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## ‘INTERNATIONAL JUSTICE’

**T**HE NATO BOMBING of Yugoslavia in the spring of 1999 has been saluted as a triumph for ‘international justice’ over the traditional claims of state sovereignty. The war was in clear breach of international law: waged without UN Security Council authorization, against an elected, civilian government which had not violated any external treaty, justifiable neither as a threat to peace and security, nor in terms of any NATO country’s self-defence. It has been welcomed instead as a ‘humanitarian’ crusade, explicitly setting individual rights above the territorial rights of nation-states. But if the sovereignty of some states—Yugoslavia, Iraq—is to be limited, that of others—the NATO powers—is to be increased under the new order: they are to be given the right to intervene at will. It is, in other words, not sovereignty itself but sovereign equality—the recognition of the legal parity of nation-states, regardless of their wealth or power—which is being targeted by the new interventionists. Yet such equality has been the constitutive principle of the entire framework of existing international law and of all attempts, fragile as they may be, to establish the rule of ‘right’ over ‘might’ in regulating inter-state affairs. ‘Humanitarian intervention’, Daniele Archibugi has written, in his discussion of ‘Cosmopolitical Democracy’, ‘is too precious a concept to be decided on the hoof or, worse still, invoked to mask special interests or designs on power.’<sup>1</sup> This article will examine the implications of such a right to ‘humanitarian’ military intervention for the future of inter-state regulation and international law.

The concept of sovereign equality is often understood as an integral part of the long-standing doctrine of state sovereignty. In fact, it is of much

more recent provenance than the classic state system which emerged at the end of the Thirty Years' War. The Peace of Westphalia of 1648 famously recognized the secular rights of German princelings above the religious claims of the Papacy, legitimating no external power beyond that of the sovereign; it was this formal recognition of the principle of territorial sovereignty which henceforth became the basis of relations between states. There was, however, no international law in the modern sense: such rights of sovereignty were effectively restricted to the major powers and there was no explicit framework of an international community which could formally limit their exercise. Without international law, the regulation of inter-state relations could not extend beyond voluntary agreements between the sovereign states—strategic alliances, aimed at preserving local interests and maintaining a relatively stable balance of power.

The epoch of this classic, 'anarchical' state-system, with no defined limits to the sovereignty of the major powers, was also the era of colonialism. The states included within it were those which could defend their own territory from the claims of other states. It was therefore quite consistent to argue that in countries which could not demonstrate such 'empirical statehood'—the colonies—sovereignty could not apply. Meanwhile, those with sufficient military force to intervene in other states' affairs—in other words, the great powers—continued to do so. During the colonial era, the major powers either regulated their territorial acquisitions directly—as in Africa and India—or, as in China, Japan and the Ottoman Empire, insisted that their own actions could not be fettered by local domestic legislation, claiming the right of extraterritoriality. Under the Westphalian system, then, superior force was the guarantor of effective sovereignty.

The Westphalian model came under attack with the modernization and growing world importance of the leading non-European states. Challenges to Western rule and increasing international instability led to new attempts to regulate inter-state affairs. The Hague Conference of 1899 saw the attendance of China, Japan, the Ottoman Empire, Persia and Siam. In 1905 Japan's defeat of Russia came as a powerful shock to European imperial confidence, closely bound up with assumptions

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<sup>1</sup> See 'Cosmopolitical Democracy', NLR 4, July–August 2000; and Geoffrey Hawthorn's reply, 'Running the World through Windows', NLR 5, September–October 2000.

of racial superiority. The second Hague Conference of 1907 was the first gathering of modern states at which Europeans were outnumbered by the representatives of other countries. But it was the watershed of the First World War—bringing in its wake the collapse of the Russian, Austro-Hungarian and Ottoman empires, the rise of colonial resistance, the establishment of the Soviet Union and the threat of new world war—that was decisive in turning Western policy makers away from the strength-based Westphalian system and towards a more juridical concept of sovereignty and a framework of international law.

