



National University of Ireland, Galway
Ollscoil na hÉireann, Gaillimh

Irish Centre for Human Rights
An tIonad Éireannach um Chearta Daonna

GALWAY, 7 August 2002

Expert Opinion by Professor William A. Schabas

You have requested me to prepare an expert opinion on the issue of deportation carried out under Israeli military law as an administrative sanction. It is my understanding that such punishments are imposed upon relatives of persons suspected of involvement in suicide and other attacks, and that they are imposed without first being established in a court of law. Specifically, you have asked whether such sanctions may be described as grave breaches of international humanitarian law, as war crimes and as crimes against humanity. I understand that this opinion may be used in support of submissions to the Supreme Court of Israel.

You will understand that given the time constraints involved in preparing this opinion, this constitutes only an outline of my position.

Professional qualifications

I hold the professorship in human rights law at the National University of Ireland, Galway, where I am also director of the Irish Centre for Human Rights. I received my doctorate in laws at the University of Montreal, and hold four other university degrees (BA, MA, LLB, LLM). I am the author of *Introduction to the International Criminal Court*, the authoritative Cambridge University Press publication on the new Court, and have made important contributions to the two leading commentaries on the Rome Statute of the International Criminal Court (Triffterer, 2000 and Cassese, 2002). I have prepared the entry on international criminal law for the latest edition of the *Encyclopaedia Britannica*. I lecture around the world on subjects relating to international criminal law, and my writings have been cited in judgments of many of the world's major tribunals, including the International Criminal Tribunal for the former Yugoslavia, the United States Supreme Court, the Judicial Committee of the Privy Council and the Supreme Court of Canada. I was invited by the United Nations as an expert to contribute to the *United Nations International Meeting on the Convening of the Conference on Measures to Enforce the Fourth Geneva Convention in the Occupied Palestinian Territory, including Jerusalem*, held in Cairo on 14 and 15 June 1999, and my remarks at that meeting are published in the proceedings.

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Grave breaches

The term "grave breaches" is a technical one, appearing in specific provisions of the four Geneva Conventions of 1949 with respect to certain violations of the conventions directed against non-combatant civilians or persons *hors de combat* such as prisoners and the wounded. As your case concerns non-combatant civilians, I shall confine my remarks to the concept of grave breaches within the fourth Geneva Convention, which concerns protection of civilians.

I understand that there is still some debate within Israel about the application of the fourth Geneva Convention to the occupied territories, although it is the virtually unanimous view of the international community, including the United States of America, that the fourth Geneva Convention is indeed applicable within the Palestinian Occupied Territories. In any event, I will not address this question in detail, and will focus my attention on whether or not the actual acts of deportation consist of "grave breaches".

It is important to point out that there has been some evolution in the concept of grave breaches since they were first defined in the 1949 Geneva Conventions. Some international judges have suggested that the concept of grave breaches should also be recognised in non-international armed conflict, but this view has not been taken up generally.¹ The "grave breach" provisions of the Conventions are taken up in contemporary international criminal law instruments, specifically the Statute of the International Criminal Tribunal for the former Yugoslavia² and the Rome Statute of the International Criminal Court.³ Because the Yugoslavia wars have been approached essentially within the context of internal armed conflict, there is actually rather little case law to date on the concept of grave breaches. The most significant development in this area appears in the draft "Elements of Crimes", which is a subsidiary instrument to the Rome Statute, adopted by the Preparatory Commission in June 2000 and expected to be confirmed by the Court's Assembly of States Parties when it first meets in September of this year.⁴ This document was adopted by consensus at a major multilateral conference (in which Israel actively participated) and can be taken as an authoritative interpretation of the concept of grave breaches.

Article 147 of the fourth Convention defines as a grave breach the "unlawful deportation or transfer" of protected persons, as well as "wilfully depriving a protected person of the rights of fair and regular trial". The same terms appear in the Statute of the International Criminal Tribunal for the former Yugoslavia (art. 2, paras. (f) and (g)) and in the Rome Statute (art. 8(2)(a), paras. (vi) and (vii)).

