
THE LEGAL DEFINITION OF THE CRIME OF APARTHEID

A TOOL TO ASSIST THOSE IN DETERMINING THE EXISTENCE OF CONTEMPORARY APARTHEID

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INTRODUCTION

Discussions about the existence of contemporary apartheid are quite often emotionally charged in popular discourse. Labeling a State or State actor as a perpetrator of apartheid can send an informed debate adrift. As a result, a debate on the existence of contemporary apartheid often fails even before it had a chance to start. However, it is possible to have an informed debate about the existence of contemporary. Such a debate can only occur, however, when there exists a common understanding of the meaning of 'apartheid'. For this reason, clarification of the definition of apartheid is necessary to advance serious discourse about its existence.

THE DEFINITION OF "APARTHEID" UNDER INTERNATIONAL LAW

Under international law, the crime of apartheid has a precise definition. This definition was codified in the *Rome Statute for the International Criminal Court*.¹

The crime of apartheid is found at Article 7: 'Crimes against Humanity':

1.: For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:...

(j) The crime of apartheid...

The crime of apartheid is defined in article 7.2.:

For the purpose of paragraph 1...

(h) "The crime of apartheid" means inhumane 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....

The phrase "acts of a character similar to those referred to in paragraph 1" has a precise meaning:²

¹ *Rome Statute of the International Criminal Court* (2002) United Nations (Office of Legal Affairs, Codification Division) online: <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

² 'Elements of Crimes,' Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2

1. Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.

2. The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.

3. "Attack directed against a civilian population" in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population.

Further, the elements of the crime are similarly precisely defined in international law:³

- "1. The perpetrator committed an inhumane act against one or more persons.
2. Such act was an act referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts.
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.
5. The perpetrator intended to maintain such regime by that conduct.
6. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
7. 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."

FN 29: "It is understood that "character" refers to the nature and gravity of the act."

ANALYSIS OF THE DEFINITION OF APARTHEID

"WIDESPREAD OR SYSTEMATIC"

The commission of the crime of apartheid has a number of elements. First, the crime must be committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."

and corrigendum), part II.B reproduced in (The Hague: International Criminal Court, 2011) at pages 1 & 12, online: <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

³ *Ibid.*

The disjunctive "or" means that the commission of the offence does not need to involve both elements. Widespread refers to encompassing not necessarily a large geographic area, but rather the multiple commission of such elements of the act meeting a threshold number of occurrences. This is necessarily temporally and personally limited. It necessarily must take place in some specifically defined territory, but that territory must not necessarily be large.

"ATTACK DIRECTED AGAINST ANY CIVILIAN POPULATION"

"A COURSE OF CONDUCT INVOLVING THE MULTIPLE COMMISSION OF ACTS"

A course of conduct may have a positive character - that is, committing actual measures or acts - or a negative character - that is, refraining from action or omission. Multiple commission necessarily means that the act or omission must occur at least more than once. Though no precise number is defined in international law, a scale of likelihood of meeting the requisite condition for committing "multiple" acts does exist, whereby, with the increased frequency of occurrence of the act or omission, there is a corresponding increased likelihood that the character of "multiple" will be met.

"PURSUANT TO OR IN FURTHERANCE OF A STATE OR ORGANIZATIONAL POLICY TO COMMIT SUCH ATTACK"

Either State or non-State actors can be implicated for the commission of the attack. The requirement involves that merely some group commit the attack as part of some policy to commit such attacks. Knowledge of whether or not the attack is committed as part of some policy can be inferred from the context in which the act was committed. In effect, though perpetrators of such attacks need not actually be intending to carry out the policy, their knowledge that such a group policy exists combined with the factual circumstance that such a policy is being carried out is sufficient for implicating the individual as committing the attack pursuant to or in furtherance of a State or organizational policy. (See: Prosecutor v Jokic, International Criminal Tribunal for the Former Yugoslavia, Judgement of the Court of Appeal)

"THE ACTS NEED NOT CONSTITUTE A MILITARY ATTACK"

The act or omission can occur during the context of an armed conflict or in the absence of an armed conflict - in effect, "peacetime".

"COMMITTED IN THE CONTEXT OF AN INSTITUTIONALIZED REGIME"

The impugned acts or omissions must take place where there exists an "institutionalized regime". It is still an open question of law as to whether a non-State organization can be characterised as an "institutional regime". However, it can be envisaged that, where such a group forms an integral part of the operation or implementation of activities in the life of the State, and where the status of such a group is recognized, either formally or informally, as capable of carrying out actions or omissions affecting a significant proportion of the population, such groups may be implicated.

