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THE ATTACK ON SRJ – AN ATTACK ON PUBLIC INTERNATIONAL LAW

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Abstract. *Ćele Kula can be understood as a symbol for the role which the Federal Republic of Yugoslavia is currently playing with regard to the United Nations, the chapter VII of its Charter, and the supremacy of public international law to politics. NATO attack on FRY was neither legal nor legitimate, nor can it be justified under present public international law. It must be considered as an attempt to revolutionarily amend the United Nations Charter. The negligence of the NATO war on FRY by UN Security Council Resolution 1244 (1999) can be seen as the first step towards a final and definite reverse of the NATO attempt. So far, neither KFOR, nor UNMIK succeeded in even laying a fundament for the implementation of the operative part of the resolution. Serious human rights issues raised by the war and the lack of law and order after the implementation of the Military-technical agreement of 15 June 1999 are at stake and also threaten the necessary success of the mission of the United Nations. The final success, which under the Charter of the United Nations and current public international law can be only a political and not a military one, will depend on Serbs and Albanian Kosovars. As soon as they find a way back to mutual understanding and peaceful cohabitation, public international law and the United Nations Charter will have got the better of NATO and its efforts to continue with the means and methods which were characteristic for the period of the former Cold War. It depends on a peaceful settlement of the Kosovo issue by Serbs and Kosovar Albanians as to whether finally NATO will be subject to law. Ćele Kula can also be understood as symbol for the possibility of an understanding of a minority by a majority, especially as the majority was also a minority in the past.*

Key words: *NATO war on FRY, UN Charter amendment by revolution, UN Security Council resolution 1244 (1999), UNMIK, KFOR, transitory regime for Kosovo, state of necessity, state responsibility*

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INTRODUCTION

When I visited the impressive city of Niš for the first time in 1964, together with my father and two of my brothers, we were shocked more than fascinated by the Ćele Kula close to Niš on the way to Dimitrovgrad. We were told that the tower had been erected by the Osman pasha in remembrance of his victory over the Serbs under Stephan Sindjelić on the hill Čegar in 1809. Nearly 1000 skulls of Serbs, who blew themselves up in order not to be captured by their enemies, were walled in. The first Serbian uprisal against the Otoman Empire had failed, decades later Serbia was successful and, inspired by Serbia, the whole Balkans became independent of the Otoman Empire. Since then the tower reminds of some of the victims that paved the way towards Serbian and the whole Balkan's independence.

A year ago, having been confined to helpless watching of NATO air-raids against the Federal Republic of Yugoslavia, being cut off any regular contact with collegues and friends in the Federal Republic of Yugoslavia, and trying to get at least more objective information on the events by comparing Serbian and Russian news to Western media reports, the Ćele Kula once more came into my memory, but now as a symbol for Yugoslav victims on the way of the whole world towards a victory of public international law over one of the last heritages of the Cold War: the North Atlantic Treaty Organisation. It might seem ridiculous to discuss a future without a NATO or at least with a NATO subject to strict subordination under public international law in front of friends and collegues who are still suffering tremendously from NATO warfare and NATO inspired policy of blockade of the Federal Republic of Yugoslavia. Such an undertaking might even seem to be scientifically bizarre in a time when outside the Federal Republic of Yugoslavia a discussion within public international lawyers, whether the NATO warfare was legal or at least legitimate, still has not come to its end.[1] I am convinced that as soon as also those specialists in public international law that continue to speak of an internationally legitimate so-called humanitarian intervention or of a state of necessity or help in need against severe and systematic violations of human rights will change their mind, once they see the pictures of people killed by the NATO and read the autopsy reports or investigation reports on injured persons or material damage caused by NATO warfare. The two volumes of documentary evidence on NATO Crimes in Yugoslavia, edited by the Yugoslav Ministry of Foreign Affairs,[2] will certainly be contended by some with the argument that the

[1] M. G. Kohen, L'emploi de la force et la crise du Kosovo:Vers un nouveau désordre juridique international. In : Revue Belge de droit international 1999/1, pp 122–148 (123) points, however, on the fact that the majority of public international lawyers also outside the Federal Republic of Yugoslavia holds that the NATO war was illegal and illegitimate. For negative reactions on the NATO warfare in the state practice see eg G. Nolte, Kosovo und Konstitutionalisierung: Zur humanitären Intervention der NATO-Staaten. In: 59 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1999/4, pp 941 – 960 (946 – 948). See also J.-G. Sarkis, Les réactions moyen-orientales à la guerre du Kosovo. In : 78 Revue de Droit International De Sciences Diplomatiques et Politiques 2000/1, pp 47 - 72. For references on the various positions on the Yugoslav crisis taken by international doctrine see also D. Thürer, Der Kosovo-Konflikt im Lichte des Völkerrechts. In: 38 Archiv des Völkerrechts 2000, 1 – 22 (4 f fn 10), who himself belongs to the third group of authors mentioned by Kohen. Thürer proposes a cautious opening of the system of regulations concerning the use of force by means of dynamic interpretation.