The principle of national self-determination was proclaimed by Woodrow Wilson at the 1919 Paris Peace Conference—for the newly created states of Central Europe. The extension of such a right to the rest of the world—ringingly affirmed by the Bolsheviks' *Declaration of the Rights of the Toiling and Exploited People* in January 1918—was held at bay. The expansion of the concept of territorial sovereignty beyond the principle of 'might is right' remained highly controversial within policy-making circles. Robert Lansing, US Secretary of State, recalled his doubts:

The more I think about the President's declaration as to the right of 'self-determination', the more convinced I am of the danger of putting such ideas into the minds of certain races. It is bound to be the basis of impossible demands on the Peace Conference and create trouble in many lands. What effect will it have on the Irish, the Indians, the Egyptians, and the nationalists among the Boers? Will it not breed discontent, disorder and rebellion? Will not the Mohammedans of Syria and Palestine and possibly Morocco and Tripoli rely on it?<sup>2</sup>

This 'danger' was a central concern of the inter-war settlement. The League of Nations timidly initiated legal restriction of great-power sovereignty through the introduction of the mandate system, with colonial administrators now deputed to 'advance the interests' of the subject peoples. The mandates—implying a recognition that colonial rule could only be temporary—were the first formal admission that empire was no longer a legitimate political form. But the concept of sovereign equality remained confined to a few, the right of self-determination denied to large sections of the world's population, Japan's attempt to include a clause on racial equality in the League of Nations Charter firmly rejected. The development of a universal legal conception of sovereign equality would have to await a further world war.

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<sup>2</sup> Robert Lansing, *The Peace Negotiations: A Personal Narrative*, London 1921, p. 87.

The 1945 settlement, preserved in the principles of the UN Charter, reflected a new international situation, transformed by the emergence of the Soviet Union as a world power and the spread of national liberation struggles in Asia, the Middle East and Africa. Ideologies of race and empire, too, seemed definitively vanquished with the defeat of the Nazi regime. It was a decisive moment in the transformation of the Westphalian system. In this context, the inter-war consensus on ‘the non-applicability of the right to self-determination to colonial peoples’ could no longer be sustained. United States policy makers, as they looked forward to assuming the mantle of the now declining British Empire, realized that updated institutions for the management of international relations would have to ‘avoid conventional forms of imperialism’.<sup>3</sup> The result was nominal great-power acceptance—however hypocritical—of a law-bound international system.

Central to this new mechanism of international regulation was the conception of sovereign equality. The UN Charter, the first attempt to construct a law-bound ‘international community’ of states, recognized all its members as equal. Article 2(1) explicitly stressed ‘the principle of sovereign equality’, while both Article 1(2) and Article 55 emphasized ‘respect for the principle of equal rights and self-determination of peoples’. New nations—which would have failed Westphalian tests of ‘empirical statehood’, and hence been dismissed as ‘quasi-states’—were granted sovereign rights,<sup>4</sup> while the sovereignty of the great powers was now, on paper at least, to be restricted. The UN system did not, of course, realize full sovereign equality. In practice, the Security Council overwhelmingly predominated, with each of its self-appointed permanent members—the United States, Britain, France, Russia and China—retaining rights of veto. Still, sovereign equality was given technical recognition in parity of representation in the General Assembly and lip-service to the principle of non-interventionism, setting legal restrictions on the right to wage war.

Under the Westphalian system, the capacity of the most powerful states to use force against the less powerful was a normal feature of the international order. Under the legal framework set up by the Charter, the

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<sup>3</sup> Justin Rosenberg, *The Empire of Civil Society*, London 1994.

<sup>4</sup> R. H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World*, Cambridge 1990.

sovereign's right to go to war (other than by UN agreement or in self-defence) was, for the first time, outlawed—a point sometimes missed by those who would argue that the post-1945 order 'failed to break' with Westphalian norms.<sup>5</sup> The principle of non-intervention was, in fact, a constituting principle of the new international community of states. Just as the rule of law in domestic jurisdictions depends upon the concentration of legalized force in a single authority, and the criminalization of the individual exercise of violence, so within the postwar system of international regulation, the legal monopoly of the use of force resides in the UN.<sup>6</sup> Article 2(4) states:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.

