

Amending the Crime Against Humanity of Apartheid to Recognize and Encompass Gender Apartheid*

The following amendment (in bolded text) is proposed to the definition of the “crime of apartheid” contained in Article 2(2)(h) of the Draft Crimes Against Humanity Convention:

“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, **or by one gender group over another gender group or groups**, and committed with the intention of maintaining that regime.

1. The current language of Article 2(2)(h) of the Draft Articles on Prevention and Punishment of Crimes Against Humanity, the starting point for the Draft Crimes Against Humanity Convention, replicates the definition of the crime against humanity of apartheid codified in Article 7(1)(j) of the 1998 Rome Statute of the International Criminal Court (hereinafter “**Rome Statute**”).
2. While in part a retrospective condemnation of the South African¹ apartheid system that had been dismantled only a few years prior, the inclusion of the crime of apartheid in the Rome Statute sought to close a lacuna in international criminal law, and with it a corresponding impunity gap. This accomplishment by States was founded upon a triple recognition: *first*, that apartheid, a crime of such gravity as would shock the conscience of humanity, could once again emerge; *second*, that it was a crime distinct from persecution on the ground of race, which was also codified; and *third*, that it was imperative that the international legal system be strengthened in its ability to bring future perpetrators of the crime of apartheid to justice.

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3. The regime of systematic domination and oppression institutionalized by the Taliban in Afghanistan, like that of the South African regime before it, has laid bare a gap in the legal framework, this time located within the definition of the crime against humanity of apartheid. The failure to codify gender apartheid has curtailed the international community's capacity to accurately define this distinct crime, characterized by its unique animus and structure, and ensure accountability for its occurrence. As a consequence, there is a gap in the ability to hold perpetrators—both State and individual—to account for the *totality* of the crimes they have committed, and to recognize and repair the distinct and often transgenerational harms suffered by victims of gender apartheid.
4. The concept of gender apartheid has long been recognized by international officials, lawyers, scholars, and human rights defenders,² including in the past year by United Nations Secretary General António Guterres,³ as well as the UN Working Group on Discrimination against Women and Girls and the UN Special Rapporteur on the situation of Human Rights in Afghanistan.⁴ Most recently, in September 2023, the Executive Director of U.N. Women called on the international community “to explicitly codify gender apartheid in international law.”⁵
5. **This brief argues for the amendment of the definition of the crime against humanity of apartheid in draft Article 2(2)(h), in order to recognize and encompass gender apartheid.** It starts by identifying the gap in the current international legal framework, highlighting the unique animus of the crime of apartheid, both racial and gendered, before going on to examine how the crime of apartheid is distinct from other international crimes, including persecution. It then discusses the accepted significance of cumulative charging in international criminal law in prosecuting the range of harms and intents that underpin the indicted charges. Finally, it argues that the Draft Crimes Against Humanity Convention presents an important and unique opportunity to strengthen the international legal system by carving out a path towards accountability for newly acknowledged victims of the crime of apartheid. The brief concludes with a proposed amendment to Article 2(2)(h) to include systematic oppression and domination “by one gender group over another gender group or groups” into the definition of apartheid.
6. While this brief stands alone, **Annex A** provides an illustrative case-study of the Taliban's treatment of women and girls in Afghanistan. As with all codified crimes, the proposed amendment is informed by past and current situations but is also drafted to apply to situations of atrocity not yet in existence—situations that will, should they come into being, demand action. Such is the edifying example of the crime against humanity of forced pregnancy, compelled into codification in the 1998 Rome Statute as a result of atrocities committed in Bosnia and Herzegovina between 1992 and 1995, and first prosecuted in relation to crimes committed in northern Uganda between 2002 and 2005 in the 2016 *Ongwen* case before the International Criminal Court.⁶
7. Nevertheless, the ever-deepening, systematized domination and oppression of Afghan women and girls should propel the discussion forward, as indeed the systematized domination and oppression of Black people⁷ in South Africa animated anti-apartheid activists and States to bring the crime of racial apartheid into being, a step which helped to end its practice.

I. Tracing the distinctive animus of the crime of apartheid

8. Although the crime of apartheid does not require elements and expressions identical to that of the South African regime in order to be recognized, investigated, and acted upon, a brief overview of the South African regime that inspired the recognition of racial apartheid is instructive both in understanding the crime's distinctive animus and in recognizing, with greater clarity, its existence on the basis of gender.

An overview of systematized domination and oppression of Black people in South Africa

9. Between 1948 and the early 1990s, the South African government established and deliberately maintained a system of racial apartheid. The apartheid regime institutionalized in South Africa, like the Taliban regime after it, was notable not only for its violence but also for the intended longevity of its design and the thoroughness of its execution. Both systems were and are designed not only to constitute a rapid attack upon a targeted group, but also to enshrine and enforce a complex system of governance—of laws, policies, and practices—to systematically oppress and dominate a subset of society over the course of decades and generations.
10. The South African apartheid system was instituted to allow the government “to segregate every aspect of political, economic, cultural, sporting and social life, using established legal antecedents where they existed and creating them where they did not.”⁸ The result was a tangle of laws and regulations that dominated every aspect of the lives of Black people, including restrictions of movement, education, employment, access to public spaces, and property ownership.⁹ Black people were prohibited from taking certain jobs or working in certain industries. Education was largely restricted to the white community, with education for Black people ending in early childhood. Pass laws prohibited Black people from freely selling their labor.¹⁰ Films and other art were prohibited from showing the intermingling of whites and Black people.¹¹
11. The police had broad powers to enforce the South African regime's laws, and were described as “an army of occupation imposing curfews and documentary controls.”¹² The police were effectively removed from judicial scrutiny, leading to a culture of impunity in which acts of torture and murder occurred regularly—and were even legally sanctioned in certain cases.¹³ Above all, the crimes of apartheid were facilitated by, and intrinsic to, a system of governance that institutionalized the wholesale denial of the Black community from participation in their civil, political, economic, social, and cultural conditions, leaving them with so few resources and freedoms that they could never overcome their carefully choreographed oppression.

Defining the crime of apartheid, informed by the South African context

12. Apartheid on the basis of race was defined as a crime against humanity by the UN General Assembly (1966)¹⁴ and UN Security Council (1984)¹⁵, and under the International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted in 1973), which also requires States Parties to adopt domestic legislation criminalizing apartheid and recognizing universal jurisdiction over the crime.¹⁶ Apartheid was also recognized as a war crime, when committed in the context of an international armed conflict, under the 1977 Additional Protocol I to the Geneva Conventions.¹⁷ Apartheid was further recognized as a crime against humanity in the Rome Statute of the International

Criminal Court in 1998, and as a violation of *jus cogens* norms by the International Law Commission in 2001.¹⁸

13. Global recognition of the crime of racial apartheid laid the foundation upon which mobilization efforts were launched to dismantle the South African apartheid system, in a context where the oppressed group had been cut off from the resources and access needed to be the sole architects of their own liberation. To this end, the UN General Assembly and UN Security Council issued numerous resolutions condemning the practice and requiring States to take steps to avoid complicity, so as to effectively isolate and target the perpetrators of apartheid.
14. The existing definition of the crime reflected the southern African context. The 1973 Apartheid Convention first defined 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.”¹⁹ The Rome Statute drew from the Convention, defining the crime of apartheid as “inhumane acts ... 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.”²⁰
15. The Apartheid Convention provides a more expansive definition of apartheid than the Rome Statute, and includes a prohibition on “[a]ny legislative 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.”²¹ The provision goes on to give examples of specific prohibitions that could constitute “measures calculated to prevent a racial group ... from participation in the ... life of the country” including denial to members of a given group of basic human rights and freedoms such as “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.”²² The Apartheid Convention further prohibits the “[e]xploitation of the labor of the members of a racial group or groups, in particular by submitting them to forced labor.”²³
16. To date, there has been no judicial elucidation on the elements of the crime of race-based apartheid, before the International Criminal Court, the International Court of Justice, or domestic courts.²⁴ The Apartheid Convention, however, was cited by the International Law Commission in its discussion about including the crime of apartheid in the Draft Articles that would eventually become the Rome Statute.²⁵ Consequently, the Convention definition remains an important source of evidence for the jurisprudential interpretation of elements of the crime of apartheid, including how the crime’s intent and additional contextual requirements can be evidenced.

