framework of more general works.<sup>29</sup> There are many factors at the basis of this shift. First, in the ICJ's

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House Demolitions, the Prohibitions of Collective Punishment, and the Supreme Court of Israel' (2003) 21 Penn State International LR 477.

<sup>26</sup> On the occupation of Iraq, see, e.g., Adam Roberts, 'The End of Occupation: Iraq 2004' (2005) 54 ICLQ 27; Andrea Carcano, *L'occupazione dell'Iraq nel diritto internazionale* (Giuffrè 2009); Eyal Benvenisti & Guy Keinan, 'The Occupation of Iraq: A Reassessment' (2010) 86 ILS 263; Andrea Carcano, *The Transformation of Occupied Territory in International Law* (Brill 2015). For other authoritative works on the law of occupation in general, published in this phase, see Aldo Amirante, *Occupazione Bellica* (Edizioni Scientifiche Italiane 2007); Gregory H. Fox, *Humanitarian Occupation* (Cambridge University Press 2008); Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law* (Martinus Nijhoff 2009); Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009); Robert Kolb & Sylvain Vité, *Le droit de l'occupation militaire: Perspectives historiques et enjeux juridiques actuelles* (Bruylant 2009); Christine Chinkin, 'Laws of Occupation' in Neville Botha, Michèle Olivier, & Delarey van Tonder (eds.), *Multilateralism and International Law with Western Sahara as a Case Study* (Unisa Press 2010) 167; Vaious Koutroulis, *Le début et la fin de l'application du droit de l'occupation* (Pedone 2010); Alessandra Annoni, *L'occupazione 'ostile' nel diritto internazionale contemporaneo* (Giappichelli 2012); Eyal Benvenisti, *The International Law of Occupation* (2nd edn, Oxford University Press 2012); Tristan Ferraro (ed.), *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory* (ICRC 2012); Philip Spoerri, 'The Law of Occupation' in Andrew Clapham & Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 182; Marco Sassòli, 'Concept and the Beginning of Occupation' in Andrew Clapham, Paola Gaeta, & Marco Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015) 1390; Hanne Cuyckens, *Revisiting the Law of Occupation* (Brill 2017); Aeyal M. Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge University Press 2017).

<sup>27</sup> See Davis P. Goodman, 'The Need of Fundamental Change in the Law of Occupation' (1985) 37 Stanford LR 1573.

<sup>28</sup> This topic has been explored from a general perspective primarily by Kenneth Watkin, who authored the 'Maintaining Law and Order during Occupation: Breaking the Normative Chains' (2008) 41 IsLR 175, and 'Use of Force during Occupation: Law Enforcement and Conduct of Hostilities' (2012) 94 IRRC 267. See, also, Iris Canor, 'When *Jus ad Bellum* Meets *Jus in Bello*: The Occupier's Right of Self-Defence against Terrorism Stemming from Occupied Territories' (2006) 19 LJIL 129; Mégret, 'Grandeur'.

<sup>29</sup> See Arai-Takahashi, *The Law*, 297–325; Dinstein, *The International Law*, 89–107; Kolb & Vité, *Le droit*, 345–66; Annoni, *L'occupazione*, 224–39; Ferraro, *Expert Meeting*, 109–19; Spoerri, 'The Law', 200–5.

Wall opinion in 2004, the Court addressed the issue of whether the occupying power may invoke *jus ad bellum* rules, and, in particular, self-defence, in response to armed attacks from within the occupied territory.<sup>30</sup> Second, in 2006, the Supreme Court of Israel delivered an important judgment on extrajudicial killings,<sup>31</sup> which attracted a lot of attention to the issue of the extrajudicial use of lethal force both within and outside of occupied territories (so-called targeted killings).<sup>32</sup> Third, as already demonstrated by the Second Palestinian Intifada and then confirmed by the aforementioned three Gaza military operations in 2009 (operation Cast Lead), 2012 (operation Pillar of Clouds), and 2014 (operation Protective Edge),<sup>33</sup> the OPT is not pacified at all, but rather, both Israel and the Palestinians continue to engage in armed activities. Finally, the occupation of Iraq functioned as a bench test for strategies

<sup>30</sup> Wall opinion, paras. 138–42. For a preliminary overview of the issues raised by the Court regarding this question, see Ruth Wedgwood, ‘The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense’ (2005) 99 AJIL 52; Sean D. Murphy, ‘Self-Defense and the Israeli Wall Advisory Opinion: An *Ipse Dixit* from the ICJ?’ (2005) 99 AJIL 62; Iain Scobbie, ‘Words My Mother Never Taught Me: “In Defense of the International Court”’ (2005) 99 AJIL 76; Olivier Corten, ‘L’applicabilité problématique du droit de légitime défense au sens de l’article 51 de la Charte des Nations Unies aux relations entre la Palestine et Israël’ (2012) 45 RBDI 67.

