Lexsitus Lecturer: Professor Darryl Robinson (Queens University)
Topic: ICC Statute Article 7(2)(a)
Level: Introductory
Date of recording: 7 June 2017
Place of recording: Ontario, Canada
Duration of recording: 23:57
PURL of film: www.cilrap.org/cilrap-film/7-2-a-robinson/
PURL of English transcript: www.legal-tools.org/doc/197a97/

Hello. I have been asked to address article 7(2)(a). My name is Darryl Robinson. I'm a professor at Queens University in Canada. In a previous video, I discussed the chapeau to article 7(1). That provision sets out the requirement of a widespread or systematic attack directed against a civilian population. But to understand that chapeau it's actually really important to know the qualification in article 7(2)(a).

Article 7(2)(a) says that in order to be an attack, there has to be some sort of a link to a state or organizational policy. What I want to tell you about is: one, the rationale for that; number two, concerns and problems with the element; and then number three, interesting issues have arisen about what is an organization. So those are the three points.

As I mentioned above, when we talked about article 7(1), "widespread or systematic" - they are disjunctive tests. A prosecutor needs only to prove one or the other. The attack was widespread or the attack was systematic. Let me also remind you that it's not the actions of the accused that have to be widespread or systematic, it's just simply the context. The context of crimes has to be widespread or systematic. Now, a lot of people would say that actually, that requirement of "widespread or systematic" is not enough. We actually need an additional element. That's what the International Law Commission thought in its draft Code of Crimes. It's what early tribunal cases said, and it's also what the Rome Conference, that adopted the ICC statute, said. However, all of that is very controversial; a lot of people would say the opposite. But first of all, to explain the concern.

The concern is that the requirement of "widespread" is not enough. Remember "widespread or systematic"are disjunctive; you only need to prove one or the other. So, it would be sufficient to prove "widespread." The "widespread": you can imagine one murder being committed in a context of widespread murder, but the widespread murders, they could be unconnected. You might have an area that has simply high national crime. Consider just as an example, South Africa in the late nineties after the fall of apartheid. They had a very high national crime rate; there were tens of thousands of murders happening. Tens of thousands of murders would easily meet the threshold for "widespread." But it's not a crime against humanity if it's just individual people committing unconnected, opportunistic crimes with no common theme to it. So, does anyone committing a murder in that country (or any other country with a high national crime rate), does that become a crime against humanity? Most people would say a "no" to that. Most everyone agrees that if you commit one crime in a con-

text of widespread, but unconnected crimes, in an area with a high crime rate, that's not a crime against humanity.

This was a strong concern for a lot of States at the Rome Conference, so the question became, well how can we reflect that in law? Now most people would respond, I think quite rightly, "look that's not even a problem, because widespread but unconnected crimes, that's not an attack on a civilian population." To be an attack, there has to be some thread connecting the crimes. And that reaction is, I think, perfectly correct. But then the question is, what is it that unites the crimes? (----) If a thousand crimes occur, how do we know that one is an attack and one is just a bunch of unconnected coincidental events? When can we lump crimes together to say, "none of those together are an attack." That's actually, I think, one of the most important mysteries of crimes against humanity. It's not a completely settled question at all, but I am convinced that there does have to be something more than just "widespread." There has to be some thread connecting them regardless of what your opinion might be or my opinion might be about the policy element per se. There has to be some element or some kind of thread drawing things together.

