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Draft articles on prevention and punishment of crimes against humanity

Recommendations from the Working Group on discrimination against women and girls

Summary

The Working Group on discrimination against women and girls has prepared the present document, pursuant to Human Rights Council resolutions 15/23 and 50/18, containing input for the discussion on the draft articles on prevention and punishment of crimes against humanity, which are currently under review by the Sixth Committee of the General Assembly.



I. Introduction

1. The Working Group on discrimination against women and girls¹ welcomes the opportunity to provide comments on the draft articles on prevention and punishment of crimes against humanity,² which are currently under review by the Sixth Committee of the General Assembly, pursuant to the request of the Assembly in its resolution 77/249. After careful observation of the grave and systematic violations of the human rights and freedoms of women and girls occurring in various parts of the world, and in fulfilment of its mandate to contribute to the realization of the human rights and gender equality of women and girls, the Working Group urges the States Members and observers of the United Nations to consider the inclusion of “gender apartheid” as a crime against humanity under article 2 of the draft articles. The Working Group wishes to call the attention of Member and observer States to the global gender backlash phenomenon that it has documented, in particular since 2018, when the Working Group issued its thematic report on reasserting gender equality and countering rollbacks.³

2. The Working Group also wishes to call the attention of Member and observer States to its joint report on the situation of women and girls in Afghanistan,⁴ prepared with the Special Rapporteur on the situation of human rights in Afghanistan pursuant to Human Rights Council resolution 51/20 and on the basis of a joint visit to the country by the Special Rapporteur and the Working Group. Based on interviews with Afghan women inside and outside the country, on the documentation and research carried out and on the analysis of the multiple edicts issued and actions taken by the de facto authorities, they reached several conclusions. A central determination was that, while the backlash against the rights of women and girls had unfolded in various countries and regions in recent years, nowhere else in the world had there been an attack as widespread, systematic and all-encompassing on the rights of women and girls as in Afghanistan. Every aspect of their lives was being restricted under the guise of morality and through the instrumentalization of religion.⁵

3. In the joint report, which was presented to the Human Rights Council in June 2023, the Special Rapporteur and the Working Group argued that the de facto authorities’ edicts, policies and enforcement methods constituted gender persecution and an institutionalized framework of gender apartheid.⁶ Recalling the definition of the crime of apartheid contained in article 7 (2) (h) of the Rome Statute of the International Criminal Court, the experts pointed

¹ The Working Group on discrimination against women and girls is an independent expert mechanism of the Human Rights Council, which is an intergovernmental body of the United Nations responsible for strengthening the promotion and protection of human rights globally. The Council established the Working Group in October 2010, in its resolution 15/23, in recognition of the fact that discrimination against women persisted, despite progress made over the years in integrating women’s human rights fully into domestic law through constitutional and legal reforms in many countries. The Council extended the mandate of the Working Group most recently in its resolution 50/18. The Working Group is tasked with developing a dialogue with States and other actors on laws and practices that are discriminatory against women and girls or have a discriminatory impact on them. More about the Working Group and its mandate may be found on its web page (www.ohchr.org/en/special-procedures/wg-women-and-girls). Working groups and special rapporteurs are part of what is known as the special procedures of the Human Rights Council. Special procedures, the largest body of independent experts in the United Nations human rights system, is the general name of the Council’s independent fact-finding and monitoring mechanisms that address either specific country situations or thematic issues in all parts of the world. Special procedure mandate holders are experts who work on a voluntary basis; they are not United Nations staff members and do not receive a salary for their work. They are independent from any Government or organization and serve in their individual capacity.

² [A/74/10](#), chap. IV.E.1. The draft articles were adopted by the International Law Commission at its seventy-first session, in 2019, and submitted to the General Assembly.

³ [A/HRC/38/46](#). For a more expansive explanation of the manifestation of the gender backlash, see Working Group on discrimination against women and girls, “Gender equality and gender backlash”, position paper, 2020, available at www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/Gender-equality-and-gender-backlash.pdf.

⁴ [A/HRC/53/21](#).

⁵ *Ibid.*, para. 97.