<sup>31</sup> HCJ 769/02 *Public Committee against Torture in Israel v. Israel*, unofficial English translation in (2007) 46 ILM 375 (‘*Targeted Killings* case’). For some interesting remarks, see Giulio Bartolini, ‘Le eliminazioni mirate di appartenenti a gruppi terroristici al vaglio della Corte suprema d’Israele’ (2007) 1 DUDI 623; Paolo Benvenuti, ‘Judicial Review nella guerra al terrorismo nella decisione della Corte suprema israeliana sui targeted killings’ (2007) 19 *Diritto pubblico comparato ed europeo* XIII; Antonio Cassese, ‘On Some Merits of the Israeli Judgment on Targeted Killings’ (2007) 5 JICJ 339; Marko Milanovic, ‘Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing *Hamdan* and the Israeli *Targeted Killings* Case’ (2007) 89 IRRC 373.

<sup>32</sup> See, e.g., Nils Melzer, *Targeted Killings in International Law* (Cambridge University Press 2008); Giulio Bartolini, ‘I *targeted killings* di appartenenti a gruppi terroristici tra diritto internazionale umanitario e diritti umani’ in Pietro Gargiulo & Maria Chiara Vitucci (eds.), *La tutela dei diritti umani nella lotta e nella guerra al terrorismo* (Editoriale Scientifica 2009) 273; Claire Finkelstein, Jens David Ohlin, & Andrew Altman (eds.), *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford University Press 2012); Roland Otto, *Targeted Killings and International Law* (Springer 2012).

<sup>33</sup> The legality of these operations has been analysed extensively by legal scholarship. Further references will be provided where specifically relevant. Just to mention some works at this stage, see Gabriella Venturini, ‘L’operazione militare di Israele contro Gaza e il diritto internazionale umanitario’ (2009) 3 DUDI 309; Luisa Vierucci, ‘Sul principio di proporzionalità a Gaza, ovvero quando il fine non giustifica i mezzi’ (2009) 3 DUDI 319; Andreas Zimmermann, ‘Abiding by and Enforcing International Humanitarian Law in Asymmetric Warfare: The Case of Operation Cast Lead’ (2011) 31 Polish YIL 47; Laurent Trigeaud, ‘L’opération Bordure protectrice menée par Israël dans la Bande de Gaza (8 juillet – 26 août 2014)’ (2014) 60 AFDI 171; Sharon Weill & Valentina Azarova, ‘The 2014 Gaza War: Reflections on *Jus Ad Bellum*, *Jus in Bello*, and Accountability’ in Annysa Bellal (ed.), *The War Report: Armed Conflict in 2014* (Oxford University Press 2015) 360.

### 1.3. *The Practice of the Occupation*

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regarding the use of armed force in occupied territory; the counterinsurgency policy employed therein attracted significant attention from scholars.<sup>34</sup>

However, the issue of the use of armed force during an occupation remains still largely underexplored given that, to the best knowledge of this author, there is no comprehensive work studying this topic from *jus ad bellum*, international humanitarian law, and international human rights law perspectives. The present book aims to fill this lacuna in international scholarship.

#### 1.3. THE PRACTICE OF THE OCCUPATION

In the course of this book, there are many references to international practice regarding the law of occupation. Although the status of occupying power is not per se derogatory from an international humanitarian law perspective,<sup>35</sup> in the second half of the twentieth century the term ‘occupation’ became a synonym for ‘oppression’ of a people;<sup>36</sup> consequently, the occupying powers in many cases deny this status in order to avoid the attached stigma and the resulting legal obligations. Despite the fact that the application of the law of occupation is not a consequence of any proclamation of occupation,<sup>37</sup> this attitude proves problematic in assessing which situations must be seen as occupations and, thus, as sources of state practice regarding the use of armed force in occupied territory.

