

ing. Because the Council neither authorized NATO's actions before they commenced nor approved them subsequently in its resolution of June 10, 1999, their legality remains questionable, at best. In fact, the Kosovo intervention reflects the problems of an undeveloped rule of law in a morally dangerous situation. It was actually an "anticipatory humanitarian intervention" based on past actions of the FRY regime and future risks. Such intervention, like "anticipatory self-defense," is a particularly dangerous permutation of an already problematic concept. Although many will share the view that the intervention was morally just in light of subsequent developments, it presents an unfortunate precedent. If this action stands for the right of foreign states to intervene in the absence of proof that widespread grave violations of international human rights are being committed, it leaves the door open for hegemonic states to use force for purposes clearly incompatible with international law.

Perhaps the example of Kosovo may stimulate the development of a new rule of law that permits intervention by regional organizations to stop these crimes without the Security Council's authorization, while limiting the risks of abuse and escalation. That is the task for the future.

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KOSOVO: A "GOOD" OR "BAD" WAR?

Operation Allied Force, the use of force by NATO in the name of peace and human rights, began on March 24, 1999, just as members of the American Society of International Law were gathering in Washington for its Annual Meeting. Coincidentally, on that same day, the House of Lords in London determined that Senator for Life Augusto Pinochet could not claim absolute sovereign immunity from extradition proceedings in the United Kingdom for torture committed in Chile while he was head of state, after the coming into force of the Torture Convention for Chile, Spain and the United Kingdom.¹ The juxtaposition of the two events seemed to signal a change in international law, in particular through a message of rejection of the impunity for gross human rights abuses that has too long been the expectation of their perpetrators. Dictators and their willing thugs could no longer expect to shelter behind the twin shields of sovereignty and immunity.

However, the aerial bombing of the Federal Republic of Yugoslavia, which lasted for over two months, and its aftermath must make this conclusion questionable. The waves of refugees from Kosovo gave a human face to this tragedy and evidence of atrocities has mounted. Civilians have been killed and their property destroyed by those wreaking "ethnic cleansing" and then vengeance by those returning, and inevitably also by NATO bombs. Victims of the bombing included refugees seeking safety, television station workers, journalists and, notoriously, occupants of the Chinese Embassy in Belgrade. NATO repeatedly regretted such incidents but continued its action, first to ensure its own five objectives,² and subsequently to secure the peace settlement agreed to by the Serb parlia-

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¹ Regina v. Bow Street Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3), [1999] 2 W.L.R. 827.

² NATO's five objectives were stipulated as non-negotiable: an end to the killing by Yugoslav army and police forces in Kosovo, withdrawal of those forces, the deployment of a NATO-led international force, the return of all refugees, and a political settlement for Kosovo. See GUARDIAN, May 11, 1999, at 2. For the principles for a political settlement adopted by the Group of Eight Foreign Ministers on May 6, 1999, see SC Res. 1244, Annex 1 (June 10, 1999).

ment on June 3, 1999.³ The further agreement of June 9 on the withdrawal of Serb forces finally allowed the bombing to stop.

I have found it challenging as an international lawyer and as a person to formulate my response to the Kosovo intervention. I have found the debates and media coverage sobering, especially seeing what we discuss and what we exclude,⁴ and the language we use for discussion. The many contradictions have made it problematic whether, in the words of the British press, the substance, processes and institutions of international law had a "good" or a "bad" war: what are the implications of these events for international human rights, the emerging exercise of international criminal jurisdiction, and the role of international institutions and legal argument? Can any of these questions be separated from those of geopolitics, military strategy and economic interests?