[2] NATO Crimes in Yugoslavia. Documentary Evidence. Vol I: 24 March – 24 April 1999, Belgrade, May 1999;

evidence has not or has not sufficiently been biased. Nevertheless, violations of the law in bello by NATO aircrafts and troops will come to light by this evidence, responsibility will ensue, even if it may take a long time. It is correct that the law in bello must be differentiated from the ius ad bellum.[3] But the obvious incapability of avoiding violations of the humanitarian law even in a so-called clean or technologically most advanced war falls back to its hypothetic legitimacy and, thus, to the ius ad bellum. To be entitled to fight violations of human rights by starting a war and causing dead and injured civilians can hardly be argued. The life of only one single of these victims, named Vesna Milić from Surdulica,[4] for example, cannot be set off against even hundreds of lives hypothetically saved by the war leading to her death. Vesna Milić had only one life and this was destroyed once and forever. It ensues from the nature of a human right as an inalienable right of an individual that each case of violation of a right must be taken seperately and cannot be overruled by even a mass of violations.

But it is not intended to use this occasion of the 40th anniversary of the Law Faculty of Niš to summarize the scientific discussion abroad or to deepen the own arguments, which were raised in May 1999.[5] It is still held that the war on Yugoslavia was a war of aggression and, thus, was an international crime according to the law on state responsibilty as drafted for codification by the International Law Commission (Art 19 par 2 lit a Draft Rules on State Responsibility). It infringed the prohibition of force in the international relations, a law of peremptory nature, and could not be justified by Chapter VII of the United Nations Charter as a whole or Art 51 particularly. The provision of Art 51 UN Charter consumes the general rule of state of necessity with respect to the United Nations Charter. Even if it is acknowledged that Article 51 has been extended to non-member states of the United Nations by overruling customary law, this extension does not cover de-facto regimes or a people fighting for independence. For this purpose the conflict between classical and socialist public international law remains unsettled, no generally accepted practice and legal opinion can be adduced for such an extension. Furthermore, as protection against genocide and serious and systematic violations of human rights are also considered as part of ius cogens, a legal conflict between the prohibition of use of force and prohibition against genocide arises. Both principles have the same legal force. Both principles must be interpreted and implemented with mutual respect for each other. This excludes forceful intervention. The authority to settle the conflict between these principles on the political as well as legal level lies with the UN Security Council, being responsible for peace and international security and being bound to the purposes and principles of the United Nations. Thereby is included its commitment to the UN Charter as a whole and to public international law in general.[6] In principle, the International Court of Justice is also competent to deal with such a conflict on a legal level, whereas it acted rather hesitantly

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Vol II: 25 April – 10 June 1999, Belgrade, July 1999, also known as so-called Whitebook.

[3] See chapters II, III, and IV of the contribution of Thürer (fn 1), pp 4 – 20.

[4] See fn 2, vol II, p 49.

[5] See M. Geistlinger, Bomben auf das Völkerrecht. In: ZOOM 2/99, pp 5 - 8. A similar, but considerably expanded reasoning can be found in: M. Bothe, B. Martenczuk, Die NATO und die Vereinten Nationen nach dem Kosovo-Konflikt. Eine völkerrechtliche Standortbestimmung. In: Vereinte Nationen 1999/4, 125 – 132 and in: Kohen (fn 1).