Taking into account states’ reluctance to qualify themselves as occupying powers, this subsection outlines some situations that may be reasonably considered to be occupations on the basis of states’ and international organisations’ practice, the case law of international and domestic tribunals, and the opinion of qualified legal scholarship. This section takes into account in particular events that have occurred since 1949, when the law of occupation experienced an important evolution thanks to the adoption of the GC IV.<sup>38</sup> This list of situations that may be considered to be occupations is not intended to be complete – it is presented only for the specific purpose of circumscribing

<sup>34</sup> See, e.g., William Banks, *Counterinsurgency Law: New Directions in Asymmetric Warfare* (Oxford University Press 2013); Ganesh Sitaraman, *The Counterinsurgent’s Constitution: Law in the Age of Small Wars* (Oxford University Press 2013); Kenneth Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict* (Oxford University Press 2016).

<sup>35</sup> Dinstein, *The International Law*, 1.

<sup>36</sup> On the relationship between the law of occupation and the principle of self-determination of peoples, see *infra*, Sections 2.4.2 and 4.3.1.

<sup>37</sup> See *infra*, Section 2.3.1.

<sup>38</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

the practice employed to study the issue at the heart of this book. Other situations may qualify as occupation if the circumstances required by the law of occupation are met.<sup>39</sup>

The refusal of South Africa to withdraw its forces and allow the local inhabitants to exercise their right of self-determination in Namibia created one of the first internationally acknowledged post-WWII occupations. Since 1920, Namibia (under the name of South West Africa) was administered by South Africa under a mandate of the League of Nations.<sup>40</sup> However, in 1966, the GA, which had replaced the League of Nations with respect to its role regarding the administration of non-self governing territories, terminated the mandate.<sup>41</sup> The refusal of South Africa to withdraw from the area and to allow the self-determination of the local people was constantly condemned by the UN. For instance, the SC repeatedly qualified the situation as an occupation and requested the withdrawal of South African troops.<sup>42</sup> In addition, the ICJ was involved in a number of proceedings regarding the legality of the South African presence in Namibia, and finally, in 1971, the Court clearly affirmed that Namibia was under occupation<sup>43</sup> – a conclusion that is shared by many scholars.<sup>44</sup> The occupation of Namibia ended only in 1990.

Common practice regarding occupation derives from the Israeli occupation of the OPT, which commenced in 1967 after the Six-Day War.<sup>45</sup> The OPT comprises the West Bank, East Jerusalem, and the Gaza Strip. Before the Israeli occupation, these territories did not comprise any existing state; rather they had been placed first under the British Mandate over Palestine,<sup>46</sup> and had

<sup>39</sup> To the best knowledge of this author, the most complete overview of situations that may be qualified as occupations is performed by Benvenisti, *The International Law*.

<sup>40</sup> Mandate for German South West Africa, 17 December 1920, reprinted in Solomon Slonim, *South West Africa and the United Nations: An International Mandate in Dispute* (The John Hopkins University Press 1973) 369.

<sup>41</sup> See UNGA Res. 2145 (XXI), 27 October 1966.

<sup>42</sup> See UNSC Res. 264 (1969), 20 March 1969, preambular para. 5; UNSC Res. 269 (1969), 12 August 1969, para. 3.

<sup>43</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276* (1970), Advisory opinion, 21 June 1971, paras. 118–19.

<sup>44</sup> See, e.g., Roberts, 'What Is', 291–2; Roberts, 'Prolonged Military Occupation', 49–50; Benvenisti, *The International Law*, 67.

<sup>45</sup> For different accounts on this conflict, see J. R. Gainsborough, *The Arab-Israeli Conflict* (Gower 1986) 126–79; John Quigley, *The Six-Day War and Israeli Self-Defense: Questioning the Legal Basis for Preventive War* (Cambridge University Press 2013).

<sup>46</sup> League of Nations, Mandate for Palestine and Memorandum by the British Government Relating to Its Application to Transjordan, Approved by the Council of the League of Nations on 16 September 1922, CPM 466. The legal problems surrounding this Mandate and its impact on the ongoing Israeli-Palestinian conflict are beyond the purview of this book. On the Mandate and the status of the OPT before the Israeli occupation, see, generally, W. Thomas