

Part 1: The crime of apartheid under international law - definition and elements of the crime

1.1 The historical origin of the term apartheid: the regime in South Africa

Beginning in the mid-17th Century, Calvinists of Dutch, German and French ancestry settled around the Cape Colony of South Africa (today's Cape Town). The white European settlers were originally known as Boers (named so for the occupation of the first white settlers - boer or boere in Dutch and Afrikaans mean farmer). They later became known as Afrikaners (people who speak Afrikaans, a local language that developed from a Dutch dialect). Britain conquered the Cape Colony in the late 18th Century, resulting in multiple, severe clashes between the Afrikaners, who migrated north and established two independent republics, and the new British regime.

Over the course of the 19th Century, the British Empire extended its rule in the southern part of the African continent, a process fraught with wars against both the Afrikaners and the black indigenous peoples. The war between Britain and the Afrikaners from 1899 to 1902 (The Second Boer War) ended Boer rule, but at the same time, amplified Afrikaner national identity. In 1910, the independent republics united with the areas under British control to form the Union of South Africa, which remained under British rule but had limited autonomy, controlled by the white settlers (English and Afrikaans speaking). The first government of the Union was led by the South African Party (SAP), which adopted a pro-British line. An opposition party, the National Party (NP), was formed in 1914. One issue on which hardline nationalist Afrikaners did not see eye to eye with the ruling party was South Africa's active participation in the Second World War alongside Britain and the Allied Powers.

The word apartheid (apartness in Afrikaans) expresses the notion of organizing the regime and society in a manner that would ensure separation between races in all aspects of life and the dominance of the white race. It first appeared in 1929,¹ and became a cause of the NP in 1944. On May 28, 1948, the NP won the election (in which only whites voted) and began reforms designed to incorporate the notion of apartheid in South African society and in the country's economy. It should be noted that the NP's apartheid policies were not purely its invention. The party relied heavily on legislation, policies and practices originating

1 Gillomee, Hermann, **The last Afrikaner leaders: A supreme test of power**, University of Virginia Press (2013), p. 22.

in British rule, which gave different rights to black indigenous people (the African majority), colourdes, who lived mostly in the Cape area, Asians, who were brought from India and Southeast Asia and their descendants, and whites.

Most non-white residents of South Africa could not vote or run for public office even before the NP took power, under laws enacted beginning in 1910. By the time the NP won the election and formed a coalition government with another nationalist party, the Afrikaner Party, the notion of racial segregation and white rule had already been ingrained in local politics. Nevertheless, the NP's ascendance saw apartheid being adopted as an official policy dictating actions in various fields of governance.

Proponents of the apartheid policy argued that it was designed to ensure "separate development" for members of the country's different ethnic groups, while preserving their unique features, heritage and culture. In practice, the policy developed into a complex system of laws and regulations that gave the white minority control over all sources of power - politics, economic activity, natural and other resources, including land, all while excluding members of other racial groups.² This is known as "grand apartheid." It concerns the **systematic, institutional discrimination of one group by another, in the context of the domination of the discriminating group over the discriminated one and with the intention of perpetuating the said domination.**

In addition to establishing the rule of the white hegemony, as described above, apartheid laws included compulsory physical and social separation in communities, educational facilities, public transportation, access to health services and cultural and leisure activities, with the best reserved for the white minority. This racial segregation, immortalized in photographs taken in public drinking fountains and busses have, over the years, come to symbolize apartheid. The people who fought the regime referred to this as "petty apartheid." Humiliating and hurtful, petty apartheid complemented grand apartheid, whose ramifications for the lives and futures of non-whites were far greater. At their peak, apartheid laws forbade interracial marriage and sexual intercourse, restricted freedom to oppose apartheid and work to end it and banned political and professional associations.

² For a review of apartheid laws in South Africa, see: John Dugard, **Human Rights and the South African Legal Order**, Princeton University Press (1978).