With respect to the grave breach of unlawful deportation, the Elements of Crimes establish five elements:

¹ *Prosecutor v. Tadic* (Case no. IT-94-I-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 80-84.

² UN Doc. S/RES/827 (1993), art. 2.

³ UN Doc. A/CONF.183/9, art. 8(2)(a).

⁴ "Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalized draft text of the Elements of Crimes", U.N. Doc. PCNICC/2000/INF/3/Add.2.

1. The perpetrator deported or transferred one or more persons to another State or to another location.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

As for the grave breach of denial of fair trial, these are the five elements of the offence:

1. The perpetrator deprived one or more persons of a fair and regular trial by denying judicial guarantees as defined, in particular, in the third and the fourth Geneva Conventions of 1949.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

You will note that the Elements of Crimes do not define or otherwise elaborate upon the concept of unlawfulness, which is used to modify the crime of deportation. As a preliminary note to the Elements explains, the drafters of this instrument chose not to address this.

In my opinion, the term "unlawful" must refer to other provisions of the Geneva Conventions, as well as to general norms of international customary law. An occupying power could not make deportation "lawful" simply by enacting legislation. Such legislation would need to be consistent with the other obligations of the occupying power towards the civilian population.

These obligations include the right to fair trial in the case of imposition of sanctions or punishment. It is for this reason that I have included references to the grave breach of denial of fair trial. Article 71 of the fourth Convention is quite clear on this: "No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial." It seems mere sophistry to suggest that deportations are administrative sanctions rather than punishment or "sentence", when they are clearly conducted within the context of criminal law and the repression of crime. Whether deportation would be an available sanction in the event of conviction by a court of

law for complicity in violent crimes is a matter that does not arise in this case and need not be discussed further.

Accordingly, while deportation of civilians might be lawful under some circumstances – article 147 of the Geneva Convention seems to contemplate this explicitly – such deportation would have to be consistent with other provisions of the Convention. The Convention refers to deportation in one other provision, article 49. It states: “Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.” There is an exception in the case of “total or partial evacuation”, carried out in the name of “the security of the population” or where required by “imperative military reasons”.

The other significant condition for application of the grave breach provisions is that the victims be “protected persons”. Article 4 of the fourth Convention describes “protected persons” as “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”. These provisions were applied by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in a broad and generous manner, in order to provide for the largest possible protection, in keeping with the humanitarian purposes of the Convention.⁵

The Elements also require that the grave breaches be committed in the context of or in association with an international armed conflict. This provision is to be read with reference to the Geneva Conventions, which, in the case of occupied territories, specifically contemplate the continuation of the protection of civilians throughout the occupation, even after the conclusion of hostilities. Article 6 of the fourth Convention states: “In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.” Accordingly, the grave breach of deportation, which is drawn from article 49, can be committed in occupied territories even when the international armed conflict is itself rather remote in time.

Not every form of detention or displacement of civilians in an occupied territory is prohibited by the fourth Convention. Specific allowance is made for “internment” or “assigned residence”, pursuant to article 41. Nevertheless, the regime of internment or assigned residence is expected to be based on objective criteria relating to the individual concerned, as the provisions dealing with judicial or administrative review of internment imply quite clearly. Individuals may be interned if they personally pose a danger to the occupying power. A system of internment based solely on an individual’s family relationship with an offender smacks of reprisal. The Nazi atrocities inspired widespread revulsion at reprisals directed against civilians, and

⁵ *Prosecutor v. Tadic* (Case No. IT-94-1-A), Judgment, 15 July 1999; *Prosecutor v. Aleksovski* (Case No. IT-95-14/1-A), Judgment, 24 March 2000, para. 151; *Prosecutor v. Delalic et al.* (Case No. IT-96-21-A), Judgment, 20 February 2001, para. 84.

reprisals against civilians are of course now prohibited in all cases under international humanitarian law.⁶

Consequently, the threatened deportations that you have described are "grave breaches" in violation of article 147 of the fourth Geneva Convention, as well as article 8(2)(a) of the Rome Statute of the International Criminal Court. Given the near-universal acceptance of the fourth Convention, and the incorporation of the grave breaches provisions within the Rome Statute and the Statute of the International Criminal Tribunal for the former Yugoslavia, there can be no doubt that these are crimes not only under convention provisions but also at customary law. Indeed, the Secretary-General, in establishing the Yugoslavia Tribunal, made it clear that "grave breaches" were crimes at customary international law,⁷ and this view is uncontested.

