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**Topic:** ICC Statute, Article 7(1) Chapeau

**Level:** Introductory

**Date of recording:** 7 June 2017

**Place of recording:** Ontario, Canada

**Duration of recording:** 21:15

**PURL of film:** [www.cilrap.org/cilrap-film/7-1-robinson/](http://www.cilrap.org/cilrap-film/7-1-robinson/)

**PURL of English transcript:** [www.legal-tools.org/doc/e86407/](http://www.legal-tools.org/doc/e86407/)

Hello, my name is Darryl Robinson. I am a Professor in Canada. I have been asked to talk to you about article 7(1), and specifically the *chapeau* for article 7. The way article 7 on crimes against humanity works is that there is a list of crimes — murder, extermination, sexual violence, other forms of inhumane acts — and then those crimes become a crime against humanity, when they are committed “as part of a widespread or systematic attack directed against a civilian population”. So, this provision is called the *chapeau* because it sits at the top of article 7 and governs everything that follows. It’s called the threshold because it’s the threshold at which these crimes become international crimes. It’s also called the contextual element because it’s the necessary context for any crime against humanity. Murder, sexual violence, torture, etc., these are all already crimes in the national law of every country, but it’s that context, the widespread or systematic attack directed against a civilian population, that elevates those crimes to make them matters of international concern. That’s why you can have universal jurisdiction where other states will prosecute, or even the attention of international courts like the ICC.

What I want to talk to you today about is maybe four main ideas:

- one is to explain the development of this provision, its initial haziness;
- number two is the significance of it and how we’ve moved away from armed conflict;
- three, I’ll touch on the idea of widespread or systematic; and then
- fourth, this idea of a civilian population.

So, first of all: the development, the initial haziness of this concept. It actually took a while to develop this formula, widespread or systematic attack. The Nuremberg Charter which was one of the first instruments to really form up the idea — the legal idea — of crimes against humanity, it simply listed those crimes starting with murder and then simply said against any civilian population. But the question is, well what does that mean? When, how do we know that a murder, for example, is being committed against a civilian population? The Nuremberg judgment did not give us much in the way of additional clues. In fact, it only had a very short paragraph on crimes against humanity, and it simply made some observations about the crimes that had happened in

Germany. It noted that they had been committed on a vast scale. It noted that there was a policy of terror and that often the crimes were organised and systematic, and it referenced to how they were committed with great horror and cruelty, but those were not necessarily being articulated as formal legal requirements. That was arguably just the Nuremberg judgment describing the events that had happened that had amounted to a crime against humanity. Even though that important question of what is the threshold test, what is it? What are the requirements to elevate crimes to crimes against humanity? Even though that wasn't dealt with great precision, the idea of crimes against humanity was nonetheless endorsed. So, the UN General Assembly, the International Law Commission and, the national legal systems around the world, they all recognised that, yes, there is such a thing as crimes against humanity, but that crucial threshold was not specified for quite a while. It was only later in the 90's with the Yugoslav Tribunal jurisprudence, The Rwanda Tribunal Statute, the International Criminal Court Statute, that we all eventually converged on this one formulation, the widespread or systematic attack against a civilian population.

So, now the second big thing I want to talk to you about is just the significance of this formulation, and particularly the movement away from armed conflict. So, if we go back and look at the history of war crimes law — war crimes, contrasting war crimes with crimes against humanity — war crimes law originated in a set of reciprocal promises. So, my state promises your state, that I am going to treat you, your soldiers or your population in a certain way and you make those reciprocal promises to me. As a result, the law of war crimes primarily protected enemy nationals: that would be, a war crime was a state attacking, for example the citizens, civilians of another state during an armed conflict — that could be a war crime.

After World War II, though, when people were confronted by the crimes committed by the Nazi regime, a lot of them were committed against German nationals, so they technically were not war crimes. It was crimes by a state against its own citizenry that didn't fall under the normal rubric for war crimes. And that's why they turned to this idea of a crime against humanity. And that's why maybe the most important word in that definition is "any". It's just that small little word "any", any civilian population. These crimes are committed against any population, i.e. including your own population, and that's what made crimes against humanity different from war crimes.

Decades later, I think one of the biggest, most important breakthroughs in the law of crimes against humanity has been the movement away from armed conflict — that it doesn't need to be linked to armed conflict. The Nuremberg Charter suggested that it did. It was unclear shortly after: is that a legal requirement as an element of crimes against humanity? Or is that just a limitation in that Tribunal? What got clear later with the Yugoslav Tribunal jurisprudence, the ICC Statute, and all kinds of authorities today, is that crimes against humanity are not restricted to atrocities that are committed during armed conflict. So, it can be any kind of violence directed even against one's fellow nationals, even in the absence of an armed conflict, but it does require some kind of scale and coordination.