1.2 The criminalization of apartheid under international law

On December 2, 1950, the UN General Assembly adopted a resolution stating that “a policy of ‘racial segregation’ (Apartheid) is necessarily based on doctrines of racial discrimination,” and calling on South Africa to refrain from enacting laws that define separate living areas for different racial groups.³

The term “racial discrimination” was officially defined for the first time in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which the UN General Assembly opened for signature on December 21, 1965. The definition included in the ICERD went beyond discrimination on the basis of race alone:

[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁴

The definition of racial discrimination in ICERD goes beyond the traditional, narrow scope of racial group, which focuses on a **biological-genetic** classification of humans, towards a **social** approach that looks at the political and identity classifications of groups of people, and includes these in its definition of race as well. Over the years, the conceptualization of race as a social construct has taken hold. For instance, the International Criminal Tribunals for Rwanda and the Former Yugoslavia have ruled that the definition of a certain group as a “racial group” depends on circumstances and on social, cultural and political context. According to the tribunal, such a definition is arrived at on a case by case basis (and is not limited to racial, **biological** origin).⁵ The idea that racial groups are determined by self-identification with a social, cultural or political group adopted in the jurisprudence of these tribunals is in line with the recommendations of the UN Committee on the Elimination of Racial Discrimination (1990), whereby membership in a racial group should be based on self-identification.⁶

3 General Assembly Resolution 395 (V), Treatment of people of Indian origin in the Union of South Africa, A/RES/395(V), (Dec. 2, 1950).

4 International Convention on the Elimination of All Forms of Racial Discrimination, Nov. 21, 1965, 660 U.N.T.S. 195, Art. 1(I).

5 Prosecutor v. Rutaganda, Case No. ICTR-96-3, Trial Judgment, 6 Dec. 1999, paras 55, 57.

6 UN Committee on the Elimination of Racial Discrimination General Recommendation VIII, ‘Identification with a particular racial or ethnic group’, UN Doc. A/45/18, 22 Aug. 1990, p. 27. Following this recommendation, the Committee on the Elimination of Racial Discrimination ruled the Convention applied to discrimination against members of the Indian caste system - Committee on the Elimination of Racial Discrimination, ‘Concluding Observations: India’, UN Doc. CERD/C/IND/CO/19, 5 May 2007, at para. 8) Prosecutor v. Rutaganda, Case No. ICTR-96-3, Trial Judgment, 6 Dec. 1999, paras 55, 57.

Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination sets forth that:

*States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.*⁷

Until 1966, the UN General Assembly addressed South African Apartheid in terms of a violation of the principles and spirit of the Charter of the United Nations (1945)⁸ and the Universal Declaration of Human Rights (1948).⁹ On December 16, 1966, the UN General Assembly issued its first condemnation of apartheid in terms of **crimes against humanity**.¹⁰ In 1968, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity set forth that “inhuman acts resulting from the policy of apartheid” are considered crimes against humanity.¹¹ The term “inhuman acts” opened a space for interpretation as to whether the apartheid regime itself is criminal as opposed to inhuman acts resulting from it or carried out as part of it that have been expressly criminalized.¹²

It is against this backdrop that the UN General Assembly began drafting an international convention on the suppression and punishment of the crime of apartheid as a regime.

7 International Convention on the Elimination of All Forms of Racial Discrimination, Article 3.

8 The Charter of the United Nations mentions human rights primarily in Article 1(3) of Chapter I entitled Purposes and Principles and in Articles 55-56, in Chapter IX entitled International Economic and Social Co-operation. Article 1(3) relates to the UN's goal for achieving international co-operation to encourage respect for and protection of human rights, while Article 55 of the Charter sets forth goals to be promoted by the UN to create the stability and well-being required for peaceful relations among nations, based on respect for the principle of equal rights and self-determination. These goals address economic, social and cultural development of various countries and the encouragement of respect to human rights and fundamental freedoms universally, “without distinction as to race, sex, language, or religion.”

9 Article 2 of the Universal Declaration of Human Rights declares the right to equal entitlement without discrimination, to the rights and freedoms enshrined therein: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

10 General Assembly Resolution 2202, The policies of apartheid of the Government of the Republic of South Africa, [A/RES/2202\(XXI\)](#) A-B, (Dec, 16, 1966).

11 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 21, 1968, 754 U.N.T.S. 73, Art.

12 Jonathan Alshech, “Apartheid as a Crime against Humanity,” **Zmanim: A Historical Quarterly**, Vol 138 (2017), pp. 116-131 (Hebrew).