War crimes

The term "war crimes" is a much broader one than that of "grave breaches", in that it applies to a much greater range of serious violations of the laws and customs of war, as well as to acts committed in internal as well as international armed conflict. The sources of this law are treaties, such as the Hague Convention of 1907 (as recognised in the judgment of the International Military Tribunal at Nuremberg of 30 September-1 October 1946), as well as customary law. There are various codifications of this concept, but without any doubt the most authoritative is article 8 of the Rome Statute. With a few exceptions, article 8 is generally recognised as consistent with customary international law.

Most of the norms included in article 8 of the Rome Statute are uncontroversial. Israel has contested the inclusion, in article 8(2)(b)(viii) of "[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory", which it argues is inconsistent with customary international law.

It is worth pointing out that in contesting the customary nature of article 8(2)(b)(viii) of the Rome Statute, Israel is implicitly confirming its acceptance of the balance of the article, including the prohibition of deportations found in article 8(2)(a)(vii).

In effect, not every violation of the Geneva Conventions is a grave breach of the Conventions. International law recognises other serious breaches of the Conventions, but they do not involve the various obligations of international cooperation and duty to prosecute that avail in the case of grave breaches, as set out in article 146 of the Convention. But since 1949, when international criminal law and international humanitarian law were in a very early stage, it has now become well-accepted that other serious violations of the Geneva Conventions also involve individual criminal responsibility. This is confirmed by the case law of the International Criminal

⁶ *Prosecutor v. Kupreskic et al.* (Case No. IT-95-16-T), Judgment, 14 January 2000, para. 531, 528-536

⁷ "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)", U.N. Doc. S/25704, para. 34.

Tribunal for the former Yugoslavia⁸ and, of course, by the incorporation of the concept within the Rome Statute.

Article 8(2)(b)(viii) is drawn from article 49 of the fourth Geneva Convention. Quite clearly, the grave breach provisions of the fourth Convention do not contemplate article 49 as a whole, and specifically, they do not criminalise the transfer of settlers to an occupied territory. It is my understanding that this is the issue raised by Israel. I cannot point you to any judicial authority confirming that violations of article 49, as a whole, incur individual criminal liability at customary international law. Their incorporation within the Rome Statute is a compelling argument in favour, but as I have already pointed out, Israel has clearly objected to this.

However, while it may be premature to state that article 49 of the fourth Geneva Convention, taken in its entirety, is considered criminal at customary law, there can be no doubt that some of it falls within this category. Indeed, the reference to deportations in article 147, dealing with grave breaches, can only be understood with reference to article 49. Thus, a distinction must be made between transfer of civilians of the Occupying Power, which is what Israel has contested, and deportation of protected persons within the occupied territory.

It would seem unquestionable, given the inclusion of such deportations within the grave breach provisions, that they also fall within the category of serious violations of the laws and customs of war. While there may still be some doubt about the customary nature of the first limb article 8(2)(b)(viii) of the Rome Statute – a question that does not really concern this litigation – there can be none about the customary nature of the second limb, that is, “the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory”. Neither Israel nor any other State has challenged the description of this act as a “war crime”.

The Elements of Crimes establish three elements for the commission of this crime:

1. The perpetrator...
 - (b) Deported or transferred all or parts of the population of the occupied territory within or outside this territory.
2. The conduct took place in the context of and was associated with an international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Whether such deportations, conducted within Israel at the present time, are “in the context of” and “associated with an international armed conflict” has been addressed in my comments on “grave breaches”.