So, I want to just highlight for you the differences between say, crimes against humanity *versus* war crimes; and between crimes against humanity *versus* genocide.

The difference from war crimes is that war crimes always require an armed conflict. However, even just one little violation would constitute a war crime. One killing of one civilian would constitute a war crime. Crimes against humanity, on the other hand, they don't require the armed conflict but they do require some element of scale and coordination, which I will talk about in just a moment.

Crimes against humanity are different from genocide. They're much closer to genocide, in fact genocide was originally an offshoot, a subset of crimes against humanity. But the laws developed in its own way that you can think of it independently now. Both, crimes against humanity and genocide can be committed outside of armed conflict. Both involve collective violence, but genocide is narrower in that it requires an intent to destroy a national, ethnic, racial or religious group — and there's other commentators here that will deal with that. Crimes against humanity remains a particularly important crime because it's probably the most prevalent crime. Genocide is comparatively rare, war crimes require armed conflict; but crimes against humanity are prominent in all kinds of situations that the Court might be faced with.

Now, the third thing I want to turn to is the threshold for crimes against humanity. How does this widespread and systematic attack requirement work? What I want to draw your attention to is the structure of an international crime.

- There is always some conduct by the accused, something that the accused did.
- Then there is a context, the context that elevates that to make it a matter of international concern.
- And then there will be a link between the accused behaviour and that surrounding context.

What's really important to understand is that the accused need only commit one crime. If the accused commits a single act of murder, a single torture or so on, that can be enough as long as it's part of a widespread or systematic attack.

So, what I want to really underscore is that it's not the actions of the accused individual in the dock that has to be widespread or systematic. Widespread or systematic simply goes to the context of surrounding crimes. The term "widespread" is understood to refer to the large scale nature of the attack and the number of victims. Typically, in international cases there will be, thousands of crimes [that] will happen in a crime against humanity. But there are tribunal cases that indicate that it could be a much lower number. It could be you know, it might be as low as three hundred. Judges understandably, and probably rightly, have avoided trying to put any specific number to it, but that's the range that we are looking at.

The word "systematic": systematic refers to a high level of planning and the fact that these are not just random occurrence, the improbability of random occurrence. Now, the tribunal jurisprudence emphasizes/mentions this idea, improbability of random occurrence — they talk about that within the word systematic. In a separate video, I will talk about article 7(2)(a), and I am going to suggest that actually all crimes against humanity need that context to be not something that was randomly occurring. So, I think the requirement of improbability of random occurrence is probably a generic general requirement.

So, the International Criminal Court might wind up needing eventually to flesh out the meaning of systematic, but it appears to require a high level of organization. Drawing on earlier jurisprudence of the tribunals, it might require involvement of the state; or it might require high level officials; or it might require investment of resources; a plan, an objective, active involvement. That's to be determined. Another thing to emphasize is that these requirements, widespread or systematic — they're disjunctive. They're high thresholds. Widespread requires a lot, systematic requires a lot, but a prosecutor only needs to prove one or the other, widespread or systematic.

So the three points I want to emphasize with respect to widespread or systematic:

- One, widespread or systematic applies to the general surrounding contextual of crimes. It's not the accused individual.

- Two, the word widespread is about the scale of the crimes. The word systematic is about the level of organization, the collective dimension of the crimes.
- And three, you only need one or the other, widespread or systematic.

There is a really important qualification or limitation on that though, which appears in article 7(2)(a) — which will be dealt with in a separate video. But, article 7(2)(a) requires, in addition, that you show that there is a link to a state or organisation, somehow coordinating or encouraging the crimes. I will talk about that separately in the 7(2)(a) video.

Lastly, the civilian population. So, that is a requirement that goes back to Nuremberg, that there has to be a civilian population. The word “population”, probably, was there to reflect, again, this idea of scale. That’s now well covered in the requirement of a widespread or systematic attack. But what about this word “civilian”? It has actually become a little bit controversial, what this seemingly simple word means. The word is probably necessary in order to harmonise the law of crimes against humanity with the laws of armed conflict. Under current international law today, armed conflict is possible and it can be legal. For example, you might resort to force in self-defense, or because the Security Council authorised it. So, and again this goes against our normal morality or normal understanding, but there are circumstances when you are allowed to attack military targets, including human beings who are soldiers. So, widespread or systematic attacks on legitimate military targets, including enemy soldiers, are not crimes and they are not crimes against humanity.