'We may not appreciate', writes Louis Henkin, 'how remarkable that was, that transformative development in the middle of the twentieth century: "sovereign states" gave up their "sovereign" right to go to war.'<sup>7</sup> It marked, it seemed, the end of the Westphalian system of legitimating great-power domination through the use of force.

The universal recognition of sovereign equality entailed a new conception of states, whose legal authority now derived not from wealth or might but nationhood. Formally speaking, non-Western states from now on had the same standing as Western ones within the international order, despite continuing inequalities of economic and military power.<sup>8</sup> Archibugi is right, of course, to point to the role of the UN in practice, which was repeatedly utilized as an instrument of American hegemony—as he puts it, 'judicial power overshadowed by intimidation or reprisal'.<sup>9</sup> In theory, however, a framework of international law had been created

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<sup>5</sup> David Held, *Democracy and the Global Order*, Cambridge 1995, p. 88.

<sup>6</sup> Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict: A Reconceptualization*, Cambridge 1996, p. 35.

<sup>7</sup> Louis Henkin, 'That "S" Word: Sovereignty, and Globalization, and Human Rights, etc.', *Fordham Law Review*, 1999, vol. 68, no. 1, p. 1.

<sup>8</sup> Sovereign equality was confirmed in many subsequent UN resolutions, notably the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of their Independence and Sovereignty of 21 December 1965 (Resolution 2131 [XX]) and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations of 24 October 1970 (Resolution 2625 [XXV]).

<sup>9</sup> 'Cosmopolitical Democracy', p. 141.

that limited the exercise of state sovereignty—including the right to wage war. In legal terms, at least, might no longer equalled right.

### *The new interventionism*

Even so mild a form of international regulation is now coming under ferocious attack. The case for the special treatment of some states, and demotion of others, has been put in a variety of registers. British barrister and newspaper pundit Geoffrey Robertson offers a rabid rogue-list: ‘The reality is that states are not equal. There can be no “dignity” or “respect” when statehood is an attribute of the governments which presently rule Iraq and Cuba and Libya and North Korea and Somalia and Serbia and the Sudan’.<sup>10</sup> Max Boot, features editor of the *Wall Street Journal*, prefers a swaggering cynicism: ‘There is no compelling reason, other than an unthinking respect for the status quo, why the West should feel bound to the boundaries it created in the past.’<sup>11</sup> Brian Urquhart, a former UN undersecretary-general—one of the many British under-labourers for the United States in its bureaucracy—sees sovereign equality as the ‘central barrier’ to peace and justice, providing a ‘cloak of impunity’ for every kind of abuse.<sup>12</sup>

Pitted against the concept of international law based on sovereign equality is a new form of global ‘justice’, formulated in explicit opposition to it. Advocates of this justice herald the emergence of a new, ‘human rights’ based order of international relations, arguing that the post-1945 framework—here, ‘international society’—is being eclipsed by the ethical demands of global ‘civil society’. For Martin Shaw, erstwhile International Socialist, the ‘crucial issue’

is to face up to the necessity which enforcing these principles would impose to breach systematically the principles of sovereignty and non-intervention . . . The global society perspective, therefore, has an ideological significance which is ultimately opposed to that of international society.<sup>13</sup>

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<sup>10</sup> Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, London 1999, p. 372.

<sup>11</sup> Max Boot, ‘Paving the Road to Hell: The Failure of UN Peacekeeping’, *Foreign Affairs*, 2000, vol. 79, no. 2, pp. 143–8.

<sup>12</sup> Brian Urquhart, ‘In the Name of Humanity’, *New York Review of Books*, 27 April 2000.

<sup>13</sup> Martin Shaw, *Global Society and International Relations: Sociological Concepts and Political Perspectives*, Cambridge 1994, p. 134–5.

