

## Codifying Gender Apartheid as a Crime against Humanity under International Law

For decades, the term “gender apartheid” has been used to describe systematic gender-based oppression and domination, including by the Taliban regime in Afghanistan in the 1990s.<sup>1</sup> Since the Taliban takeover of August 2021, there has been increased recognition of the escalating gender apartheid in Afghanistan including by Afghan and international jurists and women’s rights defenders, the UN Secretary-General and multiple UN experts, and UN Member States.

To date, gender apartheid has not been formally codified under international law. This leaves victims and survivors of gender apartheid without adequate remedy or reparation for the totality of crimes committed against them. In response to this accountability gap, many have called for the codification of a crime of gender apartheid under international law. In March 2023, dozens of prominent Afghan and Iranian jurists and women’s rights defenders launched the [End Gender Apartheid Campaign](#), urging the international community to recognize gender apartheid under international and domestic law and in September 2024, UN Women Executive Director Sima Bahous [called](#) for an “intergovernmental process to explicitly codify gender apartheid in international law.”

On 5 October 2023, the Atlantic Council Strategic Litigation Project and Global Justice Center issued a [joint letter and legal brief](#) (“Legal Brief”) endorsed by over 100 leading jurists and public figures<sup>2</sup> specifically urging UN Member States to codify the crime of gender apartheid in the potential crimes against humanity treaty presently under consideration by the UN General Assembly’s Sixth Committee (Legal). As of April 2024, 10 UN Member States had expressed openness to exploring the inclusion of gender apartheid in the draft crimes against treaty.<sup>3</sup>

This Q&A provides a snapshot of the legal and policy bases and consequences of the proposed codification of the crime against humanity of gender apartheid. For more information, please visit <https://endgenderapartheid.today/legal-brief.php>.

### *1. How can gender apartheid be defined as a crime against humanity under international law?*

The crime of apartheid was first recognized and codified under international law in response to the systematic oppression and domination of Black and non-white people in southern Africa from 1948 to the early 1990s. Accordingly, apartheid was defined in the [Apartheid Convention](#) and the [Rome Statute](#) as a crime of humanity comprising inhumane acts aimed at maintaining systematic domination by one racial group of another.

The Legal Brief asserts that the Taliban’s ever-deepening oppression and domination of Afghan women and girls evokes the dystopian ambition of the South African apartheid government and warrants a similar legal response. It identifies the crimes against humanity treaty as an appropriate avenue for codification,

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<sup>1</sup> For instance, the UN Special Rapporteur on the elimination of intolerance and all forms of discrimination based on religion or belief Abdelfattah Amor (Tunisia) asserted that Afghan women in 1999 were being subjected to a “form of apartheid.” Press Release, Special Rapporteurs on Religious Intolerance and Judicial Independence, Independent Expert on Compensation Address Commission on Human Rights, HR/CN/99/32 (Apr. 12, 1999), <https://www.ohchr.org/en/press-releases/2009/10/special-rapporteurs-religious-intolerance-and-judicial-independence>.

<sup>2</sup> See question 10 below for a snapshot of the joint letter’s signatories. The full list of signatories is available at <https://endgenderapartheid.today/legal-brief.php>.

<sup>3</sup> These States include Afghanistan, Australia, Austria, Brazil, Chile, Iceland, Malta, Mexico, the Philippines, and the United States. See Akila Radhakrishnan & Alyssa Yamamoto, *More States Open to Considering Gender Apartheid for Draft Crimes against Humanity Treaty*, Just Security (May 24, 2024), <https://www.justsecurity.org/96096/gender-apartheid-crimes-against-humanity-treaty/>.

and proposes that the current definition of the crime of apartheid in the Draft Articles on Prevention and Punishment of Crimes against Humanity (“Draft Articles”) – the proposed starting point for the treaty, which largely replicates the Rome Statute, including verbatim the definition of apartheid – be expanded to include the following amendment (italicized text):

“inhumane acts ... committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups, *or by one gender group over any other gender group or groups*, and committed with the intention of maintaining that regime.”

## **2. *How is the crime of gender apartheid distinct from the crime of gender persecution?***

Apartheid is legally unique because it requires the specific intent to maintain an institutionalized regime of systematic oppression and domination, as well as the animating context of such a regime. The crime of gender persecution, which entails the “severe deprivation of fundamental rights” where victims are targeted because of their (perceived) identity on the basis of gender, requires neither such intent nor context.

The crimes of apartheid and persecution can and should coexist just as racial apartheid and persecution already coexist in the Rome Statute and more broadly in international law. These crimes are mutually reinforcing, and where the two crimes involve overlapping facts, they can be charged cumulatively to capture the full extent of wrongful conduct.