Now, early Yugoslav Tribunal cases, national cases from World War II to the present, the international law Draft Code, and the International Criminal Court Statute, they all suggest what the required glue or thread is. The required glue or thread is a link to some state or organization. Some state or organization is instigating, directing, or encouraging the crime. That was the, I think, very good phrase used by the International Law Commission. That idea is often called the policy element, has been called the policy element for quite some time. I've come to consider that might be a very unfortunate label for the idea. I'll explain why it's a bad label. But the idea is some sort of link to a state or organization is what let's us say, "hey that's not just unconnected crimes, that's an attack; someone is directing this attack." Now, the policy element is very controversial. It's in the ICC Statute, yes, but a lot of scholars and a lot of jurists argue that one, it's not required in customary law; or it shouldn't be required; or they have concerns about how it might get interpreted. In fact, the tribunals themselves changed their mind about the element. The early tribunal jurisprudence, for example of Tadić - the important case Tadić- said yes of course, in addition to widespread or systematic, you also need a state or organizational policy. That approach was followed in the ICC statute, but then later the ICTY, the Yugoslav Tribunal started to change its mind. There were cases that started questioning: maybe it is required, maybe it's not, maybe it's just a factor. And then finally the Appeals Chamber, in a case called Kunarac, in a footnote actually, just said, oh yeah, it's not required anymore.

So, that footnote by the way has been criticized by Bill/William Schabas, Cherif Bassiouni, Claus Kress. They have pointed out that when you look at the authority cited in the footnote, they don't actually stand for the proposition. So, it's probably regrettable that there's now this divergence about what is the law of crime against humanity. In any event now, after Kunarac, we have split authorities. On the one hand, you have the Yugoslav Tribunal jurisprudence, which purports to reflect custom, and it says policy elements not required. At the same time, you have the ICC statute, which purports to codify custom that says, it is required. So, we have this divergence, which is regrettable, because we'd like it to be a single law of humanity. But it's okay, sometimes these different bodies diverge in ways and some people would say, "well that pluralism is good. We can try out different ways to try to figure out the best law." An important thing for you is it means, as a lawyer if you're applying this, you have to know, are you applying the ICC law, in which case then you have to look at 7(2)(a). Or are you applying the tribunal law, in which case you don't, or if you're applying some national law, you have to find out, do they have a policy element or not? In terms of the merits of the policy element, there are good arguments on both sides. Against it,

some people say, “well it’s hard to prove.” Number two, it’s too much like “systematic”, because both policy and systematic are requiring some kind of organization. And a lot of people just aren’t worried about this crime rate problem, so they just dismiss it, it’s not a concern. In favor of the policy element, if you want to define crimes carefully, you probably do need something to screen-out widespread and unconnected crimes. Certainly, the states who are the creators of international law were not willing to shrug off the crime wave problem. They wanted it addressed somehow.

Now, turning to more concerns and problems with the policy element. In my opinion, the policy element was meant to be a relatively easy element to prove that screens-out unconnected crimes. And I would turn your attention to the Tadić case, on which <v ->-</v> article 7(2)(a) was based. And the Tadić case explained: a policy does not have to be adopted at a high level; it does not have to be written; it doesn’t have to be formally adopted; and most importantly, the Tadić case told us, you can infer it from the circumstances. You can look at the manner in which the crimes were occurring and you can see, wait, that is not coincidence, that is not haphazard. But I think a big problem with the element is this word “policy.” Again, Tadić and other early cases and national cases emphasize that it’s a term of art that means a course of action adopted as expedient - that’s the old dictionary definition. But the problem is, that in common usage, “policy” has another connotation - very formalistic, very bureaucratic. Meaning, you know, you can think about a corporate policy, a government policy; makes you think a board of directors has formally looked at a proposal and approved it, and that makes a policy. Tragically, so, a lot of skeptics quite rightly raise this concern, and I think their concerns have been borne out because some early ICC cases fell in to precisely that trap of looking for a very formalistic, bureaucratic concept of policy. One example was the Gbagbo case: that was the case against Laurent Gbagbo, where in the context of an election in the Côte d’Ivoire, there were attacks repeatedly committed by pro-Gbagbo state forces and youth militia. And they were repeatedly committed against people who supported his opponent in the election. There were thousands of these crimes. So, the question is, are these thousands of crimes, committed by pro-Gbagbo forces against anti-Gbagbo voters, are those just random coincidental crimes or are they coordinated?