⁶ *Ibid.*

out that the article could be adapted to include gender apartheid, which could be understood as inhumane acts committed in the context of an institutionalized regime of systematic oppression and domination by one group over another group or groups, based on gender, and committed with the intention of maintaining that regime. They deemed this an accurate description of the situation in Afghanistan, as documented in the joint report, where systematic discrimination against women and girls was at the heart of Taliban ideology and rule.⁷ Under this understanding of the critical condition of women and girls in Afghanistan, as being the condition of gender apartheid, the experts emphasized that other States and actors and the international community at large had a duty to take effective action to end the practice, as was done to end racial apartheid in southern Africa.⁸

4. Shortly after the presentation of the joint report to the Human Rights Council, an expert group meeting was convened on the subject by the Afghanistan country office of the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women) on 26 and 27 July 2023. The experts at that meeting provided several elements of analysis and, in line with the views of the experts set out in their joint report, recommended that firm action be taken to develop further legal and political tools to name and end gender apartheid.⁹ The Working Group recalls the statement of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, issued in September 2023, and endorsed by the Working Group and other United Nations experts, in which he raised concerns that the State's strict mandatory hijab law could be described as a form of gender apartheid, given that the authorities appeared to be governing through systemic discrimination with the intention of suppressing women and girls into total submission.¹⁰

5. The joint report by the Special Rapporteur and the Working Group is only one of the most recent examples of experts urging the international community to recognize and address gender apartheid.¹¹ In 1999, the Special Rapporteur on religious intolerance issued a report on civil and political rights, including religious intolerance.¹² In the section on violations affecting women, the Special Rapporteur deemed the Taliban's treatment of women to be the most tragic illustration of violations of the freedom of religion or belief, describing women's treatment in Afghanistan as tantamount to veritable apartheid against women, as women, and on the basis of specious interpretations of Islam.¹³ In 2005, the Executive Director of the United Nations Population Fund also vowed to end gender apartheid.¹⁴

⁷ Ibid., paras. 95 and 100.

⁸ Ibid., para. 96.

⁹ UN-Women, "Report on the expert group meeting on international strategies and tools to address the situation of women and girls in Afghanistan, 26 and 27 July 2023, Istanbul, Türkiye", p. 11. Available at www.unwomen.org/sites/default/files/2023-09/expert-group-meeting-report-international-strategies-and-tools-to-address-the-situation-of-women-and-girls-in-afghanistan-en.pdf.

¹⁰ Office of the United Nations High Commissioner for Human Rights (OHCHR), "Iran's proposed hijab law could amount to 'gender apartheid': UN experts", press release, 1 September 2023, available at www.ohchr.org/en/press-releases/2023/09/irans-proposed-hijab-law-could-amount-gender-apartheid-un-experts.

¹¹ OHCHR, "Experts: Taliban treatment of women may be 'gender apartheid'", 11 July 2023, available at www.ohchr.org/en/stories/2023/07/experts-taliban-treatment-women-may-be-gender-apartheid. See also the intervention by the Deputy High Commissioner for Human Rights at the meeting of the Human Rights Council held on 19 June 2023, highlighting that the backlash against the rights of women and girls since the Taliban took power in 2021 had been profound and all-encompassing. She expressed the Office's deep concerns about the discriminatory and restrictive environment and the climate of fear in which women and girls lived in Afghanistan. She underscored that extreme discrimination and violence against women and girls should not be accepted, let alone normalized, anywhere. Available at www.ohchr.org/en/news/2023/06/human-rights-council-opens-fifty-third-session-hears-presentation-annual-report-high.

¹² E/CN.4/1999/58.

¹³ Ibid., para. 111.

¹⁴ United Nations Population Fund (UNFPA), "UNFPA welcomes Millennium Project's emphasis on critical roles of gender and reproductive health in poverty reduction; urges speedy implementation of recommendations", press release, 17 January 2005, available at www.unfpa.org/press/unfpa-welcomes-millennium-projects-emphasis-critical-roles-gender-and-reproductive-health.