Distinctive animus of the crime of apartheid

17. Apartheid is a crime of sweeping dystopian vision. Through its commission, its perpetrators seek to maintain a form of governance designed to systematically oppress and dominate a subset of society so that the dominant group may live alongside them and benefit from their subjugation. It is a regime which, by design, self-perpetuates through the excising of a

subset of the population under the perpetrators' control from political, economic, and social life to such a degree that, with the remnants of their own resources and freedoms, they can never organize to escape or overcome their orchestrated subjugation.

18. Apartheid is not directed towards annihilation because the strata of society being oppressed and controlled is existentially essential to the dominant group. This is for two reasons. First, the imagined-into-being identity of the dominant group as "superior" has as its bedrock the corresponding belief that the subjugated group is of inherently lesser value, and their oppression is instrumental to the success of the ideologically based governance project being implemented. Second, and more pragmatically, the dominant group's ability to function relies on the existence of the oppressed group, with the apartheid system by design, giving rise to a perpetually controlled dehumanized under-class, excised from the possibility of full personhood.
19. The implicit justification for creating and calcifying such a system is the perceived superiority of one group over "inferior" groups. Fermenting just under the surface of the apartheid regime's belief of a group's less-than-human status are bigotries, deeply rooted in many human societies but radicalized and institutionalized in the cultivating environment of an apartheid regime. The precise nature of exploitation of the oppressed group(s) cleaves to the distinct but easily recognizable chauvinisms of the dominant group and the society they are seeking to maintain.
20. In the South African context, the regime's view of Black people as inherently inferior to white people underpinned and justified the entrenchment of a system of governance that had as its beating heart the systematic dominance and oppression of the Black community. This was recognized by the International Commission of Jurists, which in 1963 stated, "a great deal of South African legislation has been implemented in a way which leaves no doubt that apartheid aims at the political, cultural and economic subjection of a supposedly inferior section of the community."²⁶ This view of Black people as inferior legitimized, in the eyes of the perpetrators, the routing of Black people into jobs characterized by low wages, faint job security, little to no opportunity for advancement, and menial, sometimes dangerous, often intense physical labor.²⁷ For Black men, this often meant working in white-owned mines and on farms.²⁸ For Black women, this commonly meant taking up positions as domestic workers in white homes.²⁹
21. In Afghanistan, the Taliban has systematically eviscerated female autonomy and agency over their lives and futures. The Taliban's system of governance has removed women and girls from public life—from Parliament, offices, salons, universities and schools, parks and playgrounds, and protests—and sequestered them to the smallest possible concentric circle: a dot of existence behind their (or rather, their closest male relation's) front door. The Taliban has designed and enacted a system of governance that has successfully compressed Afghan women and girls into narrow roles in which the Taliban relegate them to what they view as their solitary value: as child-bearers, child-rearers, and sources of unremunerated domestic labor.
22. Apartheid's governance structures, which enshrine and enforce the systematic oppression and domination of a subset of society, are strategically designed to perpetuate their own existence. In both the South Africa and Taliban regimes of systematic domination, members of the oppressed group were/are, deliberately and thoroughly, cut off from opportunities which could have provided a path to economic advancement and autonomy

through denial of access to: work in certain industries and jobs;³⁰ equal education;³¹ equal healthcare;³² justice;³³ political power;³⁴ and movement, including travel to areas with greater opportunities.³⁵ Both apartheid systems were/are maintained through the denial of key civil and political rights that would have allowed members of the oppressed groups to advocate for a change in their intentionally subordinated position. Finally, both apartheid systems invite(d) and provoke(d) public and private violence against members of the oppressed groups, for which there was/is little to no accountability.

23. The denial of equal education, to Black adults and children in South Africa and women and girls in Afghanistan, has had a particularly pernicious effect, immediately curtailing opportunities for advancement for the individuals. Within a short period, the denial of access to equal education causes transgenerational disempowerment and solidifies the status of the subjugated to that of an unremunerated or under-remunerated lower caste, facing colossal barriers to their escaping their regime-assigned and regime-enforced purpose.³⁶ Furthermore, by forcing an entire class of people to undertake menial and/or unpaid work and depriving them of the possibilities of advancement offered by education and more gainful employment, apartheid—both racial and gendered—deprives the subjugated classes of the resources and access to all or most legal, political, and/or social mechanisms to resist, while exacting an often-brutal price for those who made the attempt regardless.
24. In both the South Africa and Afghanistan contexts, the subjugated groups were/are tethered to the regimes' project of domination and oppression, with all avenues to uproot or escape the system of control closed off by design and enforced by both laws and/or policies as well as regime-legitimized violence. Excluded from public life, the labor of Black women and men in South Africa (1948-1990) and women and girls in Afghanistan (1996-2001, 2021-present) undergirds and assures the relative prosperity of members of the dominant groups. In this way, one sees the significance of the crimes of apartheid as being intentionally directed towards *maintaining an institutionalized regime*: all white people in apartheid-era South Africa and men in Taliban-controlled Afghanistan benefit from the systematized domination and oppression of the “inferior” groups, whether or not they agree with the regime that those within it—those who are most aptly defined as perpetrators—maintain.
25. It is also the case that members of the dominant groups, where they suffer an inhuman act of the requisite character committed in the context of the institutionalized regime of systematic domination and oppression with the intent to maintain that regime, are also victims of the crime of apartheid. All white people in apartheid-era South Africa and all men and boys in Taliban-controlled Afghanistan were/are also obliged to be compliant with the apartheid project and to enforce its rules. In South Africa, white anti-apartheid activists also faced arrests and abuses, while highlighting their treatment still more “bearable” than that meted out by the regime to Black activists.³⁷ In Afghanistan, the Taliban has ordered that men be punished if a woman in their family fails to comply with Taliban dress codes. The regime has also imprisoned men who advocate for women's rights.³⁸ This, too, is how apartheid regimes self-sustain: by exacting high prices even on members of the dominant group who acknowledge the humanity of the subjugated class and who seek to use their position to upend the carefully calibrated oppression and domination that governs the lives of all those under the control of the perpetrators.
26. Crimes against humanity, by virtue of the chapeau requirement that they be committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, demand those making allegations in legal fora cross a high

evidential threshold. This underscores and befits the serious nature of these international crimes, as those which shock the conscience of humanity. The additional contextual requirement of the crime against humanity of apartheid—the existence of an institutionalized regime of systematic oppression and domination, which perpetrators must seek through their actions to maintain—imposes a higher threshold still, ensuring that the commission of the crime of apartheid stands firmly beyond the inequalities that most societies are still working to fully uproot. As discussed below, this contextual element unique to apartheid is also what distinguishes the crime of apartheid from all other international crimes, including that of persecution.