1.2.1 The Apartheid Convention

On November 30, 1973, the UN General Assembly opened the International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA) (hereinafter: Apartheid Convention) for signature. The Convention came into effect on July 18, 1976. The Apartheid Convention defines the crime of apartheid as “**inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.**”¹³ The preamble to the final version of the Convention lists the sources for the assertion that apartheid is a crime against humanity. They include the Universal Declaration of Human Rights (1948) which declares all persons are born equal in rights and dignity and that all are entitled to all the freedoms listed in the Declaration regardless of race, color or nationality; the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), in which the UN General Assembly declared that liberation from colonial rule is inevitable and that colonial rule must end along with the practices of separation inherent in it;¹⁴ the Convention on the Prevention and Punishment of the Crime of Genocide (1951), which the preamble to the Apartheid Convention states incriminates certain acts that may also come under the definition of the crime of apartheid; as well as other international conventions and declarations, some of which were mentioned above.

Article I of the Apartheid Convention states that “States Parties declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in Article II of the Convention, are crimes violating the principles of international law, in particular, the purposes and principles of the Charter of the United Nations.”¹⁵

Article II of the Apartheid Convention defines apartheid as (underline emphasis added, M.S.):

For the purpose of the present Convention, the term “the crime of apartheid”, which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

13 International Convention on the Suppression and Punishment of the Crime of Apartheid, New York, 30 November 1973, United Nations, Treaty Series, vol. 1015, p. 243., Art. II.

14 General Assembly resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, A/RES/1514(XV), (14 December 1960).

15 Ibid., Art. I.

1. Denial to a member or members of a racial group or groups of the right to life and liberty of person:
 - a. By murder of members of a racial group or groups;
 - b. By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
 - c. By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;
2. Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
3. Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;
4. Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;
5. Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;
6. Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

As can be seen, the definition revolves around the establishment and maintenance of a system of control by one group over another as part of which and for the sake of which acts considered “inhuman” are committed. Hence, the crime of apartheid is not only a crime committed by a regime, but **a regime whose very existence is illegitimate**,

and, therefore, any act designed to preserve the regime and the control and oppression at its core is criminal. This is also what makes the crime of apartheid unique.

On June 19, 1976, the UN Security Council made its first declaration condemning the crime of apartheid and treating it as a crime against humanity.¹⁶ On June 8, 1977, the First Protocol Additional to the Geneva Conventions of 12 August 1949, was published, listing the crime of apartheid as a grave breach of the Convention and a war crime.¹⁷

On September 3, 1981, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) entered into effect. In its preamble, the Convention declares that “the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women.”¹⁸

The criminalization of apartheid as an international crime continued after South Africa’s apartheid regime collapsed.

In a resolution dated August 18, 1995, the UN Committee on the Elimination of Racial Discrimination affirmed the universal application of Article 3 of ICERD, which prohibits all forms of racial segregation and **apartheid** and emphasized that the prohibition on racial segregation applies to all countries.¹⁹

In 1996, the Truth and reconciliation commission of South Africa, headed by Archbishop Desmond Tutu, declared that being part of the international human rights community, it considers apartheid a crime against humanity.²⁰

Two years later, the Rome Statute was opened for signatures. The statute is the constitution of the International Criminal Court in The Hague (the ICC) and the legal source for its operation.

16 Security Council Resolution 392, Situation in South Africa: killings and violence by the apartheid regime in South Africa in Soweto and other areas, S/RES/392, (June 19, 1976).

17 International Committee of the Red Cross. (1977), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Protocol I, Art. 85(4)(c), 85(5).

18 Convention on the Elimination of All Forms of Discrimination against Women, entered into effect with respect to Israel on November 2, 1991.

19 UN Committee on the Elimination of Racial Discrimination, “General Recommendation XIX: Racial Segregation and Apartheid (article 3), August 18, 1995, para 1.

20 Truth and reconciliation commission of South Africa report (1998), pp. 94-102.

1.2.2 The Rome Statute

On July 1, 2002, the Rome Statute, which constitutes the ICC, went into effect. The Statute lists apartheid as one of eleven crimes against humanity, and defines it as follows:

Acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.²¹

The definition of apartheid in the Rome Statute focuses on an “institutionalized regime” and the crime committed as part of it.