6. The Working Group calls attention to the rise in the frequency and urgency of United Nations experts' remarks on gender apartheid since the Taliban's return to power. In August 2023, the Under-Secretary-General/Executive Director of UN-Women characterized the Taliban's treatment of women as the most blatant violation of basic rights, rights to which the international community had unambiguously proclaimed its commitment.¹⁵ Recognizing the urgency of addressing women's rights under Taliban rule, the Executive Director urged the international community to continue to apply every pressure and employ every means at their disposal to press for change.¹⁶

7. In his address to the Security Council, on 12 January 2023, the Secretary-General specifically condemned "gender-based apartheid" in Afghanistan, where unprecedented, systemic attacks on the rights of women and girls and the flouting of international obligations constituted one of the primary threats to international peace and security and the rule of law.¹⁷ Following those remarks, the Executive Director of UN-Women called upon the Security Council to lead the effort to explicitly codify gender apartheid in international law, in her remarks to the Council at the meeting on the situation in Afghanistan on 26 September 2023.¹⁸ As the Executive Director explained, the explicit codification of gender apartheid in international law was necessary, because the existing tools at the disposal of the international community were not created to respond to mass, State-sponsored gender oppression.¹⁹ Speaking directly to gender apartheid in Afghanistan, she concluded that that systematic and planned assault on women's rights was foundational to the Taliban's vision of State and society and it must be named, defined and proscribed in our global norms, so that we could respond appropriately.²⁰

8. The draft articles currently under consideration provide a unique and crucial opportunity to galvanize international legal condemnation and action against gender apartheid. Gender apartheid may be acknowledged simultaneously as a violation of a jus cogens norm under general public international law, as a grave and systematic human rights violation under international human rights law and as a crime under international criminal law. Concerning the latter dimension, by designating gender apartheid as a crime against humanity, the international community would make the long overdue recognition that existing and potential State laws, policies and practices that relegate women to conditions of extreme inequality and oppression, with the intent of effectively extinguishing their fundamental rights, reflect the very core of apartheid systems.²¹ Such laws, policies and practices extinguish the autonomy of women and girls in all major areas – education, work, freedom of movement, health, political and public life, economic participation and cultural and personal life – and attack the essence of their human dignity and personhood, with the

¹⁵ UN-Women, "Statement on Afghanistan by UN-Women Executive Director Sima Bahous", 15 August 2023, available at www.unwomen.org/en/news-stories/statement/2023/08/statement-on-afghanistan-by-un-women-executive-director-sima-bahous.

¹⁶ Ibid.

¹⁷ 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 January 2023, available at 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.

¹⁸ UN-Women, "The women's rights crisis: listen to, invest in, include, and support Afghan women", 26 September 2023, available at www.unwomen.org/en/news-stories/speech/2023/09/speech-the-womens-rights-crisis-listen-to-invest-in-include-and-support-afghan-women.

¹⁹ Ibid. See also [A/HRC/47/38](#), para. 12. In that report, the Working Group noted that gender inequality, manifesting in systemic disadvantages for women throughout their life cycle and gender-based violence, was viewed by many women around the world as a crisis in itself, one that had been normalized by centuries of patriarchal, colonial and racialized legal and policy frameworks and institutions and deepened by the non-implementation of legal protections and political commitments. Such crises were not officially recognized and continued to be ignored, notwithstanding their systemic nature and the grave consequences for women and girls.

²⁰ UN-Women, "Statement on Afghanistan by UN-Women Executive Director".

²¹ The Constitutional Court of South Africa proclaimed that it was "clear that the practice of apartheid constituted crimes against humanity" as a matter of common law, independent of the Rome Statute, in 2004. Constitutional Court of South Africa, *The State v. Wouter Basson*, Judgment of 10 March 2004, para. 37. Available at www.saflii.org/za/cases/ZACC/2004/13.pdf.

ultimate goal of maintaining a system of oppression and subjugation. In sum, they constitute domination of one group over another, the very definition of apartheid under the Rome Statute.

9. The Working Group therefore proposes the addition of gender apartheid as a crime against humanity under article 2 (1) of the draft articles, in the section “Definitions of crimes against humanity”. The Working Group also proposes the insertion into article 2 (2) of the following definition of gender apartheid, which is an adaptation of the definition of racial apartheid under article 7 (2) (h) of the Rome Statute to the context of gender, employs consistent phrasing to that used by international legal bodies to outline gender-based crimes, such as in the policy of the Office of the Prosecutor of International Criminal Court on the crime of gender persecution,²² and incorporates the human rights component of discrimination in such a way that is consistent with the legal context and framework:

“The crime of gender 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 discrimination, oppression and domination by one group over another group or groups, based on gender, and committed with the intention of maintaining that regime.

