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**The United Nations' Failure to Enforce International Law in Palestine and
the Need of Effective Mechanisms of International Criminal Law:
The Case of Jenin**

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(1) The cancellation of the Jenin investigation and the status quo in the Security Council

In resolution 1405 (2002), adopted on 19 April 2002, the United Nations Security Council “welcomed” “the initiative of the Secretary-General to develop accurate information regarding recent events in the Jenin refugee camp through a fact-finding team” and “requested” him to “keep the Security Council informed.” In the meantime, it has become known to the international public at large that the “fact-finding team” of the Secretary-General never started its work; the formulations in the Security Council’s resolution, like those in virtually all Security Council resolutions on Palestine since 1967, have remained dead letter.

The total failure of the United Nations system to undertake an independent investigation of the grave violations of international humanitarian law by the Israeli occupying forces in Palestine has highlighted once more the predicament of the United Nations Organization in all matters related to the Palestinian right of self-determination in general and to the continued hostile, illegal occupation of Palestinian land in particular. The attitude of the Secretary-General was characterized by defeatism: when confronted with the Israeli rejection of the fact-finding team’s visit, he gave entirely up on the plan – a plan that anyway was merely “welcomed,” not mandated by the Security Council.

It is an undeniable fact of recent United Nations history that the Security Council – in sharp distinction from its resolutions concerning Arab countries such as Iraq or Libya – did not base any of its resolutions regarding Palestinian issues (including the one dealing, inter alia, with the Jenin investigation) on Chapter VII of the Charter. This implies that all these resolutions – not only 242 (1967), 338 (1973), but also the recent resolutions 1402 (2002) and 1403 (2002) – are legally non-binding and cannot be enforced – as would be possible in the case of Chapter VII resolutions through the provisions of Arts. 41 and 42 of the Charter.¹ Furthermore, in the above mentioned resolution the Security Council merely “welcomed” the Secretary-General’s initiative to establish and dispatch a fact-finding team to the Jenin refugee camp, but did not undertake any action of its own and did not instruct the Secretary-General to go ahead with the investigation. If one reads the exact wording of resolution 1405 (2002), the Council resorted to a mere palliative measure without ever seriously considering

¹For details see the author’s paper: *The Palestine Problem in the Framework of International Law. Sovereignty as the Crucial Issue of a Peaceful Settlement of the Palestinian-Israeli Conflict*. Cornell University Library, Middle East & Islamic Studies Collection, at <http://www.library.cornell.edu/colldev/mideast/koechler.htm> (June 2001).

to enforce measures aimed at an independent investigation of the atrocities committed in Jenin, and in the Jenin refugee camp in particular.

The reasons for this extremely weak and cautious attitude – to say the least –, on the part of the Security Council, vis-à-vis the Israeli occupying power are entirely political: any resolution with binding character, i.e. any resolution obliging Israel to accept an independent international investigation – under United Nations auspices – of the atrocities committed in Jenin, would have been vetoed by at least one permanent member of the Security Council, namely the United States of America.² Because of the traditional US bias in favour of Israel, the Security Council – if it adopts any resolution at all touching the interests of Israel – has been condemned to follow a policy of double standards, exempting the Israeli occupying power from the application or imposition of any measures that might be deemed adverse to vital Israeli interests.³

(1) The history of international investigating commissions and power politics

In the modern history of international relations, international investigating commissions on a governmental level have always and exclusively been set up in the framework of power politics, determined by the specific interests of the states concerned. Up to the present day, five investigatory commissions dealing with matters of international criminal law and the related criminal responsibility of individuals have been established, namely:

- (1) the *Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties* (with the mandate to investigate war crimes committed by the defeated powers during World War I) (1919);
- (2) the *United Nations War Crimes Commission* (with the mandate to investigate German war crimes during World War II) (1943);
- (3) the *Far Eastern Commission*, investigating Japanese war crimes during World War II (1946);

² On the Security Council's predicament in that regard see the author's analysis: "The Voting Procedure in the United Nations Security Council," in: Hans Koechler, *Democracy and the International Rule of Law. Propositions for an Alternative World Order*. Vienna / New York: Springer, 1995, pp. 85-116.

