Chapter 3

Topographies of Force

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I Introduction

It is a special pleasure to have been invited to participate in this volume that honors Yoram Dinstein for the seminal contributions he has made to international law in the fields of the *jus ad bellum*, the *jus in bello* and human rights and whose scholarship is known to us from (amongst other works) *War, Aggression and Self-Defence*, first published in 1988 and now in its fourth edition, and *The Conduct of Hostilities under the Law of International Armed Conflict*, published in 2004. Both of these works have become leading authorities in their respective fields and serve as fitting testaments to Professor Dinstein’s academic craft, his intellectual skill and, of course, his passionate commitment to these aspects of the international law canon. In truth, neither of these volumes ever seem able to remain long enough on the shelf – either because they are in active service instructing or clarifying on particular points of law or because they will once again inspire and inform the classroom deliberations for the day.

While it is the task of each of these volumes to comb through the vast terrain of history and detail that constitute the modern corpuses of the *jus ad bellum* (*War, Aggression and Self-Defence*) and the *jus in bello* (*The Conduct of Hostilities under the Law of International Armed Conflict*), it is rarely the case that full consideration is given to how these corpuses actually relate to one another, or how concepts within each of these corpuses interact with each other. In a previous age, we would have relied on the concept of war as the unifying frame of refer-

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ence for both the *jus ad bellum* and the *jus in bello*, evidenced by such refrains as ‘recourse to war’, or ‘measures short of war’ or ‘the laws (and customs) of war’. For international law, the concept of war – that is, an official state of war or war as a legal condition – became the central prism through which we viewed and governed the physical might or ‘violence’ of states. Yet, as is well known, this common conceptual denominator was found to be ailing and failing to the point where, in the immediate wake of the Second World War, a new normative dispensation was issued for the *jus ad bellum* (the concept of force) by the 1945 United Nations Charter and for the *jus in bello* (the concept of armed conflict) by the 1949 Geneva Conventions.

Taking the concept of force as the frame of reference of this essay, we shall therefore begin a provisional enquiry into the configurations which exist between the concepts that comprise this dispensation – that is to say, in Part II, we shall reflect upon the relationship between the concepts of ‘force’ and ‘war’, or, as Philip Allott has pointedly written, its ‘hypocritical periphrasis’ of ‘armed conflict’. Our intention will be to examine the extent to which these concepts (or conceptual vocabularies) share common substantive ground – essentially to give some sense of the possible delineations between the *jus ad bellum* and the *jus in bello*. We shall then proceed, in Part III, to explore the conceptual vocabularies of the *jus ad bellum*, whether they have formed part of its traditional corpus (such as the concept of aggression) or – much like the concept of force itself – are more recent inventions or innovations (such as the concept of armed attack). How are these concepts meant to relate to one another? What are their intended functions within the *jus ad bellum*? Do they represent different legal coda for identical phenomena or are they intended to depict different phenomena within international law?

Throughout our navigation of the finer contours of this dispensation, we will focus on what might be called the *topographies of force*, or the broader normative landscape that constitutes ‘force’ within international law. To this end, Part IV of the essay engages the concept of intervention – a concept of much longer stand-

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6 Art. 6 (a) of the Nuremberg Charter identified ‘crimes against the peace’ as one of the crimes within the jurisdiction of the International Military Tribunal, which it defined as ‘planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing’. See, also, infra note 180.