For Robertson, too, ‘the movement for global justice’ is ‘a struggle against sovereignty’. Sovereign equality is seen by these ideologues as a legal fiction, a mask for the abuse of power. International law is merely an ‘anachronism’, a historical hangover, while ‘some of its classic doctrines—sovereign and diplomatic immunity, non-intervention in internal affairs, non-compulsory submission to the ICJ, equality of voting in the General Assembly—continue to damage the human rights cause.’<sup>14</sup>

The denial of sovereign equality obviously has major consequences for both the form and content of international law. The most prominent is the rise of the idea of a ‘duty’ of forcible ‘humanitarian’ intervention—the so-called *devoir d’ingérence*.<sup>15</sup> Its advocates naturally retain the right to decide on whom this obligation falls. Robertson explains that ‘humanitarian intervention cannot be the prerogative of the UN’ since it cannot be relied upon to act when necessary. The duty of intervention must therefore stand independently: ‘UNanimity cannot be the only test of legitimacy’.<sup>16</sup> For Shaw, ‘it is unavoidable that global state action will be undertaken largely by states, ad hoc coalitions of states and more permanent regional groupings of states’.<sup>17</sup> In practice, the prosecution of international justice turns out to be the prerogative of the West.

Such is overtly the substance of NATO’s new ‘strategic concept’, promulgated at the Alliance’s fiftieth anniversary summit in Washington in late April 1999, at the height of the Balkan War. As US Deputy Secretary of State Strobe Talbott explained,

We must be careful not to subordinate NATO to any other international body or compromise the integrity of its command structure. We will try to act in concert with other organizations, and with respect for their principles and purposes. But the Alliance must reserve the right and freedom to act when its members, by consensus, deem it necessary.<sup>18</sup>

Similarly, a new study of ‘humanitarian intervention’ in the wake of the Kosovo war argues explicitly for ad hoc and arbitrary powers to intervene:

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<sup>14</sup> *Crimes Against Humanity*, pp. xviii, 83.

<sup>15</sup> Mario Bettati and Bernard Kouchner, *Le Devoir d’ingérence*, Paris 1987.

<sup>16</sup> *Crimes Against Humanity*, pp. 382, 72.

<sup>17</sup> *Global Society*, p. 186.

<sup>18</sup> Cited in B. Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’, *European Journal of International Law*, 1999, vol. 10, pp. 1–22.

A code of rules governing intervention would be likely in the early twenty-first century to limit rather than help effective and responsible action on the part of the international community . . . Any attempt to get general agreements would be counter-productive . . . It may be inevitable, possibly even preferable, for responses to international crises to unfold selectively.<sup>19</sup>

Ironically, the new ‘global’ forms of justice and rights protection will be distinctly less universal than those of the UN-policed international society they set out to replace. David Held argues that, ‘in the first instance’, at least,

cosmopolitan democratic law could be promulgated and defended by those democratic states and civil societies that are able to muster the necessary political judgement and to learn how political practices and institutions must change and adapt in the new regional and global circumstances.<sup>20</sup>

Rather more bluntly, Shaw explains the rationale of all-round NATO intervention:

This perspective can only be centred on a new unity of purpose among Western peoples and governments, since only the West has the economic, political and military resources and the democratic and multinational institutions and culture necessary to undertake it. The West has a historic responsibility to take on this global leadership.<sup>21</sup>

This line of argument is now increasingly official doctrine. The *Guardian* could hail British military intervention in Sierra Leone as ‘the duty owed by a wealthy and powerful nation to, in this case, one of the world’s poorest countries’.<sup>22</sup> Here inequality is expressly theorized as the basis of the new world order. Yet the modern system of law (whether international or domestic) depends, both at the basic level of its derivation and in the vital question of its application, on the concept of formal equality between its subjects. All international institutions—whether the UN, OSCE or even NATO itself—derive their authority from inter-state agreements. International law derives its legitimacy from the voluntary assent of nation-states. Without such consent, the distinction between

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<sup>19</sup> Albrecht Schnabel and Ramesh Thakur, eds, *Kosovo and the Challenge of Humanitarian Intervention*, New York: forthcoming. See [www.unu.edu/p&g/kosovo\\_full.htm](http://www.unu.edu/p&g/kosovo_full.htm)

<sup>20</sup> *Democracy and the Global Order*, p. 232.

<sup>21</sup> *Global Society*, pp. 180–1.

<sup>22</sup> ‘We Are Right To Be There’, *Guardian*, 13 May 2000.

law (based on formal equality) and repression (based on material force) disappears. The equal application of the law entails parity between its subjects, without which it ceases to have meaning. In today's climate, the rights of weaker states can be infringed on the grounds that the law does not fully apply to them, while more powerful states can claim immunity from the law on the grounds that it is they who ultimately enforce it.