³ On the complex legal history of the Palestine problem – in the context of international power politics – see Hans Koechler (ed.), *The Legal Aspects of the Palestine Problem with Special Regard to the Question of Jerusalem*. Studies in International Relations, vol. 4. Vienna: Braumüller, 1981.

- (4) the *Commission of Experts Established Pursuant to Security Council Resolution 780* (with the mandate to investigate violations of international humanitarian law in the former Yugoslavia) (1992); and
- (5) the *Independent Commission of Experts Established in accordance with Security Council Resolution 935* (“Rwandan Commission”) (with the mandate to investigate violations of international humanitarian law committed during the Rwandan civil war) (1994).

All these commissions were set up on the basis of selective justice and as result of a consensus among either the victorious powers after a war or among the permanent members of the Security Council. This modus of creation implied the definition of each commission’s mandate to investigate only crimes committed by the parties that lost a war or that turned out to be the weaker ones in the global constellation of power as represented by the Security Council. Because of their specific – or limited – mandate, those commissions could only assist in selective law enforcement by the respective international tribunals established in connection with these commissions; their mandate, in strictly legal terms, was not compatible with the idea of the universality of justice, i.e. with the requirements of the international rule of law.⁴

Because of the absence of this element of a consensus based on power politics, no investigatory commission on atrocities committed in the occupied Palestinian territories was or will ever be established in the framework of the United Nations. In the present power constellation of the so-called “New World Order,”⁵ the predicament of the United Nations Organization, and in particular of the Security Council, consists in the lack of the necessary consensus among the permanent members in regard to the evaluation of the situation in the Middle East. This is the main reason why – up to the present day – no effective measures have been implemented for the protection of the population in the occupied Palestinian territories.

(2) Fact-finding missions in Palestine: United Nations inaction versus non-governmental initiatives

So far, all resolutions that have been adopted by the United Nations General Assembly, its Committee for the Exercise of the Inalienable Rights of the Palestinian People,

⁴ On the legal implications concerning the Yugoslav war crimes tribunal see Hans Koechler, *Memorandum on the Indictment of the President of the Federal Republic of Yugoslavia, the President of the Republic of Serbia and Other Officials of Yugoslavia by the "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991."* Caracas, 27 May 1999.

⁵ See the author’s analysis: *Democracy and the New World Order*. Studies in International Relations, XIX. Vienna: International Progress Organization, 1993.

by the Security Council and other UN agencies and institutions, were – in a strictly legal sense – mere appeals and recommendations with the undertone of morality, they did not create any clearcut legal obligations; in other words: regrettably, there exists no enforceable legal obligation on the part of the occupying power to comply with these resolutions. Since 1967, it has become a ritual in United Nations fora to call upon Israel to withdraw its troops from the occupied Palestinian and other Arab territories and to respect the provisions of the Fourth Geneva Convention – but those appeals were never followed by action on the part of the institutions having adopted those resolutions, i.e. by a specific programme of implementation.⁶ Unlike in other crisis regions, UN monitoring and/or protection forces were never dispatched to Palestine. Because of the Israeli rejection, not even the most modest and rather timid measure of sending a “fact-finding mission” to the Jenin refugee camp (that legally is under United Nations, i.e. UNRWA administration anyway!) was possible.