II. Apartheid, as distinct from all other international crimes, including persecution

27. Since its initial codification in 1998, international criminal law has unequivocally recognized that the crime of apartheid exists separately, and is distinct, from the crime of persecution.
28. Key to the crime of apartheid is its distinguishing intent and animating context, *both unique among all other international crimes*. The crime requires the commission of an inhuman act of requisite character with **the intent to maintain an institutionalized regime of systematic oppression and domination**. It is this institutionalized regime that forms the necessary animating context of the crime. The crime’s distinctive intent and additional contextual requirement, beyond the chapeau elements intrinsic to all crimes against humanity, distinguish the crime of apartheid from all other international crimes, including the crime of persecution. Persecution requires neither such context nor such intent but concerns itself with the “severe deprivation of fundamental rights”³⁹ where the victim or victims have been targeted “by reason of the identity of a group or collectivity or targeted the group or collectivity as such.”⁴⁰
29. Perpetrators of apartheid therefore have a fundamentally discrete *mens rea*. They do not only aim at the deprivation of rights, severe or otherwise, by reason of the identity of a group. Rather perpetrators of apartheid intend to maintain an existent system of governance founded upon the systematic domination and oppression of another group or groups, to which the perpetrators have accorded inherently lesser value. It is this distinct intent and the context that underpins it that differentiates the crime of apartheid from the crime of persecution.
30. The intent to maintain an institutionalized regime of systematic oppression and domination of one group over another (or others) is markedly different in scope and dystopian ambition from the crime of persecution, as serious and significant as the latter crime is. This is already recognized, without controversy, given that the current definition of race-based apartheid sits neatly alongside the crime of persecution on the ground of race in the Rome Statute’s 1998 codification of international crimes, which is replicated in Article 2(2)(h) of the Draft Crimes Against Humanity Convention. In seeking to hold accountable a regime of race-based domination and oppression, such as was established and maintained in South Africa, the international legal community would experience no difficulty, in the view of the drafters, in distinguishing between a race-based apartheid regime and a situation of persecution on the ground of race. This remains true even where many of the *means* through which the race-based apartheid system is propagated—which is to say the deprivation of

fundamental rights of a targeted racial group—share the same factual basis that are relevant to the crime of persecution.

31. Arguments that the crime of persecution on the grounds of gender obviates the need to recognize gender apartheid fail to acknowledge both the *sui generis* nature of the required intent of those maintaining an already-existing regime of systematic domination and oppression of a subsection of a society. Former United Nations Special Rapporteur Professor Bennouna states, “the persecution approach fails to adequately implicate the institutionalized and ideological nature of the abuses in question or reflect on the responsibilities of other international actors to respond appropriately.”⁴¹ The proposed amendment to include the crime of gender apartheid will serve not only to recognize the true nature of a distinctive crime, but also to equip diplomatic, legal, and human rights communities with a stronger tool with which to mobilize against, and hold accountable, apartheid regimes and their conflagrating ideologies.
32. It is reasonable to posit that an apartheid regime, whether race or gender-based, will have as one implementing tool in the crime’s *actus reus*, the severe deprivation of the fundamental rights of the oppressed group. Leaving aside the already-discussed matter of the unique *mens rea*, which forms the root of the crime of apartheid, common facts in evidence are unremarkable in international law. It is well-settled that common facts may evidence multiple crimes simultaneously, as explained below.

III. The importance of cumulative charging in reflecting full culpability

33. Given concerns regarding the conduct in question being able to evidence other indictable crimes, a short examination of the recognized value of the practice of cumulative charging is warranted.
34. Cumulative charging is a process “by which an accused can be charged with a number of different crimes on the same underlying acts, with the charges being expressed cumulatively rather than alternatively.”⁴² The first bodies established to try individuals accused of committing international crimes each allowed charges of crimes against peace, war crimes, and crimes against humanity based on the same underlying conduct.⁴³ Subsequent international criminal tribunals, including the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Special Court for Sierra Leone (SCSL), and the Extraordinary Chambers in the Courts of Cambodia (ECCC) have similarly entertained multiple charges against an accused based on the same underlying acts.⁴⁴ These *ad hoc* and hybrid tribunals have permitted cumulative charging even where one charge is subsumed under another charge. One example of this would be the charging of murder and extermination, both as crimes against humanity, based on the same underlying conduct.⁴⁵
35. More recently, the cumulative charging of offences with materially distinct elements has been approved by the International Criminal Court in the 2022 *Ongwen Appeals Judgement*, where the Court considered that “the test for cumulative convictions ... finds its rationale in the need to reflect the full culpability of an accused person, given that each provision which has a ‘materially distinct’ element protects different legal interests. What the legal interests protected by each crime are, can only be discerned by reference to the elements of that specific crime. When two or more crimes have materially distinct elements, the interests protected are necessarily different, and a conviction for only one of these

crimes will therefore not be reflective of the full extent of the culpability of an accused person.”⁴⁶

36. The Appeals Chamber elucidated on the specific protected interests of the crimes of sexual slavery, rape, and forced marriage, stating that “while the protected interests may overlap to a certain degree, the fundamental nature of the crime of sexual slavery is reducing a person to a servile status, and depriving him or her of his or her liberty and sexual autonomy, whereas for the crime of rape, it is the invasion of a sexual nature, of a person’s body, and the attack on his or her sexual autonomy.”⁴⁷ In contrast, “the interest protected by forced marriage as a form of other inhumane acts is not necessarily ‘violence against physical integrity and deprivation of liberty’ ... but, crucially, a person’s right to freely choose one’s spouse and consensually establish a family.”⁴⁸
37. The fundamental nature of the crime of apartheid centers on, and is defined by, the deliberate maintaining of the systematized domination and oppression of one group over another within the context of an institutionalized regime. The codification of gender apartheid would allow victims and survivors to hold the perpetrator regime and/or the individual perpetrators responsible for the *totality* of their conduct. This rationale also underpins the desirability of cumulative charging in recognizing the complete picture of criminality for which the accused must be held to account. As set forth by the ICTY Appeals Chamber and endorsed by the SCSL and ICC Appeals Chambers: “multiple convictions serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct.”⁴⁹