[6] See M. Bedjaoui, Nouvel ordre mondial et contrôle de la légalité des actes du Conseil de Sécurité. Bruxelles 1994, pp 47 f.

so far in the cases initiated by the Government of the Federal Republic of Yugoslavia against the NATO member states concerning the legality of the use of force.[7] The competence of these bodies as well as the law on state responsibility, as far as drafted on the basis of international customary law by the International Law Commission exclude the admissibility of any reference to extra-legal state of necessity. Art 33 of the Draft Articles on State Responsibility holds that a state of necessity cannot be invoked for violating a peremptory international norm or a treaty which explicitly or implicitly excludes a state of necessity as justification of a violation of obligations emanating from this treaty. The UN Charter can and must be understood as such a treaty. Also the argument of a reprisal raised by Knut Ipsen[8] is not able to legitimize the action of NATO, as countermeasures are not allowed to interfere with peremptory norms, which excludes any use of force as a countermeasure. The warfare by NATO also lacks any proportionality, which would be a further prerequisite of the international admissibility of a countermeasure.

The desparate search for arguments in order to legitimize the warfare by NATO in journals on public international law in NATO and EU member states can be explained by the political as well as legal risks which are at stake for all politicians in these states bearing responsibility for the decision to go to war against the Federal Republic of Yugoslavia or to justify the war,[9] as this happened by the EU which is currently continuing a war with other means than the use of force.[10] The risks, provided impartiality of the Tribunal, in theory could even embrace the placement on trial before the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991.[11] So far, respective initiatives were not dealt with impartially.[12]

1. Supremacy of Politics to Law – the Connex between the Yugoslav Crisis with the End of the Former Soviet Union from an International Legal Perspective

The Yugoslav Crisis must be seen as being directly connected to the end of the former Soviet Union. It can be assumed that without the end of the former Soviet Union the

[7] See the documentation in: Jugoslavenska revija za međunarodno pravo 1999/1-3, pp 207 – 276.
[8] See K. Ipsen, Der Kosovo-Einsatz – Illegal? Gerechtfertigt? Entschuldbar? In: Die Friedenswarte 1999, 1-2, pp 19 – 23 (23).
[9] Decision of the Council of 8 April 1999, as included by Common Position 1999/318/CSFP, OJ L 123/1 of 13 May 1999 ("Whereas on 8 April 1999 the Council concluded that extreme and criminally responsible policies and repeated violations of United Nations Security Council Resolutions by the Federal Republic of Yugoslavia (FRY) had made the use of severest measures, including military action, both necessary and warranted;").
[10] See eg Common Position 1999/357/CSFP of 10 May 1999 of the Council concerning additional restrictive measures against the Federal Republic of Yugoslavia of 10 May 1999, as amended on 24 June 1999; 1999/604/CSFP of 3 September 1999 of the Council amending Common Position 1999/273/CSFP of the Council concerning a ban on the supply and sale of petroleum and petroleum products to the FRY.
[11] Established by UN Security Council Resolution 827 (1993). See also Ch. Tomuschat, Völkerrechtliche Aspekte des Kosovo-Konflikts. In: Die Friedenswarte 1999, 1-2, pp 33 – 37 (37).
[12] See eg Request of 6 May 1999 in the International Criminal Tribunal for the Former Yugoslavia by Michael Mandel et al that the prosecutor investigate named individuals for violations of international humanitarian law and prepare indictments against them pursuant to Articles 18.1 and 18.4 of the Tribunal Statute. In: http://jurist.law.pitt.edu/icty.htn of 14 July 1999.

breaking up of the former Yugoslavia as a whole would not have happened. This fact should be kept in mind when drawing conclusions for the international legal order from the case of Yugoslavia. There are many authors in public international law that welcome a completely new role and strengthened position of the UN Security Council. The UN Security Council resolutions concerning Libya, Irak, Haiti, Somalia, Rwanda, Yugoslavia and others are adduced to underlie a new competence of the Council in enforcing international legal norms with erga omnes character.[13] At the same time these authors point at a new understanding of the UN Security Council's responsibility for the establishment and maintenance of international peace. It is held, that peace, as can be seen from the establishment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, does not any more mean pure absence of force, but is filled up by the values of the so-called international community. This expanded role of the UN Security Council is understood as newly developed safeguard for combating international crimes as drafted for codification by the International Law Commission.[14] All this is said to have happened in the decade that passed since 1989.