## **3. *Why is the proposed crimes against humanity treaty an appropriate avenue for codification?***

As the first major United Nations treaty on core crimes since the 1998 Rome Statute, the proposed crimes against humanity treaty offers a unique opportunity to fill the accountability gap that currently leaves victims and survivors of systematic gender-based oppression and domination without adequate recourse. The treaty is a particularly suitable and pragmatic avenue for international action since it presents an ongoing codification opportunity. Following the debates in the Sixth Committee, it is clear that while States are cautious at this stage in the political process, many States have viewed the treaty as an opportunity for both codification and progressive development. Inclusion of the crime of gender apartheid could therefore show the progress made since the Rome Statute, reflecting gender-based crimes including gender apartheid.<sup>4</sup>

The proposed amendment would not require reopening and amending already-adopted international instruments like the Rome Statute and/or the International Convention on the Suppression and Punishment of the Crime of Apartheid, though these complementary avenues are also worth pursuing.

## **4. *How can the crime of apartheid include gender when its original context was specific to race?***

There are significant similarities between the institutionalized regimes of systematic, race/gender-based oppression and domination of southern Africa in the past and of the Taliban regime in Afghanistan in the present. In both contexts, members of the oppressed group were/are deliberately and systematically cut off from equal education, work, healthcare, justice, political power, movement, and any opportunities for autonomy and advancement. The dystopian aim was/is to maintain an institutionalized regime that perpetuates the subjugated group’s subordinated position, whether by race or gender.

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<sup>4</sup> As for a broader gender-sensitive approach to the draft CAH treaty, see the joint call to advance gender justice, available at <https://www.globaljusticecenter.net/wp-content/uploads/2023/10/Letter-to-UN-Member-States-Re-Gender-Justice-Approach-to-Crimes-Against-Humanity-Treaty.pdf>.

The deteriorating situation for women and girls in Afghanistan should mobilize international action around codification, just as the brutality of the southern African apartheid regime contributed to the initial codification of race-based apartheid under international law. Many jurists and activists involved in dismantling apartheid in southern Africa have voiced support for the codification of gender apartheid, recognizing the parallels in the respective regimes' projects of domination and oppression, as well as the ways that the gender apartheid codification effort can educate a new generation about the horrors of apartheid-era South Africa.

**5. *What would the legal and policy consequences of codification in the crimes against humanity treaty be for States Parties?***

Codification of the crime of gender apartheid in the proposed crimes against humanity treaty will give victims and survivors a clear legal avenue to hold perpetrators—whether state or individual—to account for the totality of crimes perpetrated against them. Based on the existing Draft Articles on Prevention and Punishment of Crimes against Humanity, if the crime of gender apartheid is included, States parties would be obligated to criminalize the crime in their domestic laws and take steps to prevent, punish, and not engage in the perpetration of gender apartheid. Alleged State violations of the treaty would be subject to inter-State dispute resolution, including potentially before the International Court of Justice.

The proposed legal obligation on the part of States parties, including third States, not to take part in the perpetration of gender apartheid can be compared to a due diligence obligation. The legal obligation does not, however, dictate specific policy responses. The international community's response to the South African apartheid system—comprising a suite of policy measures, including sanctions, economic, cultural, and other boycotts, and financial divestments—offers an example of the types of measures States can take in response to gender apartheid, though none would necessarily be obligatory as a matter of law. Indeed, the continued engagement including for purposes of protecting and strengthening women's rights and broader human rights safeguards, and for other protected needs such as humanitarian assistance, would remain permissible.

**6. *How is gender defined in the Legal Brief?***

The International Law Commission (ILC) chose not to define “gender” in the Draft Articles, thus allowing for flexibility as the jurisprudence of international law evolves over time. In explaining their decision, which was supported by a wide range of states and civil society, the ILC found that “since the adoption of the Rome Statute, several developments in international human rights law and international criminal law have occurred, reflecting the current understanding as to the meaning of the term ‘gender.’”

While the Draft Articles do not define the term gender, international law should guide how we understand the concept of “gender” as it relates to gender apartheid. For example, in proposing a definition, the Legal Brief notes that “‘gender’ has been defined with reference to more than just ‘women,’” citing key documents that support this proposition, including the 2014 ICC-OTP *Policy Paper on Sexual and Gender-Based Crimes* and the 2022 ICC-OTP *Policy on the Crime of Gender Persecution*, as well as the 2022 IIM *Gender Strategy and Implementation Plan*.

**7. Will the codification of the crime against humanity of gender apartheid open the doors to liability for any States party with institutionalized gender-based discrimination?**

The Legal Brief's proposed definition for the crime of gender apartheid stipulates a very high legal threshold due to the requirement to show specific intent to maintain an institutionalized regime of systematic gender-based oppression and domination. Although gender-based discrimination continues to pervade most governance structures and legal systems, demonstrating this intent requirement and the broader animating context requirement will be quite difficult. Indeed, the exceedingly rare finding of racial apartheid is a case in point.

In addition, the crime of gender apartheid would also have to meet the chapeau elements of any crime against humanity, *i.e.*, it would have to be committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack.