The Security Council did not have a good war. Inevitably, the language of law was engaged in various arenas to make claims with respect to the legality of the use of force under the UN Charter, or customary international law.⁵ But assertions of legality require a leap of faith. It does not need repeating that the international prohibition on the use of force is subject only to the right to self-defense (which was not in issue) and the primary (not exclusive) responsibility of the Security Council for international peace and security.⁶ Since early 1998, the Security Council has acted under Chapter VII "for the purposes of fostering peace and stability in Kosovo." On March 31 of that year, it imposed a new arms embargo on the Federal Republic of Yugoslavia by Resolution 1160, and called upon all states "to act strictly in conformity with this resolution." However, it allocated no broad competence for enforcing the resolution, unlike those, for example in the context of Iraq, authorizing "all necessary means" for their implementation. Specific obligations were directed in Security Council Resolution 1203 of October 24, 1998, toward the "Kosovo Albanian leadership" (to comply with all relevant resolutions, to condemn all terrorist actions and to pursue its goals by peaceful means only), and the Federal Republic of Yugoslavia (to comply with all relevant resolutions and to be mindful of its primary responsibility for the safety and security of all diplomatic personnel and for the safe return to their homes of refugees and displaced persons). The Council demanded the cooperation of both these entities with the Kosovo Verification Mission of the Organization for Security and Co-operation in Europe (OSCE) (a mission established by the Holbrooke Agreement of October 1998 and withdrawn before the commencement of the bombing) and with international efforts to improve the humanitarian situation and avert an impending humanitarian catastrophe. In contrast, other states were urged only to provide personnel for the verification mission and resources for humanitarian assistance.

Despite the Security Council's decision "to consider further actions and additional measures" in the case of noncompliance, the prospect of a veto by the Russian Federation prevented the authorization of unilateral or regional (NATO) enforcement, or of the use of force. It has become commonplace to assert that the Security Council's omission implies consent or authorization, even with respect to the use of armed force; examples are the creation of safe havens in northern Iraq, the invasion of airspace to monitor air lanes, and the bombing of Iraq in December 1998 in response to its defiance of the UN Special

³ Agreement on the Principles (Peace Plan) to Move towards a Resolution of the Kosovo Crisis, UN Doc. S/1999/649, reprinted in SC Res. 1244, *supra* note 2, Annex 2.

⁴ See Barbara Stark, *What We Talk about When We Talk about War*, 32 STAN. J. INT'L L. 91 (1996).

⁵ Notably, in the International Court of Justice in the case brought by Yugoslavia against the NATO states. While the respondents denied the Court's jurisdiction for the ordering of interim measures, they also emphatically asserted the legality of their actions. See *Legality of Use of Force (Yugo. v. UK)*, Oral Pleadings, ICJ Doc. CR/99/23, para. 7 (May 11, 1999). The Court rejected Yugoslavia's application on June 2, 1999 <<http://www.icj-cij.org/icjwww/iddecisions.htm>>.

⁶ For a detailed analysis of the legality of NATO action (prior to the bombing campaign), see Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999).

Commission. But such instances effectively rewrite carefully negotiated Security Council resolutions,⁷ and each time this occurs, especially at the behest of any of its permanent members, the legal authority of the Security Council is diminished.

But the failure of the Security Council to authorize stronger measures was in the face of gross human rights abuses earlier acknowledged by it.⁸ Atrocities were invoked to bring the use of force within the parameters of humanitarian intervention. How can I, as an advocate of human rights, resist the assertion of a moral imperative on states to intervene in the internal affairs of another state where there is evidence of ethnic cleansing, rape and other forms of systematic and widespread abuse, regardless of what the Charter mandates about the use of force and its allocation of competence? The *Pinochet* case emphatically reminded us that the consequences of international crimes are not territorially restricted. The criteria that have been argued as the basis for an emerging legal doctrine of unilateral (unauthorized) humanitarian intervention appeared to have been largely satisfied as regards Kosovo: the use of force was "directed exclusively to averting a humanitarian catastrophe,"⁹ and the UN institutions had failed to respond adequately. Whether the need to begin bombing on March 24 was overwhelming is less clear. Resistance to Western demands and the NATO ultimatum at Rambouillet were the precipitating factors, although Serbian forces were again on the offensive. Nevertheless, formalism was not allowed to stand in the way of humanitarianism and the human rights provisions of the Charter could be presented as having a "good" war. Perhaps these issues resound even more forcefully in the United Kingdom where the commitment to an "ethical" foreign policy has been expounded since 1997.