From a legal point of view the new practice of the UN Security Council has been correctly classified as an amendment to the UN Charter, clearly transgressing the limits of simple dynamic interpretation of the Charter.[15] To become law and not only remain politics all criteria for international customary law must be fulfilled. So far, coherence in practice as well as in legal reasoning[16] is missing, so that the UN Security Council, obviously driven by the one superpower surviving from the period of the Cold War, the United States of America, opens the post Cold War period by continuing to deal with public international law as before, by trying to maintain the supremacy of politics over law in international relations. Prior to the NATO war on the Federal Republic of Yugoslavia the danger that once the UN Security Council will no longer be willing to hold track with the convictions of the so-called international community, which in their very essence are perceived by those authors as the convictions of the US, NATO and EU, was seen in the potential loss of credibility of the United Nations as a whole.[17] The NATO war demonstrated that this was not the real danger of transgressing the limits of law by dealing with public international law merely politically. What happened was that politics started to act outside any legal framework, thereby endangering the whole legal framework. The United Nations, themselves, could escape, because they were fully ignored.

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[13] For many others see eg H. Endemann, Kollektive Zwangsmaßnahmen zur Durchsetzung humanitärer Normen. Frankfurt/Main 1997, p 459.

[14] See Endemann (fn 13), p 384 – 399.

[15] See A. Stein, Der Sicherheitsrat der Vereinten Nationen und die Rule of Law. Baden-Baden 1999, pp 311, 394. In principle a comparable view is hold by B. Martenczuk, Rechtsbindung und Rechtskontrolle des Weltsicherheitsrats. Die Überprüfung nichtmilitärischer Zwangsmaßnahmen durch den Internationalen Gerichtshof. Berlin 1996, pp 246 f and 288 f.

[16] This can be explained by completely different motives of the veto-powers in the UN Security Council for not exercising their right to veto. For the Peoples' Republic of China's motives see eg K. Möller, Der stille Teilhaber. China zwischen Eigeninteresse und Kooperationsbereitschaft. In: 47 Vereinte Nationen 1999/4, pp 140 – 144.

[17] See for many others eg Endemann (fn 13), p 459.

The danger for the credibility of the United Nations started with the implementation of UN Security Council Resolution 1244 (1999). This resolution, which is extensively handled by the UN Secretary General and by his Special Representative, created a system of de facto occupation of the Kosovo, still being a part of the Federal Republic of Yugoslavia, by the United Nations, acting via KFOR and UNMIK.[18] UNMIK orients on an understanding of normal police duties that include a law enforcement authority. Also international security presence is understood by relying on armed forces being entitled to enforcement as far as necessary for the fulfilment of their tasks under extraordinary circumstances of armed conflict.

The NATO, as well as both the UN Security Council and the UN Secretary General concerning the Federal Republic of Yugoslavia, demonstrate a policy of trial and error, which is expression of a still insecure state of public international law, if one is aware that normally nearly a whole generation is necessary in order to end up at a new customary legal norm. Scholars do not sufficiently take into account that a fundamental conceptual difference concerning practically all parts of public international law existed between the so-called former East and the so-called former West and that law as a whole according to the Soviet concept and state behaviour, but by a realistic view, also to a significant extent according to US state practice was subordinate to politics. It cannot be expected that only the disappearance of one decisive protagonist of the socialist conception of public international law, which, however was not the only protagonist, would immediately lead to the overcoming of all differences that existed before.

The dissolution of the former Soviet Union not only meant the end of a state or even of a superpower, but also initiated a period of insecurity concerning the state of public international law as a whole. When the Institute of State and Law of the Soviet Academy of Sciences started the edition of its seven volumes' course on public international law in 1989,[19] it became visible that the progressive loss of state power of the Soviet Union went hand in hand with an initial confession of Soviet scholars to the respect of the primacy of public international law over international politics. This orientation, which before was held by non-aligned states and other, mostly small or otherwise powerless states and authors predominantly coming from such states was seen as one of the most important results of the politics of perestroika under the last Soviet president Gorbachev.[20] Whereas throughout the whole period of so-called peaceful co-existence of the two legal concepts forming a set of international rules accepted by both of them by concordance of their wills as basis for their mutual relationships, a period of constant approximation of the two positions to each other could be witnessed, which was very much supported by the non-aligned and permanently neutral states, fundamental differences remained. In 1958, the Yugoslav President Josip Broz Tito defined the Charter of the United Nations as the set of

[18] For more details see M. Geistlinger, The Legal Status of Kosovo under the United Nations Security Council Resolution 1244 (1999). In: VIII Medzinárodné Otázky 1999/4, pp 80 – 89 (86 f).

[19] V. N. Kudryavtsev (main editor), Kurs mezhdunarodnogo prava v semi tomakh. Moskva 1989, see I, p 14. Further deveoped by N. A. Ushakov, Mezhdunarodnoe pravo: osnovnye ponyatiya i terminy. Moskva 1996, p 6 and based on a historical approach by G. K. Dmitrieva, I. I. Lukashuk, Stanovlenie mezhdunarodnoy normativnoy sistemy. In: Russian Yearbook of International Law 1995. Sankt-Peterburg 1996, pp 7 – 39.