10. Article 2 (1) of the draft articles provides a description of “inhumane acts”, which include murder, extermination, enslavement, forcible transfer, imprisonment or other severe deprivation of physical liberty, torture, rape, forced pregnancy, sexual slavery, persecution based on group identity and other inhumane acts of a similar character. The International Convention on the Suppression and Punishment of the Crime of Apartheid provides even further insight into the form that inhumane acts commonly take in apartheid systems. Perhaps most distinct to the gender apartheid context is article II (c), which includes the following inhumane acts when committed for the “purpose of establishing and maintaining domination”:

Any legislative or other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association.²³

11. These various characterizations of inhumane acts in service of domination of one group over another are markedly apt to describe gender apartheid. As legal scholar and former Special Rapporteur in the field of cultural rights, Karima Bennoune, has explained in the context of Afghanistan, “if gender or sex is substituted for race, every single one of these elements [of inhumane acts] is present in both Taliban 1.0 and 2.0 policies vis-à-vis women.”²⁴ Taliban edicts, policies and practices are institutionalized, systematic oppression and domination of women and girls committed with the intention of maintaining the gender-oppressive regime.

12. The Working Group proposes the addition of gender apartheid as a crime against humanity under the draft articles in recognition of the fact that gender apartheid leads to the same outcomes of discrimination, oppression and domination as racial or ethnic apartheid.

²² Office of the Prosecutor of the International Criminal Court, “Policy on the crime of gender persecution”, 7 December 2022, available at <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf>.

²³ International Convention on the Suppression and Punishment of the Crime of Apartheid, art. II (c). The Convention entered into force 18 July 1976.

²⁴ Karima Bennoune, “The international obligation to counter gender apartheid in Afghanistan”, *Columbia Human Rights Law Review*, vol. 50, No. 1. Available from <https://hrhr.law.columbia.edu/hrhr/the-international-obligation-to-counter-gender-apartheid-in-afghanistan/>.

While the methods and systems may vary, the end result is the same: the targeted group is unjustifiably treated unequally and ultimately excluded, by norm, policy, plan and design, from public participation, education, employment, health care, political representation and dialogue and its members deprived of exercising their human rights and of control over their bodies, decisions and the fundamental conditions of their lives.

II. Gender apartheid as a distinct and complementary crime to gender persecution

13. As explained above, the existing legal definition of apartheid only recognizes apartheid based on race and ethnicity. However, currently recognized violations of the human rights of women and girls and gender-specific crimes, such as gender persecution, although highly significant, lack provisions explicitly recognizing the institutional and mass character of violations amounting to apartheid. Utilizing a gender apartheid framework in tandem with other recognized human rights violations and gender-specific crimes, including gender persecution, would help to ensure urgent accountability for existing and potential regimes acting with the aim and result of the effective extinction of the rights of women and girls.

14. Although existing gender-specific crimes do address most practices or patterns of gender inequality, recognized crimes addressing gender persecution do not fully capture the institutionalized, widespread nature of rights deprivation involved in systems of gender apartheid.²⁵ Under article 7 (2) (g) of the Rome Statute, “persecution” refers to the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity. Gender persecution is committed against persons because of sex characteristics and/or because of the social constructs and criteria used to define gender.²⁶ Whereas under article 7 of the Rome Statute, crimes against humanity, including gender persecution, must be committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, the specific crime of gender persecution does not cover the institutionalized component of apartheid systems – so much so that, under the Rome Statute itself, persecution and apartheid are two separate crimes. Persecution based on gender however has been legally recognized as a crime, whereas gender apartheid has not. As identified in the report on the workshop on a convention on the prevention and punishment of crimes against humanity, held on 13 and 14 March 2023, and circulated as a document of the Sixth Committee, there is a new phenomenon of gender apartheid.²⁷ Gender apartheid, like racial apartheid, is a State-designed system of coordinated and comprehensive policies and practices intended to oppress and subjugate a particular group because of their identity.