IV. A Gap in Gender Justice

38. The evolution of international law is a narrative of the struggle to surface the experiences of marginalized groups, including women and girls. Gender justice is not simply about women and children, as for example, men and older boys are often targeted as a consequence of the gendered roles they are perceived to inhabit.⁵⁰ However, the crimes that have struggled to be granted recognition are those most likely to affect women and girls. Patriarchal structures and attitudes inform the greater seriousness with which we view, investigate, and litigate crimes that affect men more than women and other gender minorities.
39. Indeed, the elements of the crime of rape as a violation of international law were only defined for the first time in 1998, in the International Criminal Tribunal for Rwanda’s groundbreaking *Prosecutor v. Akayesu* Judgment.⁵¹ *Akayesu* was also precedent-setting for finding that sexual violence was a genocidal act.⁵² Nevertheless, international prosecutors following *Akayesu* continued to fail to properly investigate and prosecute sexual violence as a whole, and, in many subsequent ICTR cases, sexual violence was not charged on the initial indictment, counts involving sexual violence were withdrawn, and there were a significant number of acquittals for rape.⁵³
40. The struggle for recognition of crimes that most greatly impact women and girls is also demonstrated by the history of the crime of forced pregnancy. As details of widespread sexual and reproductive violence against women emerged from the conflict in the former Yugoslavia and the Rwandan genocide, the crime of forced pregnancy was expressly recognized as a serious violation of international human rights law and international humanitarian law, but not expressly listed as a crime under the jurisdiction of the ICTY or

the ICTR.⁵⁴ Additionally, even though *Akayesu* recognized that forced impregnation could in some circumstances amount to the crime of genocide by measures intended to prevent births within a group, the ICTR did not prosecute acts of forced pregnancy as genocide.⁵⁵ The ICTY applied factual findings of forced impregnation and subsequent detention of women to prevent abortion to infer a policy of “ethnic cleansing” and evidence relating to forced pregnancy was advanced in several cases.⁵⁶ However, acts of forced pregnancy were not prosecuted using available crimes under the ICTY Statute.⁵⁷ Thus, as the horrific facts of Bosnia and Rwanda brought forced pregnancy to the fore in the years leading up to the Rome Statute, a number of States, with support of the NGO Women’s Caucus for Gender Justice, successfully advocated for explicit criminalization of forced pregnancy as a crime against humanity and a war crime in the Rome Statute.⁵⁸

41. One cannot prevent and punish what one does not recognize, and gender justice groups have been key to advocating for the comprehensive recognition of sexual and gender-based crimes in international law. Just as the efforts of the Women’s Caucus drove inclusion of forced pregnancy in the Rome Statute, the groundbreaking findings on rape in *Akayesu* were a result of the legal activism of the female-led coalition that pushed to have the indictment amended to include acts of sexual violence, and which first suggested the charging of rape as genocide.⁵⁹ The current efforts of activists seeking recognition of the crime of gender apartheid in the Draft Crimes Against Humanity Convention are yet another swell in the movement for recognition of gender-based crimes in international law.

V. Proposed Amendment to Article 2(2)(h) of the Draft Crimes Against Humanity Convention

42. To codify gender apartheid, the following amendment (in bolded text) to the definition of the “crime of apartheid” contained in Article 2(2)(h) of the Draft Crimes Against Humanity Convention is proposed:

“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 **or by one gender group over another gender group or groups** and committed with the intention of maintaining that regime.

The Draft Crimes Against Humanity Convention as the appropriate legal avenue

43. The Draft Crimes Against Humanity Convention is an appropriate and important legal avenue in which to recognize and codify the crime of gender apartheid, a legal development that is urgently needed.
44. *First*, the Draft Crimes Against Humanity Convention is the first major UN treaty focused on core international crimes since the Rome Statute and presents a unique opportunity to formally recognize that institutionalized regimes of systematic oppression and domination may also be implemented and maintained on the basis of gender, with analogously severe impacts on entire populations, including but not limited to the subjugated groups. As the crime of apartheid is already stipulated in the Draft Convention this extension will not require the creation of a completely new and separate crime. Rather, it only involves amending the definition of the “crime of apartheid” in Article 2(2)(h) to better reflect the realities, both historical and ongoing, of institutionalized regimes of systematic oppression

and domination, making international law more gender inclusive and rectifying past omissions of women's experiences of human rights violations from international law.

45. *Second*, the inclusion of “gender apartheid” as a crime against humanity in the Convention dedicated to the prohibition of such crimes could help “stigmatize such egregious conduct” and “draw further attention to the need for its prevention and punishment.”⁶⁰ As in the South African context, the legal recognition of the crime, which only States are empowered to do, emboldens and further mobilizes diplomatic, legal, and social movements in their allied struggle to dismantle and hold accountable systems of egregious oppression. The word “apartheid” itself carries significant gravitas, which would help encourage States to act. Moreover, inclusion of gender apartheid in the Convention would better elucidate the obligations of States and international organizations in responding to any gross or systematic violation of the *jus cogens* norm against apartheid, whether based on race or gender. In particular, States and international organizations would be obligated to “cooperate to bring an end through lawful means” to such a regime of apartheid, refuse to recognize such regime as lawful, and refuse to render aid or assistance in maintaining such regime.⁶¹
46. Codification of gender apartheid in the Draft Crimes Against Humanity Convention carves a path through which States can be held to account. The Draft Convention not only requires States to take steps to prevent and punish crimes against humanity but also “not to engage in acts that constitute [such crimes].”⁶² Perpetrating the crime of gender apartheid, would therefore put a State in violation of its obligations under the Draft Convention. Article 15(2) of the Convention would then allow avenues for State responsibility for perpetuating gender apartheid, including at the International Court of Justice.⁶³
47. There would also be a strong argument that the obligations to prevent and punish, and not to engage in, crimes against humanity under the Draft Crimes Against Humanity Convention are owed *erga omnes partes* like those under the Genocide Convention and Convention against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment. Furthermore, Article 3(3) of the Draft Convention provides that “no exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.” This provision would help to prevent States from invoking customs, culture, or religious considerations as justifications.⁶⁴
48. *Finally*, the proposed amendment to Article 2(2)(h) comports with the object and purpose of the Draft Crimes Against Humanity Convention, *i.e.* to fill the “key missing piece in the current framework of international law and, in particular, international humanitarian law, international criminal law and international human rights law.”⁶⁵ The ILC specifically recognized that “codification of existing law [is] not the objective” of the draft treaty. As some States have recognized, the Rome Statute is simply a “starting point,” rather than endpoint, and there is room to move beyond the definitions contained in the current text. Some States have even pointed out possible pitfalls of sticking close to the Rome Statute, suggesting an appetite to diverge from it.⁶⁶
49. The inclusion of gender in the definition of the crime of apartheid under the Draft Crimes Against Humanity Convention would widen its scope compared to the Rome Statute, thus enabling it to address currently acute and relevant situations of human rights violations. Indeed, the Draft Convention only recognizes the gendered crimes that are listed under the

Rome Statute, which was negotiated in 1998. The international community certainly did not achieve a full understanding of gendered crimes in 1998, and Member States to the Rome Statute now have the opportunity to show the progress made over the past 25 years and formally recognize the crime of gender apartheid.

50. The preamble of the Draft Crimes Against Humanity Convention stresses that, “throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity.” The crime of apartheid on the basis of race or gender is such a crime and as explained above, the lack of formal recognition of gender apartheid represents a gap in the protection of human rights and opportunities in bringing perpetrators of international crimes to justice. That is a gap that the Draft Crimes Against Humanity Convention is meant to fill.