[20] See especially G. I. Tunkin, On the Primacy of International Law in Politics. In: W. E. Butler (ed), Perestroika and International Law. Dordrecht et al 1990, pp 5 – 12 and other contributions to this study.

rules which based the concept of peaceful co-existence, on the one hand, but which needed in concrete implementation on the other hand.[21] In 1990 this process still had not come to its end, as can be seen from the course on public international law, just to take one example, by Smilja Avramov and Milenko Kreća.[22]

Looking at the substance of these differences, many of them could be reduced to a theoretical trimming of US and Soviet imperialism respectively. Consequently, the falling apart of one imperialism, at least as long as the Russian Federation was not able to step into the political power of the former Soviet Union, was used by the other and its allied powers to either peacefully or militarily impose their will on many states politically and economically shakened by the end of the former Soviet Union. The mechanisms used to this end were not only NATO, EU and the UN Security Council , as well as the UN Secretary General, but also international finance organisations and to a certain degree UN special organisations, the Council of Europe and the Organisation of Cooperation and Security in Europe.[23]

Theoretically, the current period could be called a period of searching for a new consensus as a sociological basis for universally recognized and accepted legal norms. The very imperialist nature of this search, where political and economic influence, redistribution of access to natural resources, strategic interests, use of international water-ways and other projects of transport play an important role, is hidden behind a universal moralism. Not for the first time in history, if you think of the Swedish Russian confrontations in the seventeenth century or on Hitler's reasoning in order to open the second World War, and other examples, the protection of human rights served as justification for politics and media, in order to initiate concrete political measures. Russian scholars at the end of the former Soviet Union saw the danger and applied to the supremacy of public international law over international politics. It will depend on all scholars on public international law to take the war on Yugoslavia as a warning signal, as Ćele Kula, for what could happen everywhere and to everybody who is not powerful at a specific moment of time, if the supremacy of public international law is not preserved.

2. The Attack on the SRJ – An Attempt to Overthrow the United Nations Charter by Revolution

The NATO war on the Federal Republic of Yugoslavia contributed a new corner-stone to the discussion on a reform of the United Nations Charter. This discussion had been opened up by the establishment of an open-ended working goup by the UN General Assembly in 1992, and culminated so far in 1995 around the 50th anniversary of this organisation, but did not lead to any concrete results. The composition of the UN Security Council and the underlying system of two classes of states within the United Nations, the

[21] J. B. Tito, Govor prilikom promocije za počasnog doktora prava Univerziteta "Padjajdaran" u Bandungu. In: JRMP 1959/1, pp 8 – 13.
[22] See eg S. Avramov, M. Kreća, Međunarodno javno pravo. Beograd 1990[9], pp 9 – 12.
[23] In the long-run it must be doubted whether the so-called consensus-minus-one decision, which was for the first time adopted within the CSCE at the occasion of Yugoslavia can be considered a success or a failure weekening the political position and effectivity of the later OSCE as a whole.

veto-powers dominating non-veto states, was one of the major issues of this reform-initiative.[24] Rather radical proposals were brought forward by different initiators concerning the collective security issue.[25] The idea of UN standing forces was one of several proposals and became quite a controversial issue within the United States.[26] For many, an army under UN control to implement a world order, sponsored by the United States, was simply not acceptable. The United States' Government preferred a mandate given to the NATO, which secured the US command as well as the US dominance. This could be seen on the third stage of the development of the Yugoslav Crisis, if we consider warfare in Slovenia, Croatia, and Bosnia and Hercegovina as also a part of this crisis. At the same time the mandatory system of cooperation between United Nations and NATO was deemed to give sufficient response to a constant growing political pressure on developing a more progressive approach by the UN Security Council.[27]