15. As highlighted above, the existing definition of apartheid is limited only to racial groups, and it fails to account for the method of apartheid in the context of gender. In its advisory opinion on racial apartheid in South Africa, the International Court of Justice concluded that the official governmental policy pursued by South Africa in Namibia was to establish limitations, exclusions or restrictions for the members of the Indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour or employment and also submit them to restrictions or exclusions of residence and movement in large parts of the Territory.²⁸ Racial apartheid usually entails complete physical separation between groups’ enjoyment of rights, establishing separate modes of

²⁵ Gissou Nia, “Gender apartheid is a horror. Now the United Nations can make it a crime against humanity.”, Atlantic Council, 5 October 2023, available at www.atlanticcouncil.org/blogs/new-atlanticist/gender-apartheid-is-a-horror-now-the-united-nations-can-make-it-a-crime-against-humanity/. Ms. Nia notes that the intent to maintain an institutionalized regime of systematic oppression and domination of one group over others is markedly different in scope and dystopian ambition from the crime of persecution.

²⁶ See also Working Group on discrimination against women and girls, “Gender equality and gender backlash”.

²⁷ [A/C.6/77/INF/3](#).

²⁸ *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. 130.

public participation, areas of employment and forms of political representation, and often the illusion of representation for the oppressed group. This separation is the instrument used to create inequality. While the formal policy is “separate”, the reality is unequal, with an underresourced, non-participatory parallel system of services and false self-governance.²⁹ As history has taught us, separate is rarely equal.

16. Unlike racial or ethnic apartheid, gender apartheid employs some physical separation but relies mostly on exclusion. However, like ethnic and racial apartheid, it entails a near-total termination of the group’s enjoyment of fundamental rights and freedoms. The intertwined nature of the lives of men and women, in all their diversity, through reproduction and family structures, creates features that compel methods of oppression that differ from racial or ethnic apartheid. As illustrated in contemporary cases, the same ends of apartheid can be achieved by simply denying women and girls access to the major areas of social participation and self-determination. No parallel systems need to be created. Women and girls are simply banned, restricted and denied rights. They are eliminated from social, economic, cultural and political life. This important difference in the method and functioning of gender apartheid necessitates the recognition of a distinct crime against humanity.

17. Recognizing gender apartheid as an explicit crime under international law would allow for the consideration of each constitutive act of gender persecution within these regimes as components of the larger system of institutionalized and systematized oppression that results in apartheid. As the Working Group and the Special Rapporteur on the situation of human rights in Afghanistan have explained, gender apartheid framing emphasizes that the exclusion of and discrimination against women and girls is institutionalized and, as such, is a grave and systematic human rights violation.³⁰ The specific intent element that differentiates apartheid from other crimes³¹ distinguishes this extreme and egregious State practice from gender discrimination, which is unfortunately still widespread, and multiple other forms of gender inequality present throughout the world. In other words, most practices or patterns of inequality, even where widespread, will not meet the legal definition of gender apartheid.³² This is already the case with the many global and similarly widespread instances and patterns of racial discrimination. They may be violations of international human rights law, but they do not necessarily constitute apartheid.

18. As in the case of genocide and the use of rape or other forms of sexual violence as a weapon of war, individual violations, when considered together and as a strategy to oppress, harm or eliminate a group of people, should constitute an entirely new and severe cognizable legal violation. In fact, in defining crimes against humanity, the Rome Statute specifies that the provision applies only to widespread or systematic attacks. This specific application is not unintentional; it was informed, in part, by the use in the draft articles on the draft Code of Crimes against the Peace and Security of Mankind of “systematic or mass violations of human rights” to describe what would later become “crimes against humanity”.³³ “Systematic or mass violations of human rights” suggests, and correctly so, a legal distinction between small-scale, uncoordinated violations and large-scale systems of discrimination and violence. As international law has long recognized, accountability for individual violations and crimes, while necessary and productive, does not address the scale of atrocities committed by apartheid regimes.³⁴

²⁹ As seminally declared by the Supreme Court of the United States of America in the context of education in 1954: “We conclude that, in the field of public education, the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.” Supreme Court of the United States, *Brown et al. v. Board of Education of Topeka et al.*, Judgment of 17 May 1954, p. 495.

³⁰ A/HRC/53/21, para. 96.

³¹ Gerhard Kemp and Windell Nortje, “Prosecuting the crime against humanity of apartheid: the historic first indictment in South Africa and the application of customary international law”, *Journal of International Criminal Justice*, vol. 21, No. 2, available at <https://academic.oup.com/jicj/article/21/2/405/7231934#>.