Further, the military action was not that of a single state, but of a collective defense organization that has worked closely alongside the United Nations in Bosnia, and onwards. After all, complementary and coherent strategies between global and regional organizations in accordance with Chapter VIII of the Charter have been urged.¹⁰ The Security Council at various times has affirmed the actions of different European organizations with respect to Kosovo—the OSCE, the contact group, the European Union and NATO.¹¹ By indicating its support for European institutional responses to European instability, the Council perhaps implied approval of military action in view of its own paralysis; and the failure to agree on a condemnatory resolution during the bombing enhanced this perception. However, affirmations of efforts at peaceful settlement and verification cannot disguise the fact that the primacy of the Security Council with respect to the use of force was discounted. Cooperation between regional organizations and the United Nations in the form of consultation, diplomatic and operational support, co-deployment and joint operations was what the Secretary-General sought, not abandonment of the international constitutional order through the bypassing of the Security Council.¹² This disregard at the behest of a regional defense organization dominated by the sole remaining superpower reveals the "new world order" as a Western hegemon.¹³ The Security Council is resorted to, or not,

⁷ NATO engineered just such an amendment by extending the Council-mandated arms embargo to a maritime blockade on oil supplies to Yugoslavia from third states, despite no mention of oil in Resolution 1160 of March 31, 1998. See Philippe Sands, *Oil Blockade Threatens International Law of the Sea*, ASIL INSIGHT (Apr. 1999) <<http://www.asil.org>> (reproducing *id.*, Reuters, Apr. 28, 1999).

⁸ *E.g.*, SC Res. 1199 (Sept. 23, 1998); SC Res. 1203 (Oct. 24, 1998).

⁹ Legality of Use of Force, Oral Pleadings, *supra* note 5, para. 17 (quoting UK Permanent Representative in the Security Council, Mar. 24, 1999).

¹⁰ *E.g.*, Boutros Boutros-Ghali, An Agenda for Peace, UN Doc. S/24111 (1992); Supplement to An Agenda for Peace, UN Doc. A/50/60-S/1995/1 (1995).

¹¹ *E.g.*, SC Res. 1160, *supra* note 7 (the OSCE, the European Union and the contact group); SC Res. 1199, *supra* note 8 (the contact group, the European Community Monitoring Mission); SC Res. 1203, *supra* note 8 (NATO, among others, but only with respect to its providing an air verification mission over Kosovo).

¹² See Supplement to An Agenda for Peace, *supra* note 10, para. 86.

¹³ The United States has used armed force, either alone or in conjunction with allies, three times since 1998 without the authorization of the Security Council—in Afghanistan and Sudan, Iraq and the Federal Republic of

according to the likelihood of conformity within it and the “reinvention” of NATO in the post–Cold War era is at the expense of the agreed normative order.

Even if it is conceded that the extremity of the circumstances justified the action and that the unique character of NATO’s response denies it any precedential effect, other issues of transparency and accountability remain. When the primary responsibility of the Security Council for international ordering is displaced, those that seek to act in its place must be especially mindful of their responsibilities. Since the bombing was outside the terms of both the UN Charter and NATO’s own constitutive treaty,¹⁴ the constraints imposed by customary international law, including those of necessity and proportionality, assume greater importance. Does not humanitarian intervention entail a responsibility to ensure that the methods used are appropriate for the achievement of the objectives sought? Human rights give rise to responsibilities in states (acting individually and collectively) and in people.¹⁵ These must encompass a duty not to make conditions worse for a threatened population and the obligation to respect the civil, political, economic, social and cultural rights of all civilians. Both can be seen as aspects of necessity and proportionality. High aerial bombing provides no protection against attack for those who will inevitably be viewed as in some sense responsible for the catastrophe that has befallen the entire population. The more so in this case since military action was already in progress, weapons were available, “excessive and indiscriminate use of force by Serbian security forces” was a known element, and the potential deployment of NATO ground forces was denied. The predicament of large numbers of unprotected civilians was foreseeable, as was widespread damage to the social infrastructure, the environment and the cultural heritage, and the disruption of communication routes.¹⁶ Even the sweeping Security Council formula “all necessary means” must operate within the constraints of the laws of war and provision is made in the Charter to protect the interests of third states.¹⁷