The extension of 'international justice' is, in short, the abolition of international law. For there can be no international law without equal sovereignty, no system of rights without state-subjects capable of being its bearers. In a world composed of nation-states, rather than a single global power, universal law can only derive from national governments. Archibugi, arguing that representative governments cannot be trusted with international regulation, proposes instead to 'democratize the international community' through the creation of 'cosmopolitical' institutions—composed, among others, of representatives of NGOs. As part of this 'global extension of democracy', he calls for 'a revision of the powers and functions of states at an international level' to 'deprive them of the oligarchic power they now enjoy'. What he fails to see is that the practical consequences of demolishing the existing—if only juridical—equality between the states can only be to deepen their political inequality. Criticizing the British Prime Minister's shrill calls for 'humanitarian warfare', he rightly points out that Blair 'says nothing about *which* authority may use force to violate state sovereignty, *who* such force should be used against or *which* human rights have to be protected'; but he is insensitive to the dangers of a challenge to the existing framework that cannot specify a realistic constitution of alternative legal subjects.

### *The Hague War Crimes Tribunal*

Under the cover of 'international justice', a much more direct reflection of the hierarchy of global power is now being set in place, as new Western agencies are given a jurisdiction above international law. The creation of The Hague War Crimes Tribunal for the former Yugoslavia—a supposed model for 'international justice'—is a perfect case in point. Typically, the Serb leader Milan Martić has been indicted for the use of cluster bombs on the Croatian capital Zagreb in May 1995, in which seven civilians were killed and an old people's home and children's hospital damaged. NATO's own use of cluster bombs in its attack on Niš in May 1999,

which killed fifteen people and damaged the city's main hospital, was naturally in another category altogether.<sup>23</sup> Who could believe that NATO commanders deliberately made military targets of city bridges, factories, marketplaces, residential neighbourhoods and TV studios, with slight or no military value?

The truth is that the 'impartiality' of the Tribunal is a farce. In brazen breach of Article 16 of the Tribunal's Charter, which states that the prosecutor shall act independently and shall not seek or receive instruction from any government, co-operation between supposedly independent international prosecutors and Western politicians has been close and unconcealed. At a joint press conference with Tribunal prosecutor Louise Arbour, British Foreign Secretary Robin Cook declared, with scant grammar and even less regard for legal propriety, that 'we are going to focus on war crimes being committed in Kosovo and our determination to bring those responsible to justice': as if he and Arbour were part of the same team, deciding who would be held responsible for violations of international law—and naturally ruling himself out from potential charges.<sup>24</sup> James Shea, NATO spokesman during the conflict, was blunter still, replying to a question at a press conference on 17 May 1999 as to the possibility of NATO leaders being investigated for war crimes by the Tribunal: 'Impossible. It was the NATO countries who established the Tribunal, who fund it and support it on a daily basis.'

Arbour herself regularly appeared in public at high-profile meetings with NATO leaders, including Cook and Secretary of State Albright, during the Balkan War. One Tribunal judge, Gabrielle Kirk McDonald, has referred to Albright as the 'Mother of the Tribunal'. President Clinton was personally informed of the indictment of Milošević by Arbour two days before the rest of the world. There have been numerous meetings between the prosecutor and NATO officials, including its Secretary-General, to 'establish contacts and begin discussing modalities of co-operation and assistance' and, in an epic breach of legal norms, NATO—a potential defendant—has been assigned the function of arrest-

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<sup>23</sup> R. M. Hayden, *UN War Crimes Tribunal Delivers a Travesty of Justice*, Woodrow Wilson International Centre for Scholars, 2000; C. Black and E. Herman, 'Louise Arbour: Unindicted War Criminal', posted to Tribunal Watch, 17 February 2000. Archive available at [www.listserv.acsu.buffalo.edu/archives/justwatch-l.html](http://www.listserv.acsu.buffalo.edu/archives/justwatch-l.html)

<sup>24</sup> 'Louise Arbour: Unindicted War Criminal'.

ing suspects and collecting data. Of course, the Tribunal concerns itself only with the former Yugoslavia. Milošević is to be handed over to 'international justice' without delay. In other parts of the world Montesinos is assured a comfortable refuge, and Sharon received with full honours.