The acts the definition refers to are those “of a character similar” to other crimes against humanity included in Article 7 of the Rome Statute (murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery and other forms of sexual violence; persecution; enforced disappearances and “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”²² This last item is a catch-all phrase that applies to cases of particularly grave physical or mental violence as part of a broad attack on a civilian population.²³

1.1.3 The prohibition on the commission of the crime of apartheid as jus cogens or peremptory norm

As the review above shows, the prohibition on apartheid has become a central, accepted norm in international law, anchored in declarations, resolutions, conventions and even a prohibition written into international criminal law. The elevated status this principle enjoys stems not only from its wide acceptance by the international community and its institutions, but also from the fact that it is rooted in the heart of the moral code which is the foundation of international law.

Today, there is broad consensus that this prohibition has attained the highest status a legal principle can achieve in international law - jus cogens, or peremptory norm. Article 53 of the Vienna Convention on the Law of Treaties (1969)²⁴ defines a jus cogens norm as

²¹ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S., Art. 7(2)(h).

²² Rome Statute, Article 2(1)(k).

²³ **Elements of the Crime**, (ICC, 2011) p. 12.

²⁴ Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, *United Nations Treaty Series*, vol. 1155, p.331.

a “norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.” The Article also states that any treaty that is in conflict with such a norm is void (as reinforced in Article 64 of the Convention as well), and that a norm of this caliber can only be modified by a later norm of the same character. Norms that have attained jus cogens status in the past include the prohibitions on genocide and on the slave trade.

Evidence of the wide consensus that apartheid belongs among the rare prohibitions with jus cogens status can be found in the fact that it is listed alongside prohibitions whose jus cogens status is uncontested in the Draft Articles on Responsibility of States for Internationally Wrongful Acts, issued in 2001 by the International Law Commission (ILC), as examples of breaches of international law that include a wrongful act component.²⁵ The ILC, which is the highest level UN body dealing with the interpretation of international law and the drafting of international conventions, also notes the widespread agreement among states regarding the fundamental nature of the prohibition on apartheid, and notes it considers it a norm that admits no exceptions under the general principles of international law.²⁶ The ILC has recently restated its position in no uncertain terms, and included apartheid in a tentative list of norms that have attained jus cogens status in a report summarizing its draft conclusions on the issue.²⁷

It is important to note that jus cogens norms give rise to obligations erga omnes, meaning obligations whose violation is considered a violation against the entire international community rather than only the victim or the other party involved in the act, inasmuch as such exists (not every norm that gives rise to obligations erga omnes is necessarily a jus cogens norm, but every jus cogens norm does give rise to obligations erga omnes). Therefore, a breach of the prohibition on apartheid imposes duties on all states, not just the specific victims of the crime.

It is also worth noting in this context that in the matter of Barcelona Traction, Light and Power Company (Belgium v. Spain), the International Court of Justice (ICJ) ruled that the prohibition on racial discrimination was an erga omnes obligation and stated it may arise from “principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”²⁸ It is worth noting that the ICJ is the

25 International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries’, appears in the Yearbook of the International Law Commission, (2001) III, art. 40, comment 4. See also: Robbie Sable, **International Law**, The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, Hebrew University Faculty of Law, 2003, p. 16 (Hebrew).

26 *Ibid.*, art. 113.

27 Report of the International Law Commission Seventy-first session (29 April–7 June and 8 July–9 August 2019), Draft conclusion 23.

28 International Court of Justice, Case Concerning the Barcelona Traction, Light and Power Company (Belgium v. Spain), Limited Second Phase, Final Judgment (1970), ICJ Rep 3, art. 32, paras 33–34.

highest judicial instance of the UN and the competent authority on the interpretation of international law. Its decisions constitute a source of customary international law.

The aforesaid indicates it is widely accepted that the prohibition on the establishment and maintenance of a regime based on institutional, systemic discrimination and control by the discriminating group over the group subjected to discrimination, such as a regime of apartheid, is a jus cogens norm that gives rise to obligations erga omnes.²⁹

1.3 The elements of the crime as developed to date

According to the above review, the main legal sources listing the elements of the crime of apartheid as an international crime are the Apartheid Convention and the Rome Statute, each of which contains a full definition of the crime. The ICERD is another relevant instrument, as it specifies the definitions of “racial discrimination” and “racial group,” expanding the group classification to include ethnic and national origin, among others.