³² *Ibid.*, p. 421.

³³ A/46/10, chap. IV.D.1.

³⁴ NGO Working Group on Women, Peace and Security, “UN Security Council briefing on Afghanistan by Karima Bennouna” 26 September 2023, available at www.womenpeacesecurity.org/resource/un-

19. Only the apartheid framework can fully capture the role of intent, ideology and institutionalization in gender apartheid regimes, such as Afghanistan. Furthermore, because the International Criminal Court can only try a handful of perpetrators in its prosecution of gender-based persecution, that approach would not, by itself, achieve the wholesale change in policy required to end gender apartheid.³⁵ The system that is directed to the complete subjugation of women and girls by a ruling regime should merit specific recognition and response, which would be accomplished by the addition of gender apartheid as a crime against humanity.

III. Recognition of gender apartheid to combat institutionalized, grave and systematic gender-based oppression

20. Gender-based discrimination and inequality define the lived experiences of women and girls in nearly every corner of the globe. The global community has been consistent in this recognition and its commitment to addressing these long-standing and impactful inequalities. The Working Group calls upon the Member and observer States of the General Assembly to operationalize this commitment and criminalize regimes that enact systems of apartheid aimed at oppressing and subjugating women and girls. This recognition would not only honour the aim of prohibitions against apartheid more generally but would also be a critical step towards respecting and enacting the centrality of gender equality.³⁶

21. Even with current international protections, women and girls around the world face consistent and pervasive oppression. Currently, nearly every human rights treaty guarantees gender equality and prohibits discrimination based on sex and/or gender. The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination Against Women, as well as other core international human rights instruments, all serve in tandem to prohibit sex and/or gender discrimination and affirmatively require substantive gender equality. Nevertheless, women's inequality and discriminatory regimes persist, due in part to failures to enforce existing international protections. The Convention on the Elimination of All Forms of Discrimination against Women, in particular, is regarded as one of the most adhered to universal human rights treaties in principle, while admittedly also being one with the most reservations to it and one of the most violated in practice.³⁷

22. Globally and historically, women and girls have experienced severe disadvantages socially, economically, culturally and politically.³⁸ A total of 388 million women and girls lived in extreme poverty in 2022, compared with 372 million men and boys, and women had lower levels of access to resources, such as health services, food and transportation, than men and boys.³⁹ The poverty that women and girls face worldwide is linked to economic policies that have been developed within patriarchal political, legal, socioeconomic and cultural systems that privilege the dominant forms of male and corporate power.⁴⁰ When women attempt to enter the political sphere, they often lack communal or financial support, face harassment, threats of violence and sexual and physical attacks, undergo intensive

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³⁵ See Karima Bennoune, "The international obligation to counter gender apartheid in Afghanistan". For an assessment of the investigations and charges brought by the International Criminal Court against individual perpetrators of gender-based persecution, see International Federation for Human Rights and Women's Initiatives for Gender Justice, "Accountability for sexual and gender-based crimes at the ICC: an analysis of Prosecutor Bensouda's legacy", June 2021, available at www.fidh.org/IMG/pdf/cpiproc772ang-1.pdf.

³⁶ Progress towards the realization of Sustainable Development Goal 5, to achieve gender equality and empower all women and girls, by 2030 is hundreds of years from being achieved at the current pace. See United Nations, *Sustainable Development Goals Report 2023*, available at <https://unstats.un.org/sdgs/report/2023/The-Sustainable-Development-Goals-Report-2023.pdf>.

³⁷ See Karima Bennoune, "The international obligation to counter gender apartheid in Afghanistan".

³⁸ Ibid.

³⁹ See A/HRC/53/39.

⁴⁰ Ibid., para. 11.

surveillance and risk detention or kidnapping.⁴¹ The intersection of these inequalities makes women more susceptible to subjugation – if they are financially unstable, they must rely on others for mere subsistence, and if they engage politically to reform the policies responsible for their inequality, they are forcibly silenced. Discrimination against women and girls on the basis of sex and/or gender is often compounded with other forms of discrimination on the basis of their nationality, race, national, social or ethnic origin, birth, language, religion or belief, socioeconomic condition, disability, political or other opinion, sexual orientation, gender identity or other status. Against this background, gender apartheid builds on the foundation of these inequalities to exclude all women and girls, formally and materially, from basic recognition of the dignity and worth of the human person.⁴²

23. Recognizing gender apartheid as a crime would reinforce the international community's commitment to eliminating systems of rights' deprivation that go beyond gender-based discrimination in extremity and in nature. When half of a population already in vulnerable conditions is subjugated, through plan, norm, policy and system, by a governing regime, and there is no way to recognize this oppression, fundamental human rights protections fail.