"SYSTEMATIC OPPRESSION AND DOMINATION"

Though the attack may be widespread 'or' systematic, the oppression and domination must be systematized. This involves necessarily involves the commission of similar acts at the horizontal level and at the vertical level. Acts of a horizontal nature are those which are committed at the same institutional level. For example, the repeated denial of a national identity documents, passports, or other such documents necessary for international travel would be at the same horizontal level. Acts of a vertical nature are distinct not necessary in type, but in character. For example, being denied access to a complaints commission or appeal board to protest the denial of necessary travel documents would be an act or omission vertically distinct from the denial of necessary travel documents. Therefore, while the character of both the acts is the same - 'denial' - the acts reach a 'systematic'

character where they occur at both the horizontal level - 'denial of identity documents, passports, or other necessary travel documents' – and vertical level – denial of recourse to administrative or judicial review.

“OPPRESSION AND DOMINATION”

The systematic attack must be both oppressive and of a dominating character. It is oppressive in the sense that it denies rights. Denial such rights to all members of a State population would not be sufficient for meeting the crime of apartheid. The denial of rights must also be directed against a specific group in the population by one group who, because of official or unofficial status, has the ability to restrict the rights of the disadvantaged group. In other words, if the entire population of a State is systematically oppressed, the requisite element of domination cannot exist. There must exist some distinction between groups of the population for discriminatory acts or omissions to occur, and such discriminatory acts or omissions must be committed by a group that has an advantaged position over the target group.

“BY ONE RACIAL GROUP OVER ANY OTHER RACIAL GROUP OR GROUPS”

The systematic oppression and domination must be carried out specifically by only on racial group. If two or more racial groups combine to carry out systematic oppression and domination over one or more racial groups, the act would fall outside the scope of the definition of apartheid. However, where basic human rights are concerned, many scholars have argued that categorizations must be given liberal interpretation in order to ensure the greatest protection of rights. This is inferred from the object or purpose of the treaty, which is to criminalize those acts of greatest concern to humankind, and from the context of the treaty, which is complementary to both international humanitarian law – also known as the laws of war or laws of armed conflict – and international human rights law. In that light, a liberal amount of flexibility must be afforded to the finder of facts in determining the boundaries of 'racial groups'.

“AND COMMITTED WITH THE INTENTION OF MAINTAINING THAT REGIME”

Committed implies that a positive act must occur. Though the sequence of actions can be positive or negative in character – that is, acts or omissions – the overall character must be to carry out some positive act. For example, not providing for the a population a systematized universal health insurance or health care scheme would not constitute commission because the provision creates no obligation for States to act in such a way. Instead, the provision prohibits certain State action or omission to the exclusion of others.

Further, the systematized commission of the acts must be with requisite intention to carry them out for the sole purpose of maintaining a regime. In other words, the systematized commission must be intended to maintain the advantage of one group to the exclusion of others, and that advantage must be to the benefit of one group vis-à-vis a regime to the detriment of another group vis-à-vis that same regime.

With respect to “intention”, as noted above, “the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.” Intention describes the state of mind of the perpetrator. Knowledge of intent need not be specific, but may instead be inferred from the context and factual circumstances. Intention, therefore, is given no exceptionally different legal meaning as it is in relation to most other criminal acts. It is not required that the fact find ‘know’ the precise mental state of the perpetrator at the time of the commission of the act. Rather, all that is required is that the fact finder be able to determine from the evidence before him/her that the perpetrator(s) will was directed toward furthering the crime in question. Furthering means either carrying out all the constitutive elements of the crime, or any part thereof. The amount sufficient to determine ‘part’ is generally determined on a case-by-case basis, bearing in mind the nature of the acts or omission in question and the context or factual circumstances in which they occur.

NOTES:

For further clarification, the method of interpretation I used above was guided by ‘The Vienna Convention on the Law of Treaties’ at articles 31-32 (‘Vienna Convention on the Law of Treaties,’ 23 May 1967, United Nations Treaty Collection, 1155 U.N.T.S. 331 (entered into force 27 Jan 1980) online: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf). Though this treaty is not, as a whole, necessarily binding on all members of the international community, since, as a treaty, a State must ratify it in order to be bound, the specific provisions of articles 31-32 are considered customary international law. And, as customary international law, all States are bound by them. (See “Reports on the International Law Commission on the Second Part of its Seventeenth Session and on its Eighteenth Session” (UN Doc. A/6309/Rev.1) in ‘Yearbook of the International Law Commission 1966,’ vol. 2 (New York: UN, 1967) at pages 227-223 (A/CN. 4/SER. A/1966/Add. 1) online: [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1966_v2_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1966_v2_e.pdf)). Therefore, my interpretation of the treaty provisions of the Rome Statute of the International Criminal Court and its ‘Elements of Crimes’ is consistent with the accepted method of interpretation of treaties under international law.

APPENDIX A:

Vienna Convention on the Law of Treaties

Article 31: ‘General rule of interpretation’

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: ‘Supplementary means of interpretation’

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.