Where there is no authorization by the Security Council, the burden of responsibility to balance the methods chosen to pursue the objectives—bombing to stop or prevent the commission of gross human rights abuses—against other principles of international law, including the human rights of other citizens and economic loss to other states, must be high. The UN High Commissioner for Human Rights (UNHCHR) argued that a “prolonged bombing campaign in which the bombers choose their targets at will” must be subject to review for legality by the Security Council.¹⁸ The General Assembly has urged “all States to refrain from adopting or implementing any unilateral measures not in accordance with international law . . . [and] thus impeding the full realization of the rights set forth in the Universal Declaration of Human Rights.”¹⁹ What amounts to unauthorized reprisals against the civilian population for the Yugoslav Government’s refusal to accept imposed terms at Rambouillet militates against the assertion that this action constituted a good war for human

Yugoslavia. See Simon Chesterman & Michael Byers, *Has US Power Destroyed the UN?* LONDON REV. BOOKS, Apr. 29, 1999, at 29.

¹⁴ The use of force in collective self-defense is provided for in the North Atlantic Treaty, Apr. 4, 1949, Art. 5, TIAS No. 1964, 34 UNTS 243.

¹⁵ Individual duties are provided for in the African Charter on Human and Peoples’ Rights, June 17, 1981, Arts. 27–29, 21 ILM 59 (1982); the American Convention on Human Rights, Nov. 22, 1969, Art. 32, 1144 UNTS 123. The European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 UNTS 221, has no such provision.

¹⁶ In particular, the disruption of shipping on the Danube through the destruction of bridges.

¹⁷ UN CHARTER Art. 50.

¹⁸ Mary Robinson, UN High Commissioner for Human Rights, *Report on the Human Rights Situation involving Kosovo* (Apr. 30, 1999) <http://www.unhchr.ch/html/menu2/5/kosovo/kosovo_main.htm>.

¹⁹ GA Res. 53/141 (Mar. 8, 1999). The focus of these statements is measures “of a coercive nature with all their extraterritorial effects.” The same rejection must apply to the use of armed force. Compare Committee on Economic, Social and Cultural Rights, *The Relationship between economic sanctions and respect for economic, social and cultural rights*, General Comment 8, UN Doc. E/C.12/1997/8.

rights. The NATO bombing was disproportionate for being both excessive in its impact on the human rights of one civilian population and inadequate by dint of the absence of ground forces to protect the other population.

A schizophrenic view of state sovereignty has characterized the engagement. Yugoslav sovereignty remains undermined by the international military and civilian presence. The peace settlement simultaneously affirms the "commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia" and calls for "substantial autonomy and meaningful self-administration in Kosovo."²⁰ In Bosnia since the Dayton Accords, and now in Yugoslavia, sovereignty has become fluid and contingent,²¹ although this attenuation is obscured by the formal acceptance of the settlements by the respective internal parliaments. The doctrine of humanitarian intervention is predicated upon a presumed choice between state sovereignty and the protection of human rights. In reality, both are compromised. Further, the aftermath of intervention has seen a fresh wave of human rights violations and the curbing of political and economic independence through the constraints on internal reconstruction imposed by global economic and human rights institutions.²²

The peace deal also demonstrates many of these same tensions. It was brokered by a Russian negotiator, the Finnish President as the European Union's special envoy on Kosovo, and the U.S. Deputy Secretary of State. It was put to President Milošević and the Serbian parliament for acceptance. Its subsequent adoption by the Security Council illustrates the contrast between that body's marginalization and the desire to confer international legitimacy on the reconstruction of Kosovo, which was not possible for the use of force. While the Security Council's authority with respect to the latter has been undermined, it has been enhanced in the context of peace building.²³

The political settlement also constructs the Yugoslav state as a monolithic entity and ignores that it is rather "a complex set of interrelated but distinct institutions, relations, hierarchies, discourses, interests and players."²⁴ Conspicuous by their absence from the negotiations were players directly involved, for instance the Kosovo Liberation Army (KLA), the refugees, refugee agencies, governments that have taken in large numbers of refugees, and Serb civilians. The omission of military leaders on both sides required further negotiations with respect to implementation. The internationalization of the internal dispute by the commission of human rights abuses and the military action has displaced the agency of the local players and made them the passive objects of international proposals. Gaining the acceptance of the settlement by states—the discredited, criminally indicted, but internationally legitimate, leadership of the Yugoslav state, NATO members and Russia—was more important than ensuring local commitment, but the latter is also essential if the arrangement is to be workable.²⁵

The deployment of a civil and military force for the protection of the returning population reinforces the traditional international image of male protectors of women and

²⁰ SC Res. 1244, *supra* note 2, preamble.