⁸ *Prosecutor v. Tadic* (Case no. IT-94-I-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

Therefore I reach the same conclusion as in the section on "grave breaches", namely that the deportations you have described can be qualified as "war crimes".

Crimes against humanity

The concept of "crimes against humanity" was first developed at Nuremberg, where it was conceived of in order to fill a major gap in existing international law concerning the protection of civilians. In effect, at the time, atrocities committed against civilians had only be recognised as criminal when they were conducted in occupied territories. The drafters of the Charter of the International Military Tribunal established the concept of "crimes against humanity" so that atrocities committed against civilians within Germany as well as in the occupied territories could be punished at international law.⁹

While at Nuremberg, crimes against humanity were associated with the international armed conflict, that requirement has now been eliminated in customary international law. Thus, "crimes against humanity" provide a much broader scope of protection than war crimes and grave breaches, in that several of the elements required for the latter offences - that the act be committed in the context of or in association with an armed conflict, that the victim be a protected person, that the act be committed in an occupied territory - are absent.

On the other hand, crimes against humanity have their own contextual element, namely that the acts be committed as part of a "widespread or systematic attack directed against any civilian population". These requirements are discussed at length in an early judgment of the International Criminal Tribunal for the Former Yugoslavia.¹⁰ For the purposes of this opinion, I will confine my remarks to noting that the purpose of the contextual element for crimes against humanity is to insist that punishable acts be conducted pursuant to a preconceived state or governmental plan or policy involving the repeated or continuous commission of inhumane acts so as to exclude purely random or isolated acts.¹¹

"Deportation or forcible transfer of population" is a punishable act that may amount to a crime against humanity, if committed in the context of a widespread or systematic attack directed against any civilian population. "Deportation" was recognised as a crime against humanity as early as Nuremberg, and has been included within the enumeration of punishable acts in subsequent codifications, including the Rome Statute (art. 7(1)(d)).

⁹ This point is developed at length in William A. Schabas, *Introduction to the International Criminal Court*, Cambridge: Cambridge University Press, 2001, and in William A. Schabas, *Genocide in International Law*, Cambridge: Cambridge University Press, 2000..

¹⁰ *Prosecutor v. Tadic* (Case no. IT-94-1-T), Opinion and Judgment, May 7, 1997, paras. 644-649.

¹¹ See the Commentary of the International Law Commission on the draft Code of Crimes Against the Peace and Security of Mankind, UN Doc. A/51/10, paras. 94-95; *United States of America v. Alstötter et al.* ("Justice trial"), (1948) 3 TWC 1, 6 LRTWC 1, 14 ILR 278, pp. 79-80 (LRTWC); *United States of America v. Flick et al.*, (1948) 6 TWC 1, 9 LRTWC 1, 14 ILR 266, at p. 51 (LRTWC)..

In the interests of greater certainty, and reflecting concerns from States that the crimes against humanity provisions might be construed by courts in too broad a fashion, the Rome Statute, art. 7(2)(d), provides a definition of "deportation: "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law". It should be noted that there is no requirement that deportation involve expulsion from one country to another, and that it may take place within the territory of a State.

The Elements of Crimes provide further detail for the crime against humanity of deportation:

1. The perpetrator deported or forcibly¹² transferred,¹³ without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

12 The term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.

13 "Deported or forcibly transferred" is interchangeable with "forcibly displaced".

The term "grounds permitted under international law" is reminiscent of the term "lawfully" which appears in article 147 of the fourth Geneva Convention. The discussion of this issue above, under "grave breaches", should suffice to dispose of any claim that the deportations you have described are permitted by international law. Consequently, I conclude that such deportations are also crimes against humanity, to the extent that it can be established that they are part of a state or governmental policy directed towards a civilian population and are not mere random or isolated acts.

I trust these comments are helpful to yourself and to the courts of Israel, and remain at your service for any further information or clarification.

Yours very truly

A handwritten signature in black ink, consisting of a stylized 'W' and 'S' intertwined.

William A. Schabas