The definition of apartheid differs between the two conventions, but they share many common features.

Most important to the matter at hand is that under both definitions, apartheid is a regime focused crime. In other words, it is a crime that centers on the existence of a regime that has certain attributes. While unlike the Rome Statute, the Apartheid Convention does not use the term “regime,” it does, however, require a body of practices and policies that are implemented systematically, similarly to South Africa, and thus also depicts an institutional crime.

Specific acts, defined as “inhuman acts,” carried out as part of this regime, implicate the individuals who commit them in the crime of apartheid.

As for inhuman acts, there are certain differences between the definitions included in the conventions, as well as considerable overlap: Many of the inhuman acts listed in Article 2 of the Apartheid Convention could come under the crime of persecution listed in Article 7(1)(h) and defined in Article 7(2)(g) of the Rome Statute (“the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”), or in the catch-all phrase included in Article 7(1)(k) (“Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”).

²⁹ Dugard, John, and John Reynolds, “Apartheid, international law, and the occupied Palestinian territory,” *European Journal of International Law* 24.3 (2013), p. 883.

And so, both definitions, in the Apartheid Convention and in the Rome Statute, list three elements of the crime - act, context and purpose:

1. **Act** - the commission of one of the acts defined as “inhuman;”
2. **Context** - A regime of control and oppression of one group (or groups) by another group (or groups); the terms systemic control and oppression should be read literally and as related to one another: a system that allows enforcing the inferiority of one group to another. This will mostly be manifested in institutionalized discrimination in rights and resources.
3. **Purpose** - The preservation of control by the discriminating group (or groups) over the group (or groups) subjected to discrimination;

These three are complemented by the requirement applicable to all crimes against humanity that the act in question form part of a systematic or widespread attack on a civilian population rather than a single act.

The table below contains a comparison between the elements of the crime in the Rome Statute and in the Apartheid Convention:

Elements	Rome Statute	The Apartheid Convention
Act	<p>Article (2)(h): “[...]inhumane acts of a character similar to those referred to in paragraph 1.”</p> <p>[Art. 1 includes:</p> <ul style="list-style-type: none"> • Murder; • Extermination; • Enslavement; • Deportation and forcible transfer of population; • Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; • Torture; • Rape, sexual slavery and other forms of sexual violence; • Persecution of a group; • Enforced disappearance; 	<p>Article 2: “The following inhuman acts [...]:</p> <ol style="list-style-type: none"> 1. Denial to a member or members of a racial group or groups of the right to life and liberty of person: <ol style="list-style-type: none"> a. By murder; b. By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

Elements	Rome Statute	The Apartheid Convention
<p>Act</p>	<p>Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health</p> <p>Article 7(1): The crime of apartheid belongs to the category of <u>crimes against humanity</u>, and as such, is committed when the relevant inhuman action is carried out</p> <p>“as part of a widespread or systematic attack directed against any civilian population.”</p>	<p>c. By arbitrary arrest and illegal imprisonment;</p> <p>2. Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;</p> <p>3. Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association.</p> <p>4. Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial</p>

Elements	Rome Statute	The Apartheid Convention
Act		<p>group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;</p> <p>5. Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;</p> <p>6. Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.</p>
Context	Article 7(2)(h): “in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group.”	Article 2: “domination by one racial group of persons over any other racial group of persons and systematically oppressing them.”
Purpose	Article 7(2)(h): “with the intention of maintaining that regime.”	Article 2: “for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.”

The full list of elements of the crime of apartheid will be extricated from the three mentioned above, act, context and purpose, after adding the required sub-elements (the existence of more than one racial group; the act being committed as part of a widespread attack on a civilian population and others).³⁰ **For purposes of this opinion, we adopt a restrictive approach that looks only at acts that meet the criteria of both instruments.**

³⁰ Elements of the Crime, (ICC, 2011) p. 12.