²¹ *UN interim administration* [UNMIK] is the only government in Kosovo says Bernard Kouchner (Secretary-General's Special Representative in Kosovo and head of UNMIK, which is exercising legislative and executive power) (July 30, 1999) <http://www.un.org/peace/kosovo/news/99/jul99_4a.htm> [hereinafter Kosovo Archive].

²² While UN institutions played a limited role during the military campaign, a number are actively involved in the aftermath, including the UN High Commissioner for Refugees, UNICEF, the World Population Fund, the UN Development Programme, the World Health Organization, the UN Environment Programme, the human rights bodies, the International Criminal Tribunal for the former Yugoslavia, and the World Bank.

²³ Kofi Annan has argued that this "underscores" the Security Council's continuing indispensability. See Kosovo Archive, *supra* note 21, July 19, 1999.

²⁴ Sophie Watson, *The State of Play: An Introduction*, in *PLAYING THE STATE* 3, 10 (Sophie Watson ed., 1990).

²⁵ The cooperation of the Kosovar Albanian leadership in the Transitional Council and the KLA in disarming is especially important. See Kosovo Archive, *supra* note 21, Aug. 5 and July 16, 1999.

children victims,²⁶ an image that is somehow confused by the absence of “protectors” until the withdrawal of the Serbian forces. The consequences of conflict, including new targets for abuse, expose the simplifications and assumptions of dichotomies such as harmed/unharmed, protector/protected, displaced person/returnee, enemy/liberator, civilian/combatant and humanitarian/coercive. They call for nuanced assessment, inclusive negotiation, training in human rights (including gender issues) for all involved and a fully participatory reconstruction of a traumatized civil society.

Another responsibility of UN member states is to support the institutions previously created by the Security Council to achieve its objectives, including by holding perpetrators of crimes against humanity and genocide accountable before the International Criminal Tribunal for the former Yugoslavia.²⁷ Compromises at Dayton in 1995 made Milošević the effective guarantor of the Western stance on Bosnia, but Kosovo was excluded from that agenda. The subsequent unwillingness of NATO forces (under the guise of the Stabilization Force) to arrest indicted persons in Bosnia weakened the Tribunal’s authority and encouraged the assumption of legal impunity for those whose cooperation was needed. The bombing campaign by NATO sits strangely against its unwillingness to detain indicted persons in Bosnia-Herzegovina, even though its presence there is legitimated by the Dayton Accords. The indictment of Milošević (issued on May 28, 1999) affirms that the principle of international criminal accountability applies to heads of state, but, as in Bosnia, the arrest of accused is not included in the responsibilities of the international security presence in Kosovo.²⁸

These considerations weigh against concluding that, despite its commendable objectives, NATO has had a good war: its internal legitimacy, uncertain since the end of the Cold War, has been undermined before the completion of any formal reconceptualization of its role. As the U.S. “instrument of choice,” it has derogated from the international norms of nonintervention under the cloak of collectivity. Its uneasy relationship with Russia has been further strained. Consensus of the member states has been fragile. It stands accused of arrogance, carelessness and potentially of war crimes. The UN High Commissioner for Human Rights has stated that war crimes by any of the parties to the conflict—Serbs, NATO or the KLA—may come under the scrutiny of the Tribunal. It is hard to imagine that events in Kosovo have weakened the opposition of the United States to the concept of international accountability as formulated in the Rome Statute for an International Criminal Court. Moreover, they have highlighted the irony that it is prepared to bomb in the name of human rights but not to join institutions to enforce them.