VI. Conclusion

51. The codification of the crime of gender apartheid will enable victims and survivors—present and future—to hold State and individual perpetrators to account for the *totality* of crimes committed. The Taliban’s systematized oppression and domination of Afghan women and girls underscores the need for the inclusion of gender in the definition of apartheid. The crime of gender persecution alone cannot and does not capture the unique animus, structure, and harms of the crime against humanity that continues to unfold before the international community’s eyes, which is best described as gender apartheid. Judge Shahabuddeen, sitting on the ICTY Appeals Chamber in the *Jelisić* case, underscored with regard to the importance of being able to reflect full culpability in international criminal law: “[t]o convict of one offence only is to leave unnoticed the injury to the other interest of international society and to fail to describe the true extent of the criminal conduct of the accused.”⁶⁷
52. The Draft Crimes Against Humanity Convention presents a unique opportunity for Member States to accurately define the essence of a crime perpetrated by those who seek to institute and maintain a form of governance designed to systematically oppress and dominate a subset of society, and to recognize in law the gamut of its victims. With the proposed amendment, States could bring the international legal framework of the crime against humanity of apartheid up to date, making up for the 25 years that have passed since the negotiation of the Rome Statute and ensuring a more gender-inclusive approach.

¹ This brief refers to the “South African” regime, recognizing that the state policy of apartheid originated in South Africa, but was also implemented in other settler-colonies in southern Africa, including Namibia and Rhodesia.

² UN Human Rights Council, *Situation of women and girls in Afghanistan - Report of the Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls*, A/HRC/53/21 (20 June 2023), available at <https://www.ohchr.org/en/documents/country-reports/ahrc5321-situation-women-and-girls-afghanistan-report-special-rapporteur> (explaining that both gender persecution and gender apartheid are occurring). See also M. Mehran, PeaceRep, & Afghanistan Research Network, *Recognition of Gender Apartheid in Afghanistan Justified* (June 2023), available at https://peacerep.org/wp-content/uploads/2023/06/PeaceRep-Afghanistan-Research-Network-Reflection_06.pdf; N. Farid & R. de Silva de

Alwis, “Afghanistan under the Taliban: A State of ‘Gender Apartheid’?,” *Princeton SPIA Afghanistan Policy Lab* (Jan. 2023), available at https://spia.princeton.edu/sites/default/files/2023-02/SPIA_NaheedRangita_PolicyBrief_07.pdf; K. Bennoun, “The International Obligation to Counter Gender Apartheid in Afghanistan,” 54(1) *Columbia Human Rights Law Review* (2022), available at <https://hrlr.law.columbia.edu/hrlr/the-international-obligation-to-counter-gender-apartheid-in-afghanistan/>, Part II(C).

³ United Nations, “The Secretary-General’s remarks to the Security Council on the Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security: The Rule of Law Among Nations” (12 Jan. 2023), available at <https://www.un.org/sg/en/content/sg/statement/2023-01-12/the-secretary-generals-remarks-the-security-council-the-promotion-and-strengthening-of-the-rule-of-law-the-maintenance-of-international-peace-and-security-the-rule-of>.

⁴ UN Human Rights Council, *Situation of women and girls in Afghanistan - Report of the Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls*, A/HRC/53/21 (20 June 2023), available at <https://www.ohchr.org/en/documents/country-reports/ahrc5321-situation-women-and-girls-afghanistan-report-special-rapporteur>, paras. 95-96. See also UN Economic and Social Council, Commission on Human Rights, *Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution*, E/CN.4/1999/58 (11 Jan. 1999), para. 26; A. E. Mayer, “A Benign Apartheid: How Gender Apartheid Has Been Rationalized,” 5(2) *UCLA Journal of International Law and Foreign Affairs* 237 (2000), pp. 261-263, 274-279, 336. See also Physicians for Human Rights, *The Taliban’s War on Women: A Health and Human Rights Crisis in Afghanistan* (1 Aug. 1998), available at https://www.peacewomen.org/sites/default/files/Health_TalibanWarWomen_PHR_1998_0.pdf, p. 91 (discussing how Physicians for Human Rights labeled the Taliban’s policies as gender apartheid in the 1990s).

⁵ UN Women Executive Director Sima Bahous, *Speech: The Women’s Rights Crisis: Listen to, Invest in, Include, and Support Afghan Women* (26 Sept. 2023), available at <https://www.unwomen.org/en/news-stories/speech/2023/09/speech-the-womens-rights-crisis-listen-to-invest-in-include-and-support-afghan-women#:~:text=So%2C%20the%20future%20must%20be,they%20will%20do%20it%20again>.

⁶ ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Trial Judgment (4 Feb. 2021), paras. 3056-3062. See also DRC Military Garrison Court of Uvira, Judgement RP 168772022 (15 May 2023), pp. 49-50, 75-76.

⁷ This brief acknowledges that the South African apartheid regime sought to subjugate *all* non-white people. However, recognizing that those designated as Black suffered disproportionately, it focuses on the restrictions against Black people and the Black community.

⁸ A. Barnard, “Slegs Suid Afrikaners—South Africans Only? A Review and Evaluation of the International Crime of Apartheid,” 7 *New Zealand Journal of Public and International Law* 317 (Dec. 2009), p. 323 (citing South Africa Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report*, Vol. I (1998), p. 30).

⁹ Republic of South Africa, Act No. 27 of 1913, *Natives Land Act*; Republic of South Africa, Act No. 18 of 1936, *Native Trust and Land Act*; Republic of South Africa, Act No. 68 of 1951, *Bantu Authorities Act*; Republic of South Africa, Act No. 46 of 1959, *Promotion of Bantu Self-Government Act*.

¹⁰ A. Barnard, “Slegs Suid Afrikaners—South Africans Only? A Review and Evaluation of the International Crime of Apartheid,” 7 *New Zealand Journal of Public and International Law* 317 (Dec. 2009), p. 326.

¹¹ M. Meredith, *In the Name of Apartheid: South Africa in the Post War Era* (Harper & Row, 1988), pp. 33, 114-115.

¹² L. S. Hinds, “The Gross Violations of Human Rights of the Apartheid Regime Under International Law,” 1 *Rutgers Race and the L. Rev.* 231 (1999), p. 249.

¹³ See Republic of South Africa, Act No. 74 of 1982, *Internal Security Act*, § 29(6) (“No court of law shall have jurisdiction to pronounce upon the validity of any action taken in terms of this section, or to order the replacement of any persons detained in terms of the provisions of this section.”). See also G. Bindman (ed.), *South Africa: Human Rights and the Rule of Law/International Commission of Jurists* (Pinter Publishers, 1988), pp. 119-122 (discussing how South African laws granted “extraordinarily wide powers to the police and remove[d] judicial safeguards against police action” and citing examples where police and other security forces employed excessive and lethal force against black people and subjected detainees to “brutal violence and torture” and yet did not face prosecution or other disciplinary action).

¹⁴ UN General Assembly, Resolution 2202/A (XXI), *The policies of apartheid of the Government of the Republic of South Africa*, A/RES/2202(XXI) (16 Dec. 1966), para. 1.

¹⁵ UN Security Council, Resolution 556 (1984), S/RES/556 (23 Oct. 1984), para. 1.

¹⁶ International Convention on the Suppression and Punishment of the Crime of Apartheid (hereinafter “**Apartheid Convention**”), 1015 U.N.T.S. 243 (30 Nov. 1973), entered into force 18 July 1976, arts. I, II, IV.