IV. Existing regimes engaged in gender apartheid

24. As documented in the joint report, the de facto authorities in Afghanistan have enacted a regime that very likely constitutes gender apartheid. In other regimes, as documented by other special procedure mandate holders of the Human Rights Council and by the United Nations High Commissioner for Human Rights, State norms, policies and practices contain features of gender apartheid and clear violations of the human rights of women and girls. Gender apartheid is not only a theoretical possibility or legal construct, but also a real threat and a lived reality for millions of women and girls in the world – one currently unrecognized in international law.

25. In Afghanistan, the de facto authorities have issued over 80 edicts curtailing women's rights and freedoms, including their right to fully engage in political and social life and to seek education and employment. The de facto authorities have had women and men who advocate for gender equality flogged, and forced marriages, forced face coverings for women and other forms of personal subjugation have been well-documented.⁴³ These practices have caused extreme mental suffering and have severely diminished women's mental and physical well-being, as evidenced by the growing rate of suicide among women over the past two years.⁴⁴

26. The discriminatory edicts of the de facto authorities in Afghanistan, such as those prohibiting secondary education for girls or access to taxi services for women without hijabs, force women into isolation and remove the tools necessary for them to exercise their rights and to participate fully in society. Currently, the Taliban is denying women and girls the right to pursue an education after the age of 12.⁴⁵ Moreover, women have lost their rights to pursue professional training, to work in non-governmental and international organizations and to report to work without a male companion. The Taliban has also banned access for women to many elements of public life, including public baths, parks and gyms, creating an environment in which it is difficult for women to leave their homes.⁴⁶ As an Afghan woman

⁴¹ See [A/HRC/50/25](#).

⁴² Charter of the United Nations, preamble.

⁴³ See [A/HRC/38/46](#); and United States Institute of Peace, "Tracking the Taliban's (mis)treatment of women", available at www.usip.org/tracking-talibans-mistreatment-women.

⁴⁴ United Nations, "Induce Taliban to end 'gender apartheid' in Afghanistan through all available means, speakers urge Security Council, alarmed by growing oppression of women, girls", 26 September 2023, available at <https://press.un.org/en/2023/sc15421.doc.htm>. See also the survey conducted by Bishnaw-Wawra among Afghan women on the impact of Taliban edicts on Afghan Women's Economic Conditions and Mental Health, available at www.bishnaw.com/survey/31-mar-2023/.

⁴⁵ [A/HRC/53/21](#), para. 17.

⁴⁶ *Ibid.*, para. 51.

interviewed by the Working Group and the Special Rapporteur on the situation of human rights in Afghanistan lamented, “women are imprisoned; they cannot work, study or go out.”⁴⁷

27. Afghan women also lack the power to engage in any political reform, given that the de facto authorities severely restrict their participation in political and public life. As one Afghan woman noted, “there is not a single woman holding public or political office, and a limited number remain in the civil service.”⁴⁸ Through coordinated policies and practices, the de facto authorities are systematically depriving women and girls of their basic rights, including to bodily autonomy, human dignity and self-determination.

28. The policies of the de facto authorities have affected the cultural environment, and discrimination against women and girls within the family sphere, in several cases pre-existent to the Taliban regime, has originated or intensified. Within their home, they may be subjected to forced and/or child marriage, polygamy and dowry obligations.⁴⁹ Between December 2022 and February 2023, there were 578 reports of forced marriage, because many families felt it was “better to sell a child into marriage than for her to die of starvation”.⁵⁰ There are also reports of parents arranging marriages for their daughters to avoid them being forced to marry members of Taliban cadres. In addition to an increase in forced marriages, economic hardship has led some Afghan citizens to sell women and girls. Between December 2022 and February 2023, there were 118 reports of children being sold to service or repay debts.⁵¹