The total failure of the United Nations Organization to protect the civilian population in the occupied Palestinian territories is appalling. The international community is now confronted with the question as to how the provisions of the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August, 1949* can be enforced – when the only organ of the United Nations able to undertake compulsory measures in the occupied Palestinian territories is paralyzed because of the American veto – or more precisely: because of the threat of an American veto in case the Council intends to adopt an enforceable resolution that would go beyond mere recommendations and lip service to Palestinian human rights. Regrettably, this situation has made the United Nations Organization not only impotent, but irrelevant when it comes to the enforcement of international humanitarian law in Palestine and to remedies for the civilian population that has suffered so much as a result of transgressions committed by the occupying power.⁷

In the absence of United Nations monitoring and fact-finding activities, information from reliable non-governmental sources – including *Human Rights Watch*,⁸ *B'Tselem: The Israeli Information Center for Human Rights in the Occupied Territories*, and the *Palestinian Organization for Human Rights* – confirms that virtually all basic provisions of the *Fourth*

⁶ For more details see *International Day of Solidarity with the Palestinian People. Solemn meeting held by the Committee on the Exercise of the Inalienable Rights of the Palestinian People at the United Nations Office in Vienna, 29 November 2000*: “Statement by Dr. Hans Koechler, President of the International Progress Organization.”

⁷ On the political and legal context of the facts see *I.P.O. Information Service*, “War in Palestine. Declaration of the International Progress Organization.” Vienna, 2 April 2002, P/RE/17619c-is.

⁸ See *Human Rights News*, news release, Jenin, 3 May 2002: “Israel/Occupied Territories: Jenin War Crimes Investigation Needed – Human Rights Watch Report Finds Laws of War Violations.”

Geneva Convention have been breached by the Israeli invasion and occupation forces in Jenin and other occupied Palestinian towns and villages.

Among the methods applied by the Israeli army are:

- *indiscriminate killing of civilians;*
- *burying people alive in their homes;*
- *executions of Palestinian prisoners;*
- *killing civilians who were close to windows or left the house to bring people to hospitals or to look for food or to extinguish fires, etc.;*
- *deliberate attacks on ambulance cars;*
- *prevention of medical aid to the wounded so that they are bleeding to death;*
- *prevention of emergency medical aid to sick people in the sealed-off areas, which has led to the death of many civilians;*
- *preventing any kind of emergency humanitarian assistance;*
- *inhumane treatment and/or torture of prisoners;*
- *disrespect for and attacks on holy sites such as the Church of Nativity in Bethlehem;*
- *deliberate destruction of the civilian infrastructure (including water and sewage systems);*
- *wanton destruction of civilian houses;*
- *systematic destruction of the infrastructure of the Palestinian National Authority.*⁹

In regard to Jenin and the Jenin refugee camp, all the facts are documented in great detail and with great precision in the comprehensive report of Human Rights Watch (Vol. 14, No. 3 [E], May 2002) entitled “*Israel, the Occupied West Bank and Gaza Strip, and the Palestinian Authority Territories. Jenin: IDF Military Operations.*” It is noteworthy that the courageous, ambitious, even risky initiative for an independent investigation was undertaken by non-governmental organizations such as Human Rights Watch, not by any of the existing intergovernmental organizations – whether regional or international, whether the United Nations, the European Union, or any of the other multilateral entities.

In fact, the report of Human Rights watch accomplished – more or less – the work that Mr. Annan’s fact-finding team was supposed to undertake. The report describes in great detail the unlawful killings in Jenin by Israeli soldiers, the use of civilians for military purposes, the denial of medical and humanitarian access to the area and the attacks against medical personnel, as well as the disproportionate and indiscriminate use of force by the Israeli occupying army in general.

⁹ For more details see the news release of the International Progress Organization : *Massacres and human rights violations in Palestine – Urgent appeal of the International Progress Organization.* Vienna, 15 April 2002, P/RE/17652c-is.

(3) The commission of war crimes in Palestine and measures of international criminal justice

As of now, it is a well documented fact that war crimes were committed on a large scale and in a systematic manner in the Jenin refugee camp. In order to stop such atrocities in the future and to prevent the policies leading to such actions by the occupation army, (a) *independent verification and investigation* of the crimes committed and (b) *criminal prosecution* of the perpetrators of these crimes are measures of utmost importance. Because of the political constellation in the Security Council, the supreme executive organ of the United Nations cannot play any meaningful role in this regard; accordingly, it cannot and will not create an impartial international tribunal to judge war crimes, crimes against humanity and grave breaches of the Geneva Conventions in the occupied Palestinian territories.