Finally, the Kosovo intervention shows that the West continues to script international law, even while it ignores the constitutional safeguards of the international legal order. The instances since 1990 that are most frequently cited as evidence that humanitarian intervention is evolving as a doctrine of post-Charter international law were initiated by the West and involved action in non-Western states (Iraq, Somalia and Haiti). Other cases, typically of intervention by neighboring states, have not been unequivocally characterized as humanitarian intervention by their non-Western protagonists (India in 1971, Vietnam in 1979 and Tanzania in 1979) but, rather, framed in the traditional terms of self-defense. The alleged doctrine seems to exemplify international lawmaking by the West for its own application, in the name of its “civilizing” mission. Internal disorder and human rights violations are explained in terms of local nationalisms and power struggles without reference

²⁶ One commentator has commented on the “feminisation” of this conflict by the unwillingness to take risks with ground forces. Andrew Marr, *War is hell—but not being ready to go to war is undignified and embarrassing*, OBSERVER, Apr. 25, 1999, at 28.

²⁷ Security Council Resolution 1207 of November 17, 1998, deplores the continued failure of the Federal Republic of Yugoslavia to cooperate with the Tribunal.

²⁸ See SC Res. 1244, *supra* note 2, para. 9. The jurisdiction and mandate of the Tribunal are merely recalled in the preamble.

to other causes of violence such as economic intervention.²⁹ The West assumes that its wealth, power and assurance bestow a normative authority that discounts alternative views.³⁰ Accordingly, it is hard to envisage that other states would be able to undertake such a campaign, either unilaterally or together, against the wishes of permanent members of the Security Council and without being challenged by them.

At the same time, the commitment to human rights that humanitarian intervention supposedly entails does not mean equality of rights worldwide. The human rights of some people are more worth protecting than those of others. Military intervention on behalf of the victims of human rights abuses has not occurred in, inter alia, Sudan, Afghanistan or Ethiopia. It was woefully inadequate and delayed in Rwanda. The security of the East Timorese was affirmed as the responsibility of the Government of Indonesia by the agreements of May 5, 1999, between Portugal, Indonesia and the United Nations. Even when it became apparent that this obligation was not preventing the violence that followed the announcement of the referendum result in favor of East Timorese independence, the Security Council delayed authorizing intervention until Indonesian consent was obtained. It is better to be a refugee in Europe (where "they look like us") than in Africa,³¹ although greater efforts are also made to ensure that there is no expectation of long-term shelter from us. "Money for peace" is more likely to be found for some areas than for others.³² Such selectivity undermines moral authority. It is also reflected in legal scholarship, where, for example, interstate conflict in Central Africa has remained largely unremarked.

All these incidents serve to undermine the Charter on an ad hoc selective basis without providing clear articulation of the underlying principles, or even assurance of future acceptance by those who currently espouse them. The case of Kosovo may have highlighted the continuing chasm between human rights rhetoric and reality. It does not resolve the way this can be bridged.

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KOSOVO, WORLD ORDER, AND THE FUTURE OF INTERNATIONAL LAW

I. A POINT OF DEPARTURE

Perhaps more fundamentally than any recent international occurrence, the NATO initiative on behalf of the Kosovars has provoked extremely divergent interpretations of what was truly at stake, the prudence of what was undertaken, and the bearing of law and morality on this course of events. This divergence of perspectives can be suggestively framed by reference to the positions adopted by two highly respected and morally engaged international figures: Vaclav Havel, President of the Czech Republic, and Robert Fisk, correspondent and feature writer for the British newspaper *The Independent*.

Acknowledging that the tactics adopted by NATO had given rise to controversy, Havel, in an address to the Canadian Senate and House of Commons on April 29, 1999, affirmed what was for him beyond controversy about the Kosovo undertaking:

²⁹ See Anne Orford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 HARV. INT'L L.J. 443 (1997).

³⁰ See Stark, *supra* note 4, at 99.

³¹ "UNHCR is spending about 11 cents a day per refugee in Africa. In the Balkans, the figure is \$1.23, more than 11 times greater." T. Christian Miller & Ann M. Simmons, *Relief Camps for Africans, Kosovars Worlds Apart*, L.A. TIMES, May 21, 1999, at A1.

³² "The UN's consolidated humanitarian appeal for Kosovo is \$690 million, of which 58% has been met, while \$2.1 billion has just been pledged for regional construction. A UN appeal for \$25 million for Sierra Leone met profound international indifference and a mere 32% of the appeal has been covered." Victoria Britain, *Unrealistic humanitarians*, GUARDIAN, Aug. 4, 1999, at 16.