But, like I say, there’s an interesting question. What does this word mean, civilian? For example, what if a state were to round up a lot of prisoners of war and to start torturing them? What if a state were persecuting its own armed forces? That last one might sound implausible — you might think, how could a state ever attack its own armed forces? But it’s not that hypothetical. In fact, the Khmer Rouge Tribunal has started to encounter exactly that kind of issue. So there’s two views on what does civilian mean. One view is functional. The functional view just says that the word civilian is there simply as I suggested earlier, to exclude attacks, lawful attacks on military targets. So, under that notion, civilian is simply a contrast with combatant. It’s the classic dichotomy. It’s called the principle of distinction. The dichotomy between a combatant, someone who you are allowed to target because they’re fighting, and a civilian who you cannot target. So, on that view, if civilian just means non-combatant, if civilian just means not a lawful target, then a prisoner of war is a non-combatant — that is someone who you are not allowed to target. And so, a widespread or systematic attack against prisoners of war would be a crime against humanity. Similarly, attacking your own armed forces in a big purge, where you are exterminating your own soldiers, that would be a crime against humanity because they are not a legitimate target in the course of any kind of armed conflict, they are not hostile armed force. This view, I just suggested to you, the functional account in which civilian just means non-combatant, that actually was the initial position taken by the tribunals in their earlier cases. I personally think it’s the correct one, it fits with the theory of the crime and with older precedents.

But, the tribunals switched their position — and so that is the second view in this controversy. The second view looks at the status of most of the people targeted. On that view, people who are all wearing uniforms they are not civilians, they are soldiers. And, as a result on this status based view, if you are targeting prisoners of war, in general; or targeting your own armed forces, in general, they would lose the protection of crimes against humanity — and the tribunals have switched to that position. In the cases doing it, the tribunals looked at the Geneva conventions which have some quite detailed rules. And, the Geneva conventions separate combatants, prisoners

of war, civilians. So, under the Geneva convention regulations, of course, prisoners of war are not civilians. They are separate categories in the Geneva convention system. I do wonder however, if that transplant was appropriate because they are cutting the use of the word civilian out of this detailed regime, a regime that was adopted after the definition of crimes against humanity. They're taking it out of detailed regime, where prisoners of the war were actually meant to be protected under the Geneva conventions. So, I am not sure you can take the word civilian as it is defined in these detailed regulations of the Geneva conventions and just copy and paste that into the older law of crime against humanity which might have been trying to work at a more general level. In any event though, the tribunals switched to the status-based use. Under their approach, a prisoner of war is not a civilian, someone who is one of your soldiers is not a civilian. So, torturing lots of prisoners of war or purging or exterminating your own armed forces, that would not be considered a civilian population.

A Cambodia Tribunal case, a recent case, looked at this kind of question, they actually went back to the traditional functional view. So this remains an open a question, that what is a 'civilian population?' As I've probably already emphasized, I prefer the functional view, that civilian just means people that are not combatants of a hostile armed force. I think that fits better with World War II cases. It respects the principle of distinction, it harmonises crimes against humanity law with war crimes law. I think that the status-based view, while I get it because it fits with how we tend to use the words in the Geneva conventions, it doesn't have a good rationale or a good theory to it and has a lot of problematic effects, but time will tell which way the International Criminal Court will go.

So, to sum-up, we talked about this requirement of widespread or systematic attack directed against a civilian population. That requirement is needed to distinguish what would otherwise be ordinary crimes from crimes against humanity. We talked about how it was not crystal clear in the Nuremberg Charter, but has become clear since the 1990's. "Widespread" refers to scale. "Systematic" refers to a high level of planning and orchestration. It only needs be one or the other, widespread or systematic. And lastly, civilian population, what does it mean? It either means that you are not attacking legitimate military targets, or it could mean you are attacking people who are not soldiers. So, it's unclear whether prisoners of war are protected or not. The last thing I guess I ought to mention is, as long as the attack in general is going against civilians, if there were a few prisoners of war, let's just say prisoners of war, if there were a few prisoners of war swept up in it, even under the tribunal definition it would be a crime to attack them. We only look at the word "civilian", not when we are looking at every single crime curated, but rather when we are just trying to look in general at a contextual level, was there an attack against a civilian population? In that sense, we are looking at who is the target of this attack. As long as it can be said, under any jurisprudence, as long as it can be said that the target was generally civilian, then under both the tribunal approach or other approaches that would still be covered. I hope that is helpful.