What is needed, under these circumstances, is an international judicial structure that is independent of the power constellation prevailing in the Security Council (or more precisely: the power constellation built into the structure of the Security Council because of the veto provision of Art. 27 of the Charter). This entity has come into existence on 1 July 2002 when the *Rome Statute of the International Criminal Court* (ICC) entered into force. However, the ICC's jurisdiction cannot be applied retroactively and it can only be exercised vis-à-vis officials (including military personnel) who are citizens of States Parties to the Rome Statute or when the alleged crimes have been committed on the territory of a State Party. Because Israel has not ratified the Rome Statute, the definition of the international legal status of the Palestinian territories will be of crucial importance when it comes to grave violations of international humanitarian law, in particular war crimes, in the territories in the future.

A real chance for the prosecution of war crimes by the ICC may only exist if and when the State of Palestine has been recognized as subject of international law and as a member of the United Nations, and after this state will have ratified the Rome Statute. This may have a *detering effect* in regard to the eventual commission of war crimes by hostile forces on Palestinian territory in the future, but it will not bring remedy to the present situation. It is not without explanation that the United States not only has "unsigned" the Rome Statute (which it had never ratified anyway), but now totally rejects the idea of an international criminal court acting independently of the Security Council and exercising universal jurisdiction on the basis of an intergovernmental treaty such as the Rome Statute.

The evolving doctrine of universal jurisdiction has not only led to the creation of the International Criminal Court, but also to the adoption of national legislation such as the 1993 law concerning grave breaches of the Geneva Conventions enacted by the Kingdom of Belgium¹⁰ and, more recently, the “Law to Introduce the Code of Crimes against International Law” adopted by the German *Bundestag*.¹¹ However, as the fate of recent cases against a former Foreign Minister of the Democratic Republic of Congo and against the Prime Minister of Israel brought before Belgian courts has demonstrated, this law does not provide a sound legal basis for the international prosecution of such crimes. Not only has the International Court of Justice in its Judgment in the case of the former Congolese Foreign Minister rejected the exercise of universal jurisdiction by a national court – by referring to the concept of “sovereign immunity”¹² –; more recently (on 26 June 2002) a Belgian court dismissed a war crimes complaint against Israeli Prime Minister Sharon, ruling that his absence from Belgium meant he could not be tried for the 1982 massacre of Palestinian refugees in Sabra and Shatila.¹³ As human rights lawyer Reed Brody rightly observed in commenting on the judgment, the Belgian court “emptied the law of its meaning by saying that it only applies if the defendant is already in Belgium.” It is noteworthy that Belgium – as soon as its judicial system is confronted with a prominent Israeli case – is apparently shying away from its newly established doctrine of universal jurisdiction.

(4) The protection of Palestinian rights: alternative legal and political remedies

What meaningful measures – under these conditions of international *realpolitik* – can still be undertaken – apart from condemnations of war crimes and crimes against humanity issued by the United Nations Commission on Human Rights? Those resolutions have only moral and eventually political value, but no significance in regard to criminal prosecution. Especially in regard to human rights violations in Palestine, those resolutions – as well as the ones issued by the General Assembly’s Committee on the Exercise of the Inalienable Rights of the Palestinian People – have become an annual ritual without consequences.

¹⁰ *Loi relative à la répression des infractions graves aux conventions internationales de Genève du 12 août 1949 et aux protocoles I et II du 8 juin 1977, additionnels à ces conventions, 16 juin 1993*. The law was revised in 1999.

¹¹ *Gesetz zur Einführung des Völkerstrafgesetzbuches*; entry into force: 30 June 2002.