What the jettisoning of the principle of non-interventionism means is the re-legitimation of the right of the great powers to practice what violence they please. Their apologists declare that war is now the 'lesser evil', compared to the new moral crimes of 'indifference' or 'appeasement'. Liberal interventionists have emerged as the biggest advocates of increased military spending.<sup>25</sup> Sycophantic tub-thumpers like Michael Ignatieff extol without inhibition the new militarist values:

To keep the peace here [Sierra Leone] is to ratify the conquests of evil. It is time to bury peacekeeping before it buries the UN . . . Where peace has to be enforced rather than maintained, what's required are combat-capable warriors under robust rules of engagement, with armour, ammunition and intelligence capability, and a single line of command to a national government or regional alliance . . . the international community has to take sides and do so with crushing force.<sup>26</sup>

Similarly, for Max Boot,

UN administrators . . . think that no problem in the world is too intractable to be solved by negotiation. These mandarins fail to grasp that men with guns do not respect men with nothing but flapping gums . . . Just as the US Marine Corps breeds warriors, so the UN's culture breeds conciliators.<sup>27</sup>

For these ideologues, the absolute end of 'international justice' can only be compromised by diplomacy or negotiation. The new professors of Human Rights at the UN University's Peace and Governance Programme are happy to condone those 'good international citizens' who are 'tempted to go it alone' waging war for 'justice', with or without international sanction.<sup>28</sup> Robertson likewise insists that 'a human rights offensive admits of no half-measures'; 'crimes against humanity

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<sup>25</sup> For example, John Gray, 'Crushing Hatreds', *Guardian*, 28 March 2000; John Lloyd, 'Prepare for a Brave New World', *New Statesman*, 19 April 1999.

<sup>26</sup> Michael Ignatieff, 'A Bungling UN Undermines Itself', *New York Times*, 15 May 2000.

<sup>27</sup> 'Paving the Road to Hell'.

<sup>28</sup> See, for example, *Kosovo and the Challenge of Humanitarian Intervention*.

are, by definition, unforgivable'; 'justice, in respect of crimes against humanity, is non-negotiable'.<sup>29</sup> Such war can know no legal bounds. Bernard Kouchner, UN Civilian Administrator in Kosovo, argues explicitly for pre-emptive attacks—or rather, in the Newspeak so characteristic of the West's 'humanitarian' hawks, for the right to intervene militarily 'against war':

Now it is necessary to take the further step of using the right to intervention as a preventive measure, to stop wars before they start and to stop murderers before they kill . . . We knew what was likely to happen in Somalia, Bosnia-Herzegovina and Kosovo long before they exploded into war. But we didn't act. If these experiences have taught us anything, it is that the time for a decisive evolution in international consciousness has arrived.<sup>30</sup>

The ability to judge 'murderers before they kill' is an art that relies more on self-interest than science. As Benjamin Schwarz warns, at an April 2000 round table on intervention organized by *The Atlantic*:

If we choose to be morality's avenging angel in places like Kosovo, we may at first be pleased to see ourselves, like Kurtz in *Heart of Darkness*, as 'an emissary of pity and progress'. But as warriors for right, faced with those we have demonized, we may well succumb to Kurtz's conclusions as well: 'Exterminate the brutes.'<sup>31</sup>

In the Middle East, in Africa and the Balkans, the exercise of 'international justice' signifies a return to the Westphalian system of open great-power domination over states which are too weak to prevent external claims against them.

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<sup>29</sup> *Crimes Against Humanity*, pp. 73, 260, 268.

<sup>30</sup> Bernard Kouchner, 'Perspective on World Politics: Establish a Right to Intervene Against War', *Los Angeles Times*, 18 October 1999.

<sup>31</sup> Benjamin Schwarz, *Atlantic Round Table on Intervention*, April 2000, available from [www.theatlantic.com/unbound/roundtable/goodfight/schwarz3.htm](http://www.theatlantic.com/unbound/roundtable/goodfight/schwarz3.htm)