There was a lot of evidence of coordination: preparation for the atrocities, measures that were taken to identify the victims, there were statements of leaders, statements of perpetrators, explaining [that] “we are doing this to you because”, there were instructions. They had all this information. But despite that, the Pre-Trial Chamber adjourned its decision. It felt it didn’t have enough evidence; it wasn’t sure that the policy element was met. And it asked for evidence about how, when, and by whom the policy was adopted. The Pre-Trial Chamber asked for specific information about the meetings at which the policy was adopted, and it asked for information about how the policy was disseminated. So that’s the very, very bureaucratic formalistic idea of what a policy is. That is exactly what the Tadić decision said is never needed. You do not need direct evidence of inner meetings and the seal of approval on these things. You can look at the facts on the ground. You can see that these things are clearly coordinated. You can prove the policy simply by proving the improbability that this is just randomly occurring individual activity.

National cases, by contrast, from all kinds of regions have done a much better job on this. I often reference a case in Argentina against the junta there. It looked at the system and patterns of the crimes and they said listen, the hypothesis that these crimes were carried out without orders is discarded. So, we can simply look at the facts and see that it is completely improbable that it happened without a policy - sorry without direction, coordination, and encouragement- and that lets us infer it. We can prove a policy beyond a reasonable doubt by circumstantial evidence.

Another early case of the ICC was Mbarushimana, where there was this group, the FDLR, operating in the Democratic Republic of Congo. And this group, members of this group, the FDLR, kept committing very brutal massacres against various villages and populations in the Democratic Republic of the Congo. So again, is this a coincidence? Are these random crimes? Or is there something coordinated? Well it's members of the same group working together, committing massacres together, then going and committing another massacre together. That's obviously coordinated. In fact, the chamber even found this fact that there were orders issued. The orders were, go in there and destroy everything, annihilate the place, everything that has breath shouldn't. That's it, you found the orders, that's more than encouragement, that's like instructions to go do it.

The policy element was met. But strangely in that case, the Chamber for some reason thought, it had doubts about the policy element. Which again shows, I think that regrettable - I don't know how to explain the decision other than they might have had this formalistic idea of what a policy requires, but when you find the written orders of the organization, then that suffices. And again, it was interesting that national legal systems are not having a problem. They are inferring it from the improbability of coincidence. Fortunately, later cases of the ICC have been much more in line with what Tadić said in the first place, and what national systems have done, and so this problem seems to be resolving itself. ICC chambers no longer ask for minutes of the meeting at which the --- policy was adopted; they can infer it from the obvious facts on the ground.

The Katanga case said - in fact pointed out - that obviously these plans are often not going to be written down, that's the nature of them. Often the way a crime against humanity is directed, it's going to be organic and it's going to evolve step by step. You're generally not going to find minutes of it. Likewise, the Gbagbo case actually did manage to make it through confirmation, and in the confirmation decision that Chamber said, "you know, direct evidence applying is helpful, but it's not required." So, I guess to sum it all up, of what I've said so far, I would say: one, the policy element in the ICC statute is controversial; it's controversial whether it's custom or not. The purpose of it is to exclude random unconnected crimes of individuals all acting on their own initiative. And it's still to be worked out in the jurisprudence: what exactly does it mean, how demanding is it how difficult is it to prove? But the latest ICC cases seem to be on what I consider a good path of inferring it from the circumstances.

There is a last final issue to talk about. This element talks about a state or organization, so it raises a fascinating question: well what is an organization? Historically, crimes against humanity prosecutions, the attacks have been directed by either a state or by an armed group, like for example, the Lord's Resistance Army. But what else is an organization? How far does the word organization go? Interestingly, that seems like a technical question, you're just trying to interpret a word in a text, the word "organization." But as Judge Hans-Peter Kaul, I think, correctly noted, that question brings out what is the essence of a crime against humanity?