NATO warfare in Bosnia and Hercegovina was based on a mandatory system, in theory, but not in full practice being based on the Charter of the United Nations. The NATO mandate was continuously widened from operation "Sharp Guard" via operation "Deny Flight" to operation "Deliberate Force".[28] The practice in Bosnia and Hercegovina showed that the respective principles and the mechanisms layed down by the Charter were and continue to be applied in an extremely extensive manner, transgressing the issue of applying and interpreting the UN Charter and creating practice beyond the legal framework of the UN Charter. Serious doubts, therefore, must be raised concerning the legality of the practical implementation of the respective resolutions of the UN Security Council, for which internal policy issues in the United States obviously played a decisive role.[29] Bosnia and Hercegovina, but also other cases before, gave reason for initiating a debate on legitimacy and started a period of revival of the theory of natural law in international relations. In an article, the title of which "How Much Force in Humanitarian Intervention?" could not better denominate an effort to revive the ancient theory of bellum iustum, Raimo Väyrynen legitimizes NATO bombing of Bosnian Serbian sites of heavy weapons as "a limited, politically informed use of military force defended on purely humanitarian grounds" as having been able to change the course of events towards a negotiated solution

[24] See eg A. K. Henrikson, Great powers, super powers, and global powers. Managerial succession for a new world order. In: D. Bourantonis, M. Evriviades (ed), A United Nations for the Twenty-First Century. The Hague et al 1996, pp 65 – 86 ; V.-Y. Ghebali, United Nations reform proposals since the end of the Cold War : An overview. In: M. Bertrand, D. Warner (ed), A New Charter for a Worldwide Organisation? The Hague et al 1997, pp 79 – 111 (84 f).

[25] See Ghebali (fn 24), pp 86 f, 92 – 98.

[26] See Ghebali (fn 24), p 95 with further references.

[27] For many others see eg O. A. Otunnu, The Peace-and-Security Agenda of the United Nations: From a Crossroads into the New Century. In: O. A. Otunnu, M. W. Doyle (ed), Peacemaking and Peacekeeping for the New Century. Lanham et al 1998, pp 297 – 325 (312).

[28] For the description of the implementation and extent of these operations see eg A. Holstein, Das Verhältnis des Sicherheitsrates der Vereinten Nationen zu NATO und OSZE. Stuttgart et al 1996, pp 232 – 239, whose legal evaluation on pp 239 - 242, however, is not convincing; for a broader historical context with reservation as to many of his legal conclusions see also M. Pape, Humanitäre Intervention. Baden-Baden 1997, pp 218 - 250.

[29] See eg St. Hoffmann, Humanitarian Intervention in the Former Yugoslavia. In: St. Hoffmann, The Ethics and Politics of Humanitarian Intervention. Notre Dame, Indiana 1996, pp 38 – 60 (58).

of a crisis.[30] As mentioned above, Stanley Hoffmann, the editor of this study, made clear that in the case of Bosnia and Hercegovina there were also other interests at stake than purely humanitarian grounds, Väyrynen's proposal, thus, does not even withhold its own editing.

The Russian Federation and the People's Republic of China considered the NATO air-raid on Bosnian Serbs at the latest since 7 September 1995 to lie beyond the framework of the decisions of the UN Security Council, but were not able to carry their draft of a UN Security Council resolution asking for an immediate end of NATO bombing.[31] The obvious abuse of discretion by NATO in the Bosnian case, which is not a question of political or ideological attitude, but of legal evaluation, destroyed any possiblity of continuing the path of mandating powers by the UN Security Council to NATO. It can have consequences also for NATO's future role in peacekeeping, as it seems more the US' reluctant role vis-à-vis UN peacekeeping which is decisive for more effectivity of SFOR implementation of the Dayton Agreement than UNPROFOR implementation,[32] if such effectivity can be proved at all.

The issues of Kosovo and of NATO warfare on the Federal Republic of Yugoslavia, therefore, could only be dealt with, in a manner, whereby NATO and EU wanted to have them settled, clearly outside the legal framework of the Charter of the United Nations. They are an attempt of a revolutionary overthrow of the VIIth Chapter of the UN Charter. This is openly confessed by politicians as well as international lawyers, even if they do not use the word "revolution", but are speaking of "amendments in public international law which happen more informally than in national legal orders".[33] They argue that the system of collective security as laid down by the UN Charter and the composition of the UN Security Council reflect the balance of powers in 1945, with amendments in 1963/1965, and no longer correspond to the present state of political powers.[34] As no change reducing the political weight of a permanent member to the UN Security Council can be expected by means of negotiations and the legal procedure for amending the UN Charter for many appears to be an unsurmountable hindrance,[35] at least for the actual moment, revolution remains the only way out. The Yugoslav Crisis was and continues to be a test case.

