

HUMAN RIGHTS AND HUMANITARIAN INTERVENTION: THE LEGALITY OF THE NATO-YUGOSLAV-KOSOVO WAR

The panel was convened at 12:30 p.m., Saturday, April 8, by its Chair, Professor Marcella David, University of Iowa College of Law, Iowa City, IA, who introduced the panelists: Michael Matheson, Acting Legal Adviser, U.S. State Department, Washington, DC; Associate Professor Sean D. Murphy, George Washington University Law School, Washington, DC; and Professor Jules Lobel, University of Pittsburgh School of Law, Pittsburgh, PA.

The panelists considered the legality of the bombing of the Federal Republic of Yugoslavia, and the extent to which it presents a change in the law of intervention. Michael Matheson summarized the U.S. decision to intervene, while the consequences of that decision were debated by the other panelists.

JUSTIFICATION FOR THE NATO AIR CAMPAIGN IN KOSOVO

by Michael J. Matheson

There was broad consensus within NATO that armed action was required to deal with intolerable atrocities by the Federal Republic of Yugoslavia ("FRY") in Kosovo, but also a shared concern that the chosen justification not weaken international legal constraints on the use of force.

NATO states went through intensive discussion on this point. All agreed that NATO had to respond to the policy of brutal expulsions and atrocities. Yet no single factor or doctrine seemed to be entirely satisfactory to all NATO members as a justification under traditional legal standards. The Security Council had condemned Serb actions as a threat to the peace, but had not expressly authorized the use of force by NATO. Serb actions were a potential threat to the security of neighboring states, but had not, under traditional analysis, clearly reached the threshold of "armed attack" triggering the right of self-defense under Article 51 of the Charter. NATO had exercised particular responsibility for the stability of the Balkans, but the FRY had never been part of NATO or consented to a right of NATO intervention in its territory. The FRY had violated its obligations under international humanitarian agreements, but those agreements did not expressly authorize intervention by other states to enforce them. Finally, many NATO states—including the United States—had not accepted the doctrine of humanitarian intervention as an independent legal basis for military action that was not justified by self-defense or the authorization of the Security Council.

Consequently, NATO decided that its justification for military action would be based on the unique combination of a number of factors that presented itself in Kosovo, without enunciating a new doctrine or theory. These particular factors included: the failure of the FRY to comply with Security Council demands under Chapter VII; the danger of a humanitarian disaster in Kosovo; the inability of the Council to make a clear decision adequate to deal with that disaster; and the serious threat to peace and security in the region posed by Serb actions.

This was a pragmatic justification designed to provide a basis for moving forward without establishing new doctrines or precedents that might trouble individual NATO members or later haunt the Alliance if misused by others. As soon as NATO's military objectives were attained, the Alliance quickly moved back under the authority of the Security Council. This process was not entirely satisfying to all legal scholars, but I believe it did bring the Alliance to a position that met our common policy objectives without courting unnecessary trouble for the future.