

## Why States Should Codify Gender Apartheid in the Crimes against Humanity Treaty

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. Last year, the UN Secretary-General and multiple UN experts, Afghan and international women’s rights defenders, and UN Member States warned of the escalating gender apartheid in Afghanistan, marked by the systematic and deliberate subjugation and dehumanization of women, girls, and others by the Taliban regime.

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, 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 expand the legal definition of apartheid in both international and national laws to encompass gender.

On 5 October 2023, the Atlantic Council Strategic Litigation Project and Global Justice Center issued a joint letter and legal brief endorsed by over 100 leading jurists and public figures<sup>1</sup> specifically urging UN Member States to codify the crime of gender apartheid in the potential crimes against humanity (CAH) treaty presently under consideration by the UN General Assembly’s Sixth Committee (Legal).

This Q&A provides a snapshot of the brief, including the legal and policy bases for codification. For more information, please visit <https://endgenderapartheid.today/legal-brief.php>.

### ***1. How does the legal brief define the crime against humanity of gender apartheid?***

Recognizing the existing definition of apartheid in the 2019 International Law Commission’s Draft Articles on Prevention and Punishment of Crimes against Humanity (“Draft Articles”), which form the basis for the potential CAH treaty and replicates the definition of apartheid from the 1998 Rome Statute of the International Criminal Court, the brief proposes the following amendment (italicized text) to the definition of the “crime of apartheid”:

“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.”

In line with the Draft Articles, this definition does not define gender, thus allowing for flexibility as the jurisprudence of international law evolves over time. 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.

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

Apartheid is legally unique due to its requisite entrenchment, pervasion, and scale. The animating context (an institutionalized regime of systematic oppression and domination) and intent (to maintain that regime), distinguish the crime of gender apartheid from other international crimes, including 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.

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<sup>1</sup> See question 6 below for a snapshot of the joint letter’s signatories.

The crimes of apartheid and persecution can and should coexist. In fact, racial apartheid and race-based persecution already co-exist in the Rome Statute, as well as 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 CAH treaty an appropriate avenue for codification?***

As the first major United Nations treaty on core crimes since the 1998 Rome Statute, the CAH 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 CAH 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 CAH 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>2</sup>

Crucially, the proposed amendment would only require adding gender as a ground of apartheid in addition to race. It would not require further changes to the foundational elements of the crime of apartheid in the Draft Articles. Nor would it 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.

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 consequences of codification in the CAH treaty be for States Parties?***

Codification of the crime of gender apartheid in the CAH 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, if the crime of gender apartheid is included among the enumerated crimes against humanity, States parties would be obligated to criminalize the

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<sup>2</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>.

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.

#### **6. *Who endorsed the joint letter and underlying 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.

#### **7. *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.

- 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 below answer to Question 3.
- 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.”

#### **8. *What are the next steps for the CAH treaty?***

The Sixth Committee is scheduled to meet from 1 to 5 and on 11 April 2024 to exchange substantive views, including in an interactive format, on all aspects of the Draft Articles. There they will have the opportunity to consider a range of pending issues, including the potential inclusion of new gendered crimes like gender apartheid in the potential treaty. At the following Sixth Committee session in 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.