The method and means of how the NATO warfare has been ended can be considered

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[30] In: Hoffmann (fn 29), pp 1 – 11 (9).
[31] See Holstein (fn 28), p 239.
[32] See W. Biermann, M. Vadset, After Dayton. Write off the UN? In: W. Biermann, M. Vadset (ed), UN Peacekeeping in Trouble: Lessons Learned from the Former Yugoslavia. Aldershot et al 1999, pp 349 – 369 (363). For possible further consequences which could touch at the very essence of NATO itself and which continue stay at stake as long as NATO will be involved in Kosovo see V. Rittberger, Die NATO in den Fallstricken des Kosovo-Konflikts. In: 74 Die Friedenswarte 1999, 1-2, pp 24 – 32.
[33] The position of a politician combined with that of an international lawyer, trying to legitimize a revolutionary development of public international law, even wider than the UN Charter itself, is held, for example, by C. Kreß, Auf dem Weg zum Individualschutz. In: Frankfurter Allgemeine Zeitung, 31 December 1999, p 7. Creß advises the German Ministry of Justice in matters of public international law.
[34] For many others see eg Pape (fn 28), pp 288 f.
[35] See Art 108 and 109 UN Charter and for the proposals currently under discussion by the Charter Committee W. Karl, B. Mützelburg, Commentary of Art 108 and 109 UN Charter. In: B. Simma (ed), The Charter of the United Nations. Oxford 1994, pp 1163 – 1189 (1178, 1184 – 1189).

to be a first success in repulsing this attempt of revolutionary amendment to the UN Charter. It was the UN Security Council which established a provisional legal framework for Kosovo. It is KFOR, which is not synonymous with NATO, which is responsible for international security presence under the supreme authority of the United Nations. Thus, no direct connection between the war by NATO and the post-war regime, lead by the UN, has been created.[36] The Ćele Kula, in so far symbolizes Yugoslav victims of a war, which is not mentioned at all by UN Security Council Resolution 1244 (1999). United Nations and their principal organs returned to their agenda, as if nothing contrary to the UN Charter had happened. Some would have liked to find a reference to the illegality of the NATO war against the Federal Republic of Yugoslavia or a clause on responsibility in this resolution. From the point of view of public international law diplomats achieved much more: the punishment by complete disregard. The NATO war was strong enough to kill Yugoslav people, damage the property of the Yugoslav people and devastate a state, but, so far, it could not even shake the post war international legal order.

3. THE CASE OF KOSOVO – A CONTINUING CHALLENGE OF THE RESPONSIBILITY OF THE UNITED NATIONS

The establishment of the supreme authority and final responsibility of the United Nations for helping the Serbian and Albanian parties to the Kosovo issue in settling this conflict includes an enormous risk for this organisation and the effectivity as well as the future of its Charter. What can be called a victory of the UN system against the attempt of revolution can turn out as Pyrrhic victory at any future moment. The NATO war has worsened the point of departure for a successful mission of the United Nations considerably. The war caused new and enormous humanitarian problems, violated the principle of respect of human rights itself, did not decide the Kosovo issue, but made the decision even more difficult than it had been before. Existing channels of contacts between the parties have been destroyed, new partners must be found, new channels are needed for development. The lack of any effective order, as soon as the Military–technical agreement between the international security force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia[37] was implemented, and which still could not be filled sufficiently, gave rise to another humanitarian disaster, the displacement of approximately 240.000 Serbs from Kosovo accompanied by dozens of murders and kidnappings and by devastation of property.[38] The credibility of the United Nations in humanitarian matters and far beyond is as much at stake as it was in fighting violations of human rights of the Albanians in Kosovo.

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[36] For more details see Geistlinger (fn 18), p 87: the decisive sentence on this page has been misunderstood by the editors and changed without being authorized by the author: It must read: "The regime needs to be called de facto occupation, as NATO and neither the United Nations, nor even KFOR had led the war against the Federal Republic of Yugoslavia and as the respective laws of conflict ruling the rights and duties of occupying powers … ".

[37] See UN Doc S/1999/682 of 15 June 1999, pp 3 – 10.

[38] For further details see eg B. Ward, The failure to protect minorities in Post-War Kosovo. In: 11 Helsinki Monitor. Quarterly on Security and Cooperation in Europe 2000, 1, pp 37 – 47.