¹⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3 (8 June 1977), entered into force 7 Dec. 1978, art. 85(4)(c).

¹⁸ Rome Statute of the International Criminal Court (hereinafter “**Rome Statute**”), 2187 U.N.T.S. 3 (17 July 1998), entered into force 1 July 2002), arts. 7(1)(j), 7(2)(h); International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, in *Yearbook of the International Law Commission 2001* (Vol. II, Part Two), Article 40 Commentary, para. 4.

¹⁹ Apartheid Convention, art. II.

²⁰ Rome Statute, art. 7(2)(h).

²¹ Apartheid Convention, art. II(c).

²² *Ibid.*

²³ *Id.*, art. II(e).

²⁴ Two individuals in South Africa were indicted for the crime against humanity of apartheid in 2021, with the trial set to begin in 2024. See G. Kemp & W. Nortje, “Prosecuting the Crime against Humanity of Apartheid: The Historic First Indictment in South Africa and the Application of Customary International Law,” 21 *Journal of International Criminal Justice* 405 (2 May 2023). Three cases dealing with apartheid were submitted to the ICJ, but this was prior to the Apartheid Convention. The “South-West Africa Cases,” originally filed separately by Ethiopia and Liberia against South Africa and subsequently joined together, regarded the continued existence of the Mandate for South West Africa and its apartheid policies. These cases were dismissed in 1966 after a determination that neither Ethiopia nor Liberia had a legal right or interest in the case. International Court of Justice, *South West Africa Ethiopia v. South Africa*, available at <https://www.icj-cij.org/case/46>. The UN Security Council also requested an advisory opinion from the ICJ on the continued presence of South Africa—and imposition of apartheid—in Namibia after the end of the Mandate for South West Africa. In 1971, the ICJ found that South Africa’s continued presence was illegal and it was obligated to withdraw. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, *I.C.J. Reports 1971*, p. 16, para. 133(1).

²⁵ International Law Commission, Second report on the draft Code of Offences against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur, A/CN.4/377, [extract from] *Yearbook of the International Law Commission 1984* (Vol. II, Part One), para. 50.

²⁶ UN Security Council, *Report of the U.N. Special Committee on the Policies of Apartheid of the Government of South Africa*, S/5426 (16 Sept. 1963) (hereinafter “**Special Committee Apartheid Report**”), para. 26(o).

²⁷ C. Gradín, “Occupational segregation by race in South Africa after apartheid,” 23(2) *Review of Development Economics* 553 (Spring 2019).

²⁸ CJPME Foundation, *Roots of Apartheid: South Africa’s Mining Industry*, Analysis 2014-001-v1 (May 2014); South African History Online, “Land, Labour and Apartheid” (last accessed 26 Sept. 2023), available at <https://www.sahistory.org.za/article/land-labour-and-apartheid>.

²⁹ B. Gwynn, “Overcoming Adversity from All Angles: The Struggle of the Domestic Worker during Apartheid,” *South African History Online*, available at <https://www.sahistory.org.za/article/overcoming-adversity-all-angles-struggle-domestic-worker-during-apartheid-bennett-gwynn>; J. Cock, “Review: Black Women Under Apartheid,” 18(2) *Labour, Capital & Society* 405 (Nov. 1985).

³⁰ Special Committee Apartheid Report, paras. 238-258 (listing job reservations for white people, denial of trade union rights to non-white people, and preference afforded to white people for public service jobs in South Africa); Amnesty International, *The Taliban’s war on women: The crime against humanity of gender persecution in Afghanistan* (Mar. 2023),, available at <https://www.amnesty.org/en/documents/asa11/6789/2023/en/>, pp. 14-16 (discussing the Taliban’s multiple policies restricting women’s right to work in the public sector, bans prohibiting women from working in certain professions in the private sector and from working for non-governmental

organizations, and other restrictions including on clothing and freedom of movement, which have “substantially undermined employment opportunities for women”).

³¹ Special Committee Apartheid Report, paras. 32, 283-314 (detailing numerous laws and policies implemented in South Africa to ensure government control over public and private schools, segregation of white and non-white people in schools, and restricting non-white people to vocational and technical training and non-degree courses, and quoting Professor Horace Mann Bond as saying, “the segregated educational system established by the Government of South Africa ... was a political tool with which to perpetuate the White Man’s domination of the Black Man.”).

³² E. O. Nightingale, *et al.*, “Apartheid Medicine: Health and Human Rights in South Africa,” 264(16) *Journal of American Medicine* 2097 (1990), p. 2102 (finding that South Africa’s “apartheid laws, policies, and practices ... [were] the prime cause of the unequal appropriation of funds for medical services; overcrowding in black hospitals and underutilization of white hospitals; ... lack of health care in squatter camps and townships; and of inadequate or nonexistent health care in the homelands and rural areas. Apartheid, in consequence, is the underlying structure causing the dreadful burden of excess morbidity and mortality, much of it preventable, that is borne by the black population.”); Doctors Without Borders, *Persistent Barriers to Access Healthcare in Afghanistan: The Ripple Effects of a Protracted Crisis and a Staggering Economic Situation* (6 Feb. 2023), available at <https://www.doctorswithoutborders.org/latest/msf-report-persistent-barriers-accessing-health-care-afghanistan>, pp. 20-21, 25-26 (finding that women face more significant obstacles in obtaining access to healthcare compared to men, due to restrictions on freedom of movement and employment).

³³ “The Administration of Justice and the Judicial System” in G. Bindman (ed.), *South Africa: Human Rights and the Rule of Law/International Commission of Jurists* (Pinter Publishers 1988), pp. 109-117 (detailing numerous policies, practices, and factors in South Africa’s legal system that resulted in severely restricted access to justice for Black people, including presumptions against detainee rights and personal freedoms, application of overly-harsh sentences, lack of sufficient legal aid for indigent defendants, lack of lawyers in rural areas and obstacles for urban-based lawyers to represent rural clients, and abuse of the prosecution process including setting bail unreasonably high); “Afghanistan dispatch: ‘women’s ability to access the court system has been completely wrecked,’” *Jurist* (13 Mar. 2023), available at <https://www.jurist.org/news/2023/03/afghanistan-dispatch-womens-ability-to-access-the-court-system-has-been-completely-wrecked/> (discussing the Taliban’s prohibition on women serving as judges, attorneys, and prosecutors and women’s lack of access to justice agencies or denial of women’s legal petitions in Afghanistan).

³⁴ As an example, the explicit purpose of South Africa’s Bantu Self-Government Act of 1959, which abolished Black people’s limited representation in the national Parliament, was to create “a permanent White South Africa” rather than “a common multi-racial country where the Whites would be outnumbered by the Blacks three or four to one.” Special Committee Apartheid Report, paras. 120-121; In Afghanistan, the Taliban’s exclusion of women from its governing bodies and abolition of the Ministry of Women’s Affairs has “effectively eliminat[ed] women’s right to political participation.” UN Women, “In focus: Women in Afghanistan one year after the Taliban takeover” (15 Aug. 2022), available at <https://www.unwomen.org/en/news-stories/in-focus/2022/08/in-focus-women-in-afghanistan-one-year-after-the-taliban-takeover>.