¹² International Court of Justice: Judgment in the case of the *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, 14 February 2002.

¹³ For more details in regard to the political and legal implications see the analysis of Frederick Bowie, “Untried, untested,” in: *Al-Ahram Weekly*, Cairo, 11-17 July 2002, p. 5.

The setting up, by the Security Council, of an *ad hoc tribunal* (similar to the ones on the atrocities committed in the former Yugoslavia and Rwanda) is definitely a *political impossibility* because of at least one veto against such a resolution (namely by the United States of America). In fact, only the exercise of political and economic pressure upon the occupying power in Palestine – by individual states and/or by groups of states – remains as a realistic option to induce the occupying power to allow international investigations in the territories and to desist from further breaches of international humanitarian law. However, the regional organization first and foremost concerned about the situation in Palestine, namely the League of Arab States, so far has not undertaken any such specific measure – apart from verbal condemnation of Israeli practices, similar to the one enunciated by the United Nations over all the years of the Israeli occupation of Palestine.

On the basis of the United Nations Charter, there eventually exists a legal possibility to act in defense of the population in occupied Palestine – as long as the Security Council fails to exercise its duties and responsibilities under Art. 39 of the Charter so as to stop the Israeli occupation and the commission of war crimes and grave breaches of the Geneva Conventions, which constitute a threat to international security. Under Art. 51 of the United Nations Charter – and under the provisions of their own Charter – the members of the League of Arab States may exercise the right of *collective self-defense* in order to protect the civilian population of Palestine from aggression by a foreign country. The only problem in regard to the invocation of Art. 51 consists in the fact that it relates to “Members of the United Nations” that have come under attack. This may be one more argument for clarifying the international legal status of the Palestinian territories and for establishing the State of Palestine as subject of international law without any further delay. In the absence of such a measure, however, the League of Arab States – recognizing the “State of Palestine” as a member – still has the option to act in collective self-defense on the basis of its own Charter.¹⁴ Such collective Arab action would be in conformity with the provisions of Chapter VIII of the UN Charter (“Regional Arrangements”), in particular with Art. 52 (1): “Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.” Collective self-defense vis-à-vis foreign

¹⁴ See *Charter of the League of Arab States*, Article VI: “In case of aggression or threat of aggression by one state against a member-state, the state which has been attacked or threatened with aggression may demand the immediate convocation of the Council. The Council shall by unanimous decision determine the measures necessary to repulse the aggression.”

aggression against one of its members is undoubtedly an inherent right of any group of states and thereby in conformity with the purposes and principles of the United Nations.

In terms of international law – and international politics at the same time –, there exists one *extraordinary measure* the international community, i.e. the United Nations member states, may resort to in regard to the escalating humanitarian and security crisis in Palestine – so as to prevent the Israeli occupying power from continuing its policy of victimizing the civilian population and thereby threatening peace and security in the entire region and beyond. At the initiative of the concerned regional and international organizations such as the League of Arab States or the Organization of the Islamic Conference, the General Assembly of the United Nations may act on the basis of provisions of the "*Uniting for Peace Resolution*" and convene in an emergency session in order to deal with the deteriorating humanitarian and security situation in occupied Palestine. The Uniting for Peace Resolution – General Assembly resolution 377A (V) of 3 November 1950 – provides for independent action of the General Assembly in situations of a serious international crisis triggered by the paralysis of the Security Council and its inability to act under Chapter VII of the Charter. In the terms of the resolution: if the Security Council, "because of the lack of unanimity of the permanent members," fails to exercise its primary responsibility, namely "to maintain or restore international peace and security," "*the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures ... to maintain or restore international peace and security.*" According to this resolution, the General Assembly may convene within twenty-four hours when a request for an emergency session by any nine members of the Security Council or by the simple majority of the Members of the General Assembly has been made.