There was an interesting case, early in the ICC, with respect to a Pre-Trial Chamber decision concerning the election violence in Kenya, where there was again massive amounts of violence, and it was orchestrated by political parties. So, the question the Chamber confronted is: are political parties an organization? Hans-Peter Kaul in dissent, he thought that they were not, he thought that an organization had to be state-like. The majority, however, held that any organization would suffice. All the other cases have fallen in line with that majority position. There's arguments to be made on both sides. The Hans-Peter Kaul position, it respects the roots of crimes against humanity in international human rights law. So, typically there we were looking for a state. Personally, I'm more inclined to go with the majority posi-

tion of the ICC though. International criminal law criminalizes not just about states misconduct, its broader then that, it includes non-state actors. Non-state actors can and do, do a lot of harm to human beings, so I think it's important for law of crimes against humanity to reflect the power of non-state actors and not get held back in this Nuremberg type model. The current jurisprudence on organization generally seems to suggest that it could - the word organization could include - well it has to be an association of three or more people and so on, and they suggest, they are right now working with the capacity test; does the organization have the capacity to harm civilians, like by launching a widespread or systematic attack? Again, I'm pretty much inclined to agree with the majority position. However, there is a good criticism of that test, which is that it's kind of circular. It's circular for this reason. For a crime against humanity prosecution, you have to prove that there was a widespread or systematic attack. So therefore, obviously the organization was capable of launching a widespread or systematic attack, or else it wouldn't have happened in the first place. It's possible that the definition of "organization" will get refined and improved a little bit further, but I do think the court is somewhere roughly in the right vicinity on that issue.

Another interesting - and this is the final thought on this - is, it's interesting to ask yourself, what kind of organization could qualify? Because that question actually links to your intuitive views about, what are the parameters of a crime against humanity? For example, states are, well states obviously can commit crimes against humanity. Armed groups can do it. But what about terrorist organizations? What about organized crime? What about a biker gang? What about a corporation? Your answers to those questions probably are linked to your intuitions about the parameters of crimes against humanity.

For a lot of people, their intuition is that they would like to exclude terrorist organizations like Al Qaeda, because they would want to keep terrorism separate from crimes against humanity. Excuse me. Similarly, they would exclude an organized crime ring, in order to keep transnational organized crimes, separate from crimes against humanity. I think that's a perfectly defensible and reasonable view, but I guess my question would be, do these compartments have to be watertight and separate? Do we have to say, oh that was terrorism, therefore, it's not a crime against humanity? Or is it possible that they are just circles in a venn diagram, and they might overlap. But some acts of terrorism on a suitably large scale with a large number of victims and a big level of coordination might be both terrorism and a crime against humanity. In my opinion, for example, September 11th would be both. So, that's one of the things to be determined. I personally think they could overlap.

When you think of the mafia, you might normally think of transnational organized crime, but if there was an organized crime group that launched an attack that killed a thousand people, I think it might also, in my opinion, also be a crime against humanity.

In fact, among the earliest references to the idea of a crime against humanity is slavery. And slavery was rooted, a lot of it was slave rings, which today would be an organized crime group. Slavery was the original crime against humanity, so I do think there's an argument to be made for not imposing any limits like that on the word "organization." But all of that is to be determined.

So, in sum, what I have talked about here is why do we have an article 7(2)(a)? This concern about widespread but unconnected crimes, and the need to somehow make sure the acts are linked together, in order to constitute an attack. I talked about how it's very controversial. Is it custom, and is it a good idea or not? Then there's the issue of, well, what does this requirement mean? Do you need copies of written minutes of meetings, or can you infer that these were encouraged by an organization just from the way in which the crimes occur? And then lastly, what kind of organization qualifies? Does it have to be state-like? Is it something broader? Could it include any non-state actor with capacity to harm civilians?

I hope that’s helpful. Thank you.