³⁵ Special Committee Apartheid Report, paras. 208-232 (discussing South Africa’s “pass laws” that restricted Black people’s residence and presence in urban areas, controlled their residence and movements outside of urban areas, and required them to carry permits demonstrating their permission to remain within urban areas, with penalties for failing to produce a valid permit including fines, imprisonment, expulsion, or whipping); N. Gul Shafaq, “Taliban stop female Afghan students leaving country to study in Dubai,” *BBC News* (28 Aug. 2023), available at <https://www.bbc.com/news/world-asia-66636750> (discussing the Taliban’s enforcement of travel bans for women to include preventing women from leaving Afghanistan on a student visa to attend university).

³⁶ This was an explicit intent in controlling and restricting access to education in South Africa, as explained by the Minister of Coloured Affairs in 1963: “Education is not, after all, only a means of gaining knowledge. It is the road along which the child is trained to serve. ... The system of education that is to be established ... will determine the whole future of these people, and will be dependent upon the attitudes of White South Africa.” Special Committee Apartheid Report, para. 310 (citing South African House of Assembly Debates (21 Feb. 1963), cols. 1742-43).

³⁷ Zinn Education Project, Book Review: “Ruth First and Joe Slovo in the War Against Apartheid,” available at <https://www.zinnedproject.org/materials/ruth-first-joe-slovo-against-apartheid/>.

³⁸ For example, members of Black Sash, a South African group that consists primarily of white women, faced arrest, detention, harassment and surveillance for their anti-apartheid activities. See Black Sash, “History of the Black Sash” (last accessed 1 Sept. 2023), available at <https://blacksash.org.za/our-history/>. In Afghanistan, the

Taliban have imposed a decree that requires women to wear head-to-toe coverings and can punish male relatives of those who do not comply. See D. Zucchini & S. Padshah, “Taliban Impose Head-to-Toe Coverings for Women,” *The New York Times* (7 May 2022), available at <https://www.nytimes.com/2022/05/07/world/asia/taliban-afghanistan-burqa.html>.

³⁹ Rome Statute, art. 7(2)(g).

⁴⁰ ICC, *Elements of Crimes* (2013), art. 7(1)(h), Element 2.

⁴¹ K. Bennoune, “The International Obligation to Counter Gender Apartheid in Afghanistan,” 54(1) *Columbia Human Rights Law Review* (2022), available at <https://hrhr.law.columbia.edu/hrhr/the-international-obligation-to-counter-gender-apartheid-in-afghanistan/>, p. 55.

⁴² F. O’Regan, “Prosecutor v. Jena-Pierre Bemba Gombo: The Cumulative Charging Principle, Gender-Based Violence, and Expressivism,” 43(4) *Georgetown Journal of International Law* 1323 (2012), p. 1324.

⁴³ See, e.g., *United States v. Hermann Goering et al.*, reprinted in *Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg*, Vol. I, p. 65 (1947); *Judgement of the International Military Tribunal for the Far East* (November 1948), pp. 28-30; *United States v. Karl Brandt et al* (Case 1), reprinted in *Trial of the Major War Criminals Before The International Military Tribunal at Nuremberg* (Vol. I++), pp. 11, 15 (William S. Hein ed., 1997)

⁴⁴ See, e.g., ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment (2 Sept. 1998) (hereinafter “**Prosecutor v. Akayesu Judgment**”), para. 468 (concluding that “[o]n the basis of national and international law and jurisprudence ... it is acceptable to convict the accused of two offences in relation to the same set of facts ... where the offences have different elements”); ICTY, *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment (19 Apr. 2004), para. 218 (stating that under the “established jurisprudence” of the ICTY, “multiple convictions entered under different statutory provisions, but based on the same conduct, are permissible” where “each statutory provision has a materially distinct element not contained within the other”). See also ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Appeals Chamber Judgment (20 Feb. 2001), para. 400; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Trial Chamber Judgment and Sentence (6 Dec. 1999), paras 108-119; ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Trial Chamber Judgment and Sentence (27 Jan. 2000), paras. 289-299; SCSL, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-A, Appeals Chamber Judgment (26 Oct. 2009), para. 1192; ECCC, *Prosecutor v. Nuon Chea et al.*, Case File No. 002/19-09-2007-ECCC-OCIJ, Closing Order (15 Sept. 2010), paras. 1373-1390; SCSL, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-A, Appeals Chamber Judgment (26 Oct. 2009), para. 1191; ECCC, *Prosecutor v. Kaing Guek Eac “Duch”*, Case File/Dossier No. 001/18-07-2007/ECCC/TC, Trial Judgment (26 July 2010), para. 560.

⁴⁵ *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-A, Appeals Chamber Judgment (26 Oct. 2009), para. 1198.

⁴⁶ ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15 A, Appeals Judgment on Verdict (15 Dec. 2022), para. 1635.

⁴⁷ *Id.*, para. 1678.

⁴⁸ *Id.*, para. 1683.

⁴⁹ ICTY, *Prosecutor v. Mladen Naletilić aka “Tuta”, Vinko Martinović aka “Stela”*, Case No. IT-98-34-A, Appeals Chamber Judgment (3 May 2006), para. 585; SCSL, *The Prosecutor of the Special Court v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu (the AFRC accused)*, Case No. SCSL-2004-16-A, Appeals Chamber Judgment (22 Feb. 2008), para. 215 (quoting the ICTY Appeals Chamber in *Naletilić & Martinović*). See also International Criminal Court, *Prosecutor v. Ongwen*, Appeals Judgment, Case No. ICC-02/04-01/15, 15 December 2022, para. 1635.

⁵⁰ Indeed, “gender” has been defined internationally with reference to more than just “women.” While Article 7(3) of the Rome Statute defines “gender” as “the two sexes, male and female, within the context of society,” the Office of the Prosecutor (OTP) of the International Criminal Court subsequently provided that the Rome Statute definition “acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.” Rome Statute, art. 7(3); ICC, The Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes* (June 2014), available at https://www.icc-cpi.int/sites/default/files/Policy_Paper_on_Sexual_and_Gender-Based_Crimes-20_June_2014-ENG.pdf, p. 3. The OTP has further provided that “[a]s a social construct, gender varies within societies and from society to society and can change over time.” ICC, The Office of the Prosecutor, *Policy on the Crime of Gender Persecution* (7 Dec. 2022), available at <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf>, p. 3. The International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law

Committed in the Syrian Arab Republic since March 2011 (IIIM) has recognized that “[t]here is no single prevailing definition of the term ‘gender’, although it is frequently juxtaposed against the word ‘sex’. The term gender has been commonly understood as a social construction, encompassing the roles, behaviours, activities, and attributes assigned to women, men, girls, and boys. Gender roles are learned or acquired during socialisation into communities, vary widely within and between cultures and can change over time. In comparison, sex typically refers to biological characteristics, often ascribed on the basis of individuals’ reproductive functions.” International, Impartial, and Independent Mechanism, *IIIM Gender Strategy and Implementation Plan: Addressing the Adverse Impact of the Discriminatory Gender Hierarchy to Facilitate Inclusive Justice for International Crimes in the Syrian Arab Republic*, Technical Version (30 Sept. 2022), available at <https://iiim.un.org/wp-content/uploads/2023/02/Gender-Strategy-Implementation-TechnicalEnglish.pdf>, p. 8.