When the elements listed below are present, a crime of apartheid has allegedly been committed. The word “allegedly” has been added because crimes are perpetrated by people, and liability requires the mental element of awareness of the acts and their context along with intent to maintain the regime as mentioned. **The specific liability of one person or another for a crime can only be determined individually, according to findings about what the person knew and intended.**

Below is a summary of the elements of the crime of apartheid:

The elements of the crime of apartheid

1. **The presence of different “racial groups,”** as per the definition in Article 1(1) of the ICERD (which expressly includes race, color, descent, or national or ethnic origin).
2. The context of a regime in which one group (or groups) dominates another group (or groups) and systematically oppresses its members, in other words, enforcing the inferiority of one group compared to another, usually through institutional discrimination in rights and resources, but also through segregation practices.
3. **The commission of one of the acts defined as inhuman and listed in Article 2(a)-2(f) of the Apartheid Convention or Article 7(1) of the Rome Statute.** It is noted, in this context, that the commission of the crime of apartheid does not require the presence of all inhuman acts listed in the relevant articles. However, since the crime in question is a crime against humanity, it is reasonable to assume a certain degree of severity will be required, and since there is no jurisprudence on the issue, it is difficult to predict how the requirement for an inhuman act will be interpreted in terms of scope.
4. **The commission of the acts for the purpose of establishing and maintaining the context - domination by a racial group (or groups) over another racial group (or groups) and its systematic oppression.** In this context, an assessment must be made to determine whether the acts are sporadic or lack institutional context, or whether they are perpetrated as part of a widespread, systemic, institutionalized regime of oppression.³¹
5. **The act/s form/s part of a systematic or widespread attack on a civilian population** (a requirement for all crimes against humanity).³²

³¹ Dugard and Reynolds, p. 881. See supra note 29.

³² Section 7(1)(j) of the Rome Statute lists the crime of apartheid among crimes against humanity, which are defined as such when committed “widespread or systematic attack directed against any civilian population, with knowledge of the attack.”

6. **The mental element:** In addition to these, concrete criminal liability requires the mental element of awareness of the nature of the inhuman acts, their being part of a larger apparatus for their commission and the aforesaid regime context. It also requires intent to maintain the regime context.

1.4 The crime of apartheid: summary

The international community has condemned, prohibited, and criminalized apartheid, and it is now considered a crime against humanity. The normative status of the prohibition on apartheid is the highest attainable in international law - jus cogens, a prohibition with no exceptions. Like any crime, the crime of apartheid is committed by human beings. States do not commit crimes. People do. The crime of apartheid, however, is committed within the context of a specific type of regime. It is committed in the context of domination and oppression of one group by another, in other words, when the oppressed group is subjected to systemic discrimination and forced inferiority, usually through institutional discrimination in rights and resources.

In this context, it is important to pay attention to a common mistake: Despite its historical origin, the crime of apartheid can exist without racist ideology. Racism may be what motivates the establishment of an apartheid government system, but as in any other criminal offense, motive is not an element of the crime, and so, a system of government dominating over and oppressing a racial group (in the sense described) established for other motives (for instance, economic or political), would also implicate the responsible parties in the crime of apartheid.

It is also important to note that not all discriminatory treatment, even if it is systemic or institutional, establishes the crime of apartheid. The focus of the crime of apartheid and what sets it apart is the establishment and maintenance of a **regime that revolves around domination and oppression of a group or groups of people**. But even this is not enough, as the definition of the crime requires that the perpetrators have a particular intent in mind - the **preservation of the system of domination and oppression, or the preservation of the inferiority of one group and the superiority of the other**. Domination and forced inferiority are features that must be central to the regime, a part of its DNA, seen in every part of it rather than in just one area.³³

Both the nature of the crime as an unlawful regime and the classification of acts carried out as part of it as crimes against humanity (a required feature of which is that they constitute widespread attacks on a civilian population) indicate that to establish the crime, the discrimination and oppression must meet some minimal bar in terms of scope. As such,

³³ Dugard and Reynolds, p. 881, see supra note 29.

one discriminatory or injurious policy, even if wide in scope, would not be enough, nor would statutory discrimination in one area, even if severe. The crime of apartheid requires the policies or legislation to be so central to the life of the regime that they are a central feature of it.

A regime is composed of public institutions, laws, regulations, policies and practices. To ascertain whether the specific regime features described above, and as noted, are a requirement for the crime of apartheid, exist, we must look at all of these.