The UN Secretary General and his Special Representative have been endowed with vast competences and the Special Representative, as can be seen from the contents of 54 UNMIK regulations, which have been adopted by 1 May 2000, is exercising his competences in an extensive manner. Nevertheless, neither he, nor UNMIK, nor KFOR were able to settle the humanitarian issue up to now. The political and legal issues reach far beyond any initiatives undertaken so far. Both, KFOR as well as UNMIK, are still in the process of establishing the fundaments for fulfilling the list of tasks formulated by UN Security Resolution 1244 (1999).[39] They are part of a transitory regime which aims at "facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords".[40] This process, therefore, continues to depend on both parties to the Kosovo issue, Serbs as well as Albanian Kosovars. The formula chosen by the UN Security Council is very vague and gives room to a vast field of activities and possible solutions. The Rambouillet accords are not any more a bible, they are a measure of orientation, balanced by the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and by the demilitarization of the UCK.[41] The final victory over the attempt of revolution by the NATO against the United Nations Charter will be a political, and not a military one. This victory will not and cannot be a success of the United Nations, themselves. They can facilitate a victory, but the victory will be a success of the parties.

The Ćele Kula nearby Niš gives rise to hope. It reminds of a former minority having changed to a majority in independent Serbia, but which due to its own history might have preserved a compassion with the needs and political wishes of a minority. The search for compromise and a political solution, which, irrespective of any NATO war on Yugoslavia, cannot be torn away from Serbs and Albanian Kosovars, demands for an understanding of the other side. It must be admitted that mutual violence, mutual extinguishment of lives, mutual displacement, and mutual devastation of property, are not a good basis for mutual understanding and further peaceful cohabitation. But under the United Nations Charter and the principles and values universally laid down, which have been deeply inspired and influenced by the former Yugoslavia and her universal role as one of the most prominent non-aligned countries, there is no other way to a solution. It is not only peace and prosperity for you and your children that depend on your political success, it is the final victory of public international law over NATO, which depends on you.

[39] See N° 9 – 11 of the resolution.
[40] See N° 11 lit e together with N° 9 lit d of the Security Council Resolution 1244 (1999).
[41] See N° 11 lit e together with N° 8 of Annex 2 to the resolution.

NAPAD NA SRJ – NAPAD NA MEDJUNARODNO JAVNO PRAVO

Michael Geistlinger

Ćele Kula se može shvatiti kao simbol za ulogu koju Savezna Republika Jugoslavija danas igra u odnosu na Ujedinjene nacije, poglavlje VII njene Povelje i nadmoć javnog medjunarodnog prava nad politikom. Napad članica NATO pakta na SRJ nije bio ni legalan ni legitiman, niti se može opravdati po sadašnjem medjunarodnom javnom pravu. On se mora smatrati kao pokušaj za revolucionarnu promenu Povelje Ujedinjenih nacija. Zanemarivanje rata članica NATO pakta protiv SRJ Rezolucijom 1244 Saveta bezbednosti Ujedinjenih nacija (1999) može se posmatrati kao prvi korak prema konačnoj i definitivnoj rezervi pokušaja NATO pakta. Ni KFOR ni UNMIK dosada nisu uspeli da postave osnove za izvršenje operativnog dela Rezolucije. Ozbiljni problemi humanitarnog prava koje je rat pokrenuo i pomanjkanje prava i reda nakon izvršenja Vojno-tehničkog sporazuma od 15. juna 1999. godine su u opasnosti, a ugrožavaju i neophodan uspeh misije Ujedinjenih nacija. Krajnji uspeh, koji po Povelji Ujedinjenih nacija i medjunarodnom javnom pravu može biti samo politički a ne vojni, zavisiće od Srba i Albanaca sa Kosova. Čim oni pronadju put povratka ka uzajamnom razumevanju i mirnom saživotu, javno medjunarodno pravo i Povelja Ujedinjenih nacija nadmašiće NATO i njegove napore da nastavi sa sredstvima i metodama koji su bili karakteristični za period prethodnog hladnog rata. Od mirnog razrešenja problema Kosova od strane Srba i Albanaca sa Kosova zavisiće da li će NATO konačno biti u skladu sa zakonom. Ćele Kula se može shvatiti i kao simbol za mogućnost razumevanja manjine od strane većine, posebno kada je većina takodje bila manjina u prošlosti.

Ključne reči: *rat NATO zemalja protiv SRJ, revolucionarna promena Povelje UN, Rezolucija 1244 (1999.) Saveta bezbednosti UN, UNMIK, KFOR, prelazni režim za Kosovo, stanje nužde, državna odgovornost*