Such a measure as outlined in resolution 377A (V) could be realistically undertaken if there exists a collective political will and co-ordination among the member states of the Arab League and the Islamic Conference. In the absence of any legal remedies at the present moment (due to the de facto unavailability of measures of international criminal law), such an initiative could have a considerable political impact worldwide and would undoubtedly have a mobilizing effect in regard to the implementation of urgent humanitarian measures by regional and international organizations.

(5) The call for universal jurisdiction: the case of the International Criminal Court

There should be no illusion: the war crimes and systematic breaches of the Fourth Geneva Convention committed in Jenin cannot be undone by such measures. However, the case of the Jenin atrocities – termed as massacre by many observers of the crimes committed in the Jenin refugee camp – has become of exemplary nature underlining the urgent need for setting up efficient structures of international criminal justice. Israel’s outright and categorical refusal to admit a United Nations investigation in Jenin is an obvious, though indirect *admission of guilt*.

In the present phase of international relations – after the end of the Cold War –, it has become totally unacceptable that certain states, enjoying the special protection of at least one permanent member of the Security Council, can commit grave breaches of international humanitarian law with impunity. The Jenin tragedy has been a wake-up call for many who had earlier expressed their confidence in the United Nations Organization – and in particular in the Security Council – as guarantor of human rights and of the international rule of law in general. Regrettably, the world organization has been proven incompetent and powerless when it comes to the situation prevailing in Palestine; it has been condemned to follow a policy of double standards. Not only has the United Nations been unable to undertake credible and effective measures for the active protection of the Palestinian population, it has not even been in a position to undertake “passive” measures, namely to dispatch a simple fact-finding team to the Jenin refugee camp. In that regard, international non-governmental organizations, led by courageous individuals, have been considerably more efficient than the global intergovernmental organization of the United Nations.¹⁵

More than any other case in the recent history of war and occupation in Palestine, the atrocities – so far committed with impunity – in the Jenin refugee camp have made it obvious that only an independent international entity such as the International Criminal Court will be able to prosecute such crimes in the future and thus, though indirectly, provide a kind of protection – and the chance of redress – to the suffering civilian population. However, as with all institutions and instruments of international criminal law, the decisive question will be that of *jurisdiction*. In the case of the occupied Palestinian territories, the early establishment of an internationally recognized sovereign *State of Palestine* will provide the possibility to accede

¹⁵ See also the investigating reports of the International Progress Organization on the human rights situation and on breaches of the Fourth Geneva Convention during the first Palestinian *intifadah*: *The Human Rights Situation in Palestine. Reports by the Delegations of Inquiry on Behalf of the International Committee for Palestinian Human Rights*. Vienna: International Progress Organization, 1989.

to the Rome Statute of the ICC and thus warn all prospective perpetrators of war crimes in Palestine of the dire consequences of their behaviour.

The Jenin tragedy may have been the catalyst of this development. It has exposed the regrettable paralysis of the United Nations system when it comes to the protection of the civilian population in Palestine under the obligations resulting from the Fourth Geneva Convention of 1949; it has made clear beyond any doubt that effective – and unbiased – mechanisms of international criminal law cannot be implemented by the Security Council, but only by an international entity that functions independently of the power constellation in the Security Council.¹⁶

Redress for victims of war, whether in Jenin or in other areas of Palestine, will not be provided by an institution that is hostage to the most powerful member's bias in favour of the occupying power, but only by a totally independent and impartial judicial institution.

¹⁶ The recent Security Council resolution – 1422 (2002) of 12 July 2002 – has again documented that, because of the power constellation prevailing in the Council as a result of the veto, the supreme executive organ of the United Nations cannot play a constructive role in regard to the implementation of international criminal justice. To the contrary: the above mentioned resolution has provided for the immunity from criminal prosecution by the ICC of UN peacekeeping troops from States not Parties to the Rome Statute for the period of at least one year. This “policy of double standards” in favour of military personnel from the most powerful member of the Security Council is in no way compatible with the international rule of law.