29. Women and girls are experiencing the mental repercussions of these environments. In March 2023, a survey revealed that 47.6 per cent of respondents knew at least one woman or girl who had suffered from anxiety or depression since the Taliban had implemented their restrictive edicts.⁵² Moreover, 7.8 per cent of respondents knew a woman or girl who had attempted suicide.⁵³ Unfortunately, due to the oppressive environment in place, mental health practitioners have limited ability to support those women and girls.⁵⁴

30. As the Working Group and the Special Rapporteur on freedom of religion or belief have previously made clear, religion and cultural relativism cannot be used to justify the subjugation and oppression of women and girls.⁵⁵ Moreover, adherence to religious law need not mean the imposition of a restrictive code of conduct on women. As detailed in the joint report, the International Court of Justice has also made clear that claimed valid motives for apartheid, such as cultural or religious justifications, are unacceptable and irrelevant under the purposes and principles of the Charter of the United Nations and therefore contrary to international law.⁵⁶

31. As illustrated above, currently at least one system of gender apartheid likely exists and merits international attention and concern. Women and girls in Afghanistan are experiencing fundamental denials of their rights to life, liberty, health care, work and education, as well as deprivation of freedom of movement, expression, opinion and association. These deprivations are all imposed by the Taliban through plans and practices calculated to impose severe oppression and domination on a group through their exclusion from political, economic, social and cultural participation and development. These acts, practices and policies are all consistent with those considered inhumane acts undertaken in the service of an apartheid regime, as listed under article II (c) of the International Convention on the Suppression and Punishment of the Crime of Apartheid, and could very well amount to the crime of gender apartheid were such an international crime recognized.

⁴⁷ Ibid.

⁴⁸ Ibid., para. 24.

⁴⁹ Ibid., para. 66.

⁵⁰ Ibid., para. 73.

⁵¹ Ibid., para. 74.

⁵² Ibid., para. 63.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ [A/HRC/53/39](#), para. 27; see also [A/HRC/43/48](#).

⁵⁶ See [A/HRC/53/21](#); see also United Nations, “Relativist claims on culture do not absolve States from human rights obligations, Third Committee expert says as delegates denounce country-specific mandates”, 23 October 2018, available at <https://press.un.org/en/2018/gashc4241.doc.htm>.

32. Allowing the Taliban to continue severely limiting the educational opportunities, safety and health of women and girls relegates them to the periphery of society and deprives them of basic human dignity and autonomy. Moreover, increased female exclusion in other States over the past decade, indicates a widespread need for the international community to identify gender apartheid across national borders. Acknowledging gender apartheid and explicitly codifying it in international law will facilitate access to justice for women on a global scale.

V. Conclusions

33. For decades, experts have called upon the international community to recognize and address the developing phenomenon of gender apartheid. Calls from the Special Rapporteur on freedom of religion or belief in the late 1990s and, more recently, the Working Group, the Special Rapporteur on the situation of human rights in Afghanistan, the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran and other special procedures of the Human Rights Council, the Secretary-General, and representatives of the United Nations Population Fund and UN-Women, among others, have uniformly underscored the importance of codifying gender apartheid in international law.

34. Although these calls to recognize and address gender apartheid are not new, current global challenges make such recognition imperative. Since the Taliban's return to power, the gender-oppressive regime has committed systemic, intentional attacks on the rights of Afghan women and girls. Taliban-issued edicts, policies and practices represent an institutionalized system of discrimination, oppression and domination against women and girls. Taliban rule therefore makes codifying gender apartheid in international law especially urgent, because it would allow for the international community to better identify and address the regime's attacks on Afghan women and girls for what they are.

35. Against this background of urgent pleas, the draft articles on prevention and punishment of crimes against humanity provide an opportunity to codify this serious and systematic violation of fundamental human rights as a crime against humanity, an opportunity that should not be passed by. It is now the responsibility of Member States to actualize these continued calls from experts to the international community by codifying gender apartheid as a crime in international law. The Working Group urges the Member and observer States of the General Assembly to ensure that the human rights principles of equality and non-discrimination, dignity, inclusive participation, accountability and humanity are upheld globally by recognizing gender apartheid as a crime against humanity aimed at the systematic subjugation and oppression of women and girls.
