Chapter 1

A Revival of the Just War Theory?

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I Introduction

A new interest in just war theory has been prompted by pressures to justify, in legal terms, forms of armed attack or forcible intervention lying outside, or at the margins of, the uses of armed force in international relations allowed by orthodox interpretations of the United Nations Charter and customary international law.¹ Although we are concerned here principally with the *jus ad bellum*, there is a connection with the *jus in bello* in that one commonly accepted proposition of just war theory is that a use of force is not justified where the necessary means to be employed to achieve the object would be inherently excessive or indiscriminate.²

It is the position of the present writer that the orthodox interpretation of international law governing the use of armed force in international relations, which admits of no exceptions to the authorisations specified in chapter VII of the Charter, is by reason of that inflexibility no longer able to serve the interests of world order. As a result, certain states no longer seek to justify their uses of force in terms of international law. Those states look only to a political justification, or assert a doctrine of the supremacy of national law that is not subject to international law. This is a dangerous trend, subversive of the most basic principle of world order governed by law. It is argued here that, rather than to rail against such attitudes impotently, or worse still to accept them, it is better to seek principled guidance from just war theory and to accommodate that theory within an interpretation of the Charter that takes account of current realities and challenges. In that way, the ideal of a world order can be re-imagined for the 21st century and not stuck in the mould of 1945. It must be stressed that this approach

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is intended not to “bring inside the tent” those who wish defiantly to live outside it, but is directed towards a more flexible reading of the Charter to allow for a principled and humanitarian use of force in certain grave situations which demand a forcible response. It is further argued that this may be achieved without amendment to the Charter; that, like other constitutional documents, the Charter is capable of development and response to changing needs and circumstances within legitimate margins of interpretation of the existing text.³

The writer was first prompted to these thoughts by the writings of Julius Stone.⁴ They were reinforced by the publication, in December 2001, of the Report of the International Commission on Intervention and State Sovereignty.⁵ That Report did not indeed propose the interpretation of the UN Charter and international law advanced by Stone, some other writers, and here; rather it urged the Security Council, in very strong terms, to live up to its responsibility to protect the victims of grave and systematic violence and injustice, such as genocide and “ethnic cleansing”, putting aside irrelevant political considerations, and exercising its powers under chapter VII of the Charter. However, there are implications in the Report that point in the direction of imagining a justification for the use of force beyond the limits accepted by orthodox interpretation. Failure of the Security Council, whether its membership is re-designed in the future or not, to heed its responsibility would, according to the Commission send the following “messages”:

The first message is that, if the Security Council fails to discharge its responsibility in conscience-shocking situations crying out for action, then it is unrealistic to expect that concerned states will rule out other means and forms of action to meet the gravity and urgency of these situations. If collective organizations will not authorize collective intervention against regimes that flout the most elementary norms of legitimate governmental behaviour, then the pressures for intervention by ad hoc coalitions or individual states will surely intensify. And there is a risk then that such interventions, without the discipline and constraints of UN authorization, will not be conducted for the right reasons or with the right commitment to the necessary precautionary principles.

The second message is that if, following the failure of the Security Council to act, a military intervention is undertaken by an ad hoc coalition or individual

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