⁵¹ *Prosecutor v. Akayesu* Judgment, para. 598. While historical prohibitions against rape existed, the modern-day crime of rape did not emerge until after World War II, and even then, “rape” was not mentioned in the Nuremberg Charter, nor was it prosecuted at Nuremberg. Mark Ellis, “Breaking the Silence: Rape as an International Crime,” 38(2) *Case Western Reserve Journal of International Law* (2007), available at <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1335&context=jil>, p. 227.

⁵² *Prosecutor v. Akayesu* Judgment, para. 731; ICTR, *Prosecutor v. Karemera and Ngirumpatse*, Case No. ICTR-98-44-T, Trial Judgment and Sentence (2 Feb. 2012), paras. 1665-1668. See also C. A. McKinnon, “Rape, Genocide, and Women’s Human Rights,” 17(5) *Harvard Women’s Law Journal* 5 (1994), pp. 11-12, which reads, in part, “It is rape to drive a wedge through a community, to shatter a society, to destroy a people. It is rape as genocide.”

⁵³ Global Justice Center, *Beyond Killing: Gender, Genocide & Obligations Under International Law* (Dec. 2018), pp. 20-21, 52-53, available at <https://www.globaljusticecenter.net/files/Gender-and-Genocide-Whitepaper-FINAL.pdf> citing B. Nowrojee, “‘Your Justice is Too Slow’ Will the ICTR Fail Rwanda’s Rape Victims?” *UN Research Institute for Social Development* (2005); B. Van Schaack, “Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda,” *Human Rights Advocacy Stories, Santa Clara University Legal Studies Research Paper No. 08-55* (2008); Human Rights Watch, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (Sept. 1996), available at <https://www.hrw.org/legacy/reports/1996/Rwanda.htm>; ICTR, *Prosecutor v. Serushago*, Case No. ICTR-98-39-S, Trial Sentence (5 Feb. 1999), para. 4; ICTR, *Prosecutor v. Nindabahizi*, Case No. ICTR-2001-71-I, Trial Judgment and Sentence (15 July 2004), para. 13; ICTR, *Prosecutor v. Bisengimana*, Case No. ICTR-00-60-T, Trial Judgment and Sentence (13 Apr. 2006), paras. 7, 12; ICTR, *Prosecutor v. Nzabirinda*, Case No. ICTR-2001-77-T, Trial Sentencing Judgment (23 Feb. 2007), paras. 3 (including note 4), 4.

⁵⁴ Amnesty International, *Forced Pregnancy: A Commentary on the Crime in International Law* (2020), pp. 7-8, (citing *Vienna Declaration and Programme of Action*, A/CONF.157/24 (25 June 1993), para. 38: “Violations of human rights in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.”; *Beijing Declaration and Platform for Action*, A/CONF.177/120 (15 Sept. 1995), paras. 114, 132, 135.; UN Commission on Human Rights, Resolution 1995/85, *The Elimination of Violence against Women*, E/CN.4/RES/1995/85 (8 Mar. 1995), para. 5; UN Commission on Human Rights, Resolution 1996/49, *The Elimination of Violence against Women*, E/CN.4/RES/1996/49 (19 Apr. 1996), para. 5; UN Commission on Human Rights, Resolution 1997/44, *The Elimination of Violence against Women*, E/CN.4/RES/1997/44 (11 Apr. 1997), para. 4; UN Commission on Human Rights, Resolution 1997/78, *Rights of the Child*, E/CN.4/1997/78 (18 Apr. 1997), para. 13(a); UN Commission on Human Rights, Resolution 1998/52, *The Elimination of Violence against Women*, E/CN.4/RES/1998/52 (17 Apr. 1998), para. 4; UN Commission on Human Rights, Resolution 1998/76, *Rights of the Child*, E/CN.4/1998/76 (22 Apr. 1998), para. 13(a)), available at <https://www.amnesty.org/en/wp-content/uploads/2021/05/IOR5327112020ENGLISH.pdf>.

⁵⁵ *Id.*, p. 8 (citing *Prosecutor v. Akayesu* Judgment, para. 507).

⁵⁶ *Ibid.* (citing ICTY, *Prosecutor v. Karadzic and Mladic* (IT-95-5-R61 & IT-95-18-R61), Review of Indictment Pursuant to Rule 61 of the ICTY Rules of Procedure and Evidence (11 July 1996), supra note 18, para. 64; S. Verrall, “The Picture of Sexual Violence in the Former Yugoslavia Conflicts as Reflected in ICTY Judgments” in S. Brammertz & M. Jarvis (eds.), *Prosecuting Conflict-related Sexual Violence at the ICTY* (Oxford University Press, 2016), para. 328).

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* (citing B. Bedont & K. Hall-Martinez, “Ending Impunity for Gender Crimes under the International Criminal Court,” 6(1) *Brown Journal of World Affairs* 65 (1999), note 53 (listing the following countries ¶

supporters of including forced pregnancy in the ICC Statute: Australia, Austria, Azerbaijan, Bosnia-Herzegovina, Burundi, Canada, Croatia, Estonia, India, Mexico, Netherlands, Nigeria, Rwanda, Slovenia, Sudan, Turkey, and USA)).

⁵⁹ Global Justice Center, *Beyond Killing: Gender, Genocide & Obligations Under International Law* (Dec. 2018), para. 55 (citing ICTR, *Prosecutor v. Ndindabahizi*, Case No. ICTR-2001-71-I, Trial Judgment (15 July 2004), para. 13).

⁶⁰ International Law Commission, *First report on crimes against humanity, by Mr. Sean D. Murphy, Special Rapporteur*, A/CN.4/680 (17 Feb. 2015), para. 12.

⁶¹ See International Law Commission, *Draft Conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, A/77/10 (2022), Conclusion 19, pp. 70-79.

⁶² International Law Commission, *Draft articles on Prevention and Punishment of Crimes Against Humanity*, A/74/10 (2019), art. 3. This represents a significant drafting improvement compared with the Genocide Convention which does not contain an explicit obligation on States not to engage in acts constituting genocide.

⁶³ Article 15(2) of the Draft CAH Convention provides: “Any dispute between two or more States concerning the interpretation or application of the present draft articles that is not settled through negotiation shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.” *Id.*, art. 15(2).

⁶⁴ See K. Bennoune, “The International Obligation to Counter Gender Apartheid in Afghanistan,” 54(1) *Columbia Human Rights Law Review Issue* (2022), pp. 71-81 (the author discusses the unacceptability of invoking cultural relativism to justify gender apartheid).

⁶⁵ International Law Commission, *First report on crimes against humanity, by Mr. Sean D. Murphy, Special Rapporteur*, A/CN.4/680 (17 Feb. 2015), para. 12.

⁶⁶ See, e.g., UN General Assembly, *Press Release: Speakers Argue over Codifying International Law Commission Draft Articles on Crimes against Humanity, as Sixth Committee Resumes Session*, GA/L/3679 (10 Apr. 2023), available at <https://press.un.org/en/2023/gal3679.doc.htm>.

⁶⁷ ICTY, *Prosecutor v. Jelusic*, Case No. IT-95-10-T, Appeals Chamber Judgment, Partial Dissenting Opinion of Judge Shahabuddeen (14 Dec. 1999), para. 42.