**8. How will codification respect cultural differences, including cultural and religious rights as protected under international law?**

Although cultural relativism is often invoked to justify gender-based crimes, human rights violations, and systematic discrimination, international law is clear that cultural and/or religious justifications cannot be used as pretext for violating international law, including international criminal law and international human rights law. Indeed, it is important to underscore that a core component of the effort to codify the crime of gender apartheid is in fact to protect the equal rights of women, girls, and others to participate in cultural life and practices, as long-protected under international law.

**9. How did this campaign come together? Who was involved in this process?**

Noting their shared border, shared culture and shared language, a group of Afghan and Iranian women's rights activists and lawyers came together in March 2023 and launched the grassroots [End Gender Apartheid Campaign](#), which seeks to dismantle the gender-based oppression and repression perpetrated by the Taliban regime and the Islamic Republic of Iran respectively. As part of the campaign, the coalition of activists issued an open letter urging the international community to recognize "gender apartheid" under both domestic and international law.

In the months following the publication of the open letter, the Atlantic Council Strategic Litigation Project facilitated a series of consultations with over 60 Afghan and Iranian civil society representatives, international legal practitioners, scholars, and gender justice experts, as well as numerous members of marginalized communities including the LGBTQI+ and ethnic and religious minorities, ensuring an intersectional and inclusive approach. These consultations forged a better understanding of the impunity gap underlying calls for the recognition of gender apartheid, and helped to elucidate the legal and policy bases for codification – ultimately resulting in the legal brief issued to UN Member States on October 5, 2024, calling for the codification of the crime of gender apartheid in the potential crimes against humanity treaty.

**10. Who endorsed the Legal Brief?**

Over 100 jurists, scholars, public figures, and civil society leaders endorsed the letter and brief, including:

- Afghan women's rights defenders Shaharзад Akbar, Fawzia Koofi, and Judge Najla Ayoubi;
- Nobel laureates Shirin Ebadi, Malala Yousafzai, Nadia Murad, and Narges Mohammadi;
- South African jurists Richard Goldstone, Navi Pillay, Rashida Manjoo, and Professor Penelope Andrews;

- international criminal law experts, including former International Criminal Court (ICC) Chief Prosecutor Fatou Bensouda, former ICC judge Elizabeth Odio Benito, and former International Criminal Tribunal for Rwanda Chief of Prosecutions and former Special Court for Sierra Leone Prosecutor Stephen J. Rapp;
- public figures including former President of Ireland Mary Robinson, former President of Mongolia Tsakhiagiin Elbegdorj, former Prime Minister of Norway Gro Harlem Brundtland, former Secretary of State of the United States Hillary Clinton, and former Foreign Affairs Minister of Chile Antonia Urrejola; and
- gender justice experts Hina Jilani, Baroness Helena Kennedy, and Professors Leila Sedat, Christine Chinkin, Karima Bennoune, and Rangita de Silva de Alwis.

### ***11. Who else has recognized gender apartheid?***

For decades, the term “gender apartheid” has been used by UN experts, Afghan women’s rights defenders, and others to describe systematic gender-based oppression and domination. The following is a non-exhaustive list of relevant statements.

- In January 1999, then-UN Special Rapporteur on the elimination of intolerance and all forms of discrimination based on religion or belief Abdelfattah Amor [explained](#) that the Taliban had “introduced what is in point of fact a system of apartheid in respect of women.”
- Decades later, in January 2023, UN Secretary-General António Guterres [warned](#) that, amid the latest Taliban takeover of Afghanistan, “unprecedented, systemic attacks on women’s and girls’ rights and the flouting of international obligations are creating gender-based apartheid.”
- In June 2023, UN Special Rapporteur on the human rights situation in Afghanistan Richard Bennett and the UN Working Group on discrimination against women and girls, [described](#) the situation for women and girls in Afghanistan as gender apartheid, defining it in line with the Brief’s proposed definition.
- In September 2023, UN Women Executive Director Sima Bahous [called](#) on Member States of the Security Council to support “an intergovernmental process to explicitly codify gender apartheid under international law.”
- In February 2024, the Committee on the Elimination of Discrimination against Women [found](#) that in Afghanistan it “is clear that an institutionalized regime of systematic oppression and domination, committed with the intention of maintaining that regime, is tantamount to a form of apartheid.”
- Also in February 2024, the UN Working Group on discrimination against women and girls [called](#) for the inclusion of gender apartheid in the potential crimes against humanity treaty, asserting that “[o]nly the apartheid framework can fully grasp the role of intent, ideology and institutionalisation in gender apartheid regimes as seen in Afghanistan.”
- In June 2024, the UN Special Rapporteur on the human rights situation in Afghanistan Richard Bennett [reaffirmed](#) that “the institutionalized system of domination and oppression of women and girls in Afghanistan should propel the discussion of codification of the crime of gender apartheid forward,” recognizing the crimes against humanity treaty as a potential avenue for codification.

### ***12. What are the next steps for the proposed crimes against humanity treaty?***

At the next Sixth Committee session on 10 October 2024, Member States will consider the International Law Commission’s recommendation to proceed with the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries.