RE: CRIME OF GENDER APARTHEID

Introduction

1. We have been asked by the International Service for Human Rights ("ISHR") to provide advice on a potential crime of 'gender apartheid' under international law, against the backdrop of the grave human rights abuses of women and girls in Afghanistan currently being perpetrated by the Taliban. It is possible that this analysis could also be relevant to other contexts in which women and girls are subject to repeated serious human rights violations on the basis of their gender, such as areas controlled by Islamic State, Saudi Arabia and Iran, but these other contexts are not the focus of this opinion. The key objective of our advice is described by ISHR as providing "strategic direction on how to best use or develop international law to promote accountability for the Taliban and other states and regimes that systematically discriminate against and oppress women".[1]

2. Noting the various points posed for our consideration in an email from ISHR dated 11 November 2022, we consider that there are three key issues:

    i. First, whether a specific crime of gender apartheid is currently recognised under international law.

    ii. Second, if no crime of gender apartheid currently exists, the extent to which there is a need for the future recognition or development of such a crime, notably involving consideration of the important question of whether there is a gap in the protection and accountability currently provided for under international law.

    iii. Third, the avenues available to develop recognition of a crime of gender apartheid, should such a crime not currently exist in international law.

3. This advice is accordingly structured as follows:

    A. Summary of our advice.
    B. Summary of the key factual background.
    C. Whether the specific crime of gender apartheid is currently recognised under international law.
    D. The need for the future recognition or development of a crime of gender apartheid (including consideration of whether there is currently a 'protection gap').
    E. Avenues available to develop recognition of a crime of gender apartheid, should such a crime not currently exist.

[1] Email dated 11 November 2022.

A. Summary of our advice

4. A specific crime of gender apartheid is not currently recognised under international law. There is currently no treaty or customary law basis for such a crime.

5. In relation to possible prosecution of those responsible for the Taliban's conduct against women and girls, there is no significant 'gap' left by the current international criminalisation of persecution on the ground of gender (Rome Statute of the International Criminal Court, Article 7(1)) which could be filled through recognition of a crime of gender apartheid. It is very likely that the evidence used to prove the commission of a crime of gender apartheid would be highly relevant to establishing a crime of persecution, and it is difficult to imagine a scenario where a conviction for gender apartheid could be secured but a conviction for persecution could not. We consider this to be an important factor in considering whether the recognition of a separate crime of gender apartheid is necessary in order to hold accountable, in international criminal law, the perpetrators of the egregious human rights violations currently occurring in Afghanistan.

6. If the Office of the Prosecutor acts on its intention to treat the crime of persecution on the ground of gender as an area of focus for future prosecutions, it may be that new international jurisprudence will expose 'gaps' in the accountability regime. That may present an appropriate opportunity to revisit the question of whether it would be advantageous to recognise a new crime of gender apartheid, or to advocate for an amendment to the existing crime in Article 7(1)(h), that could address any such gap.

7. We have identified avenues that are available to develop the recognition of a crime of gender apartheid.

B. Summary of the key factual background

(1) Preliminary observations

8. While the question of whether a crime of gender apartheid is recognised in international law could, in principle, be answered in the abstract without consideration of any specific factual situation, we consider it helpful to preface the legal analysis below with a short summary of the current position in Afghanistan as we understand it. This provides the factual context for our legal analysis, including the question of whether the types of acts which could amount to a crime of gender apartheid – if recognised by international law – may also: (a) meet the requirements of the crime against humanity of persecution; and/or (b) violate provisions of international human rights law.

9. In compiling the following summary, we have relied on: (a) materials provided to us by ISHR; (b) additional materials which we have compiled from United Nations bodies, including in particular the UN Assistance Mission in Afghanistan ("UNAMA")[2], UN

[2] UNAMA, "Human Rights in Afghanistan: 15 August 2021-15 June 2022", July 2022 (referred to below as the "UNAMA Report").

Women[3] and the Special Rapporteur on the situation of human rights in Afghanistan;[4] and (c) press reports from reputable media sources (covering in particular the key developments since our instructions were prepared).

10. We are, of course, unable independently to verify the information contained in these materials, or to comment at this stage on their likely admissibility or weight in any criminal prosecution. However, we note that all the materials that we have considered are from UN bodies, experienced and internationally-reputed NGOs, and reputable media sources, many of whose conclusions appear to be based, at least in part, on sources located within, and fact-finding conducted in, Afghanistan itself.

11. We therefore consider that, while fact-finding on the ground in Afghanistan faces serious challenges now that the Taliban have taken power,[5] the sources we have considered represent a credible body of material which allows us to identify key features of the Taliban regime as it currently affects women and girls. We also note that the credibility of this material is enhanced by the fact that the same key features emerge from a range of sources.

(2) The law of Afghanistan

12. The first point which we note is that the current treatment of women and girls in Afghanistan stems in large part from a series of instruments published by the Taliban, referred to as "edicts" in the compilation with which ISHR has provided us, or in other places (such as the UNAMA Report) as "decrees".

13. We are not instructed as to the legal status of such edicts under the law of Afghanistan, and have not seen the edicts themselves. Therefore, we are reliant in this respect on the press reports to which each edict is linked in the compilation with which we have been provided, along with references in the other reports which we have considered. As noted above, we work on the assumption that the contents of such edicts have been accurately reported.

14. It appears to be the case that, whatever the correct classification of such edicts under the law of Afghanistan, these edicts: (a) are promulgated by the Taliban, which exercises effective control over the territory of Afghanistan;[6] and (b) are treated as binding within Afghanistan, in the sense that, once promulgated, the requirements of an edict are put into effect (for example, the edicts banning women and girls from education have led to their being immediately excluded from educational settings, and the ban on contraception is

[3] UN Women, "Gender Alert No. 2: Women's rights in Afghanistan one year after the Taliban take-over", 15 August 2022 (referred to below as the "UN Women Report").
[4] The Special Rapporteur on the situation of human rights in Afghanistan was appointed by the UN Human Rights Council with effect from 1 May 2022; his first report was issued on 9 September 2022 ("Situation of human rights in Afghanistan: Report of the Special Rapporteur on the situation of human rights in Afghanistan", A/HRC/51/6) and is referred to below as the "SR Report".
[5] The UNAMA Report, pp. 26-29, details the severe challenges faced by journalists, civil society organisations, NGOs and human rights defenders in continuing to function under the Taliban regime. See also the SR Report, paras. 77-79.
[6] For the purposes of the present advice, we do not consider the question of the status of the Taliban government in international law. We note from our research, however, that it appears that, while the Taliban currently exercises *de facto* control of the country, no State has recognised it as the government of Afghanistan. We note that the UN Reports which we have reviewed are careful to refer to the Taliban as the *de facto* authorities and do not accord them any *de jure* status.

reported to have been followed by armed searches of pharmacies to remove contraceptive products: see further below).

15. In addition to these edicts/decrees, the materials we have reviewed also refer to a number of "announcements" made by or on behalf of a range of senior government officials. For example, the UNAMA Report highlights[7] that the Ministry for the Propagation of Virtue and the Prevention of Vice ("MPVPV": see further below) has issued a range of "guidance" and "recommendations", the legal status of which is unclear, and that "the uncertain legal nature of such instructions, which are often simply announced by a spokesperson in a media interview or via Twitter, leave the system open for interpretation and abuse".

16. One example given by UNAMA in this context is the MPVPV's May 2022 directive on the wearing of the *hijab* (see further below): despite being framed as guidance, this announces punishments for male relatives of women who fail to comply with the (highly restrictive) *hijab* rules, demonstrating the fact that such rules are, in practice, mandatory. In any event, even in relation to the previous, less formal 'guidance' from MPVPV on the subject, "UNAMA documented cases where, *de facto*, MPVPV personnel[8] were involved in the implementation of sanctions and punishments for alleged violations of its 'advice', including fines and physical punishments."[9]

17. We consider the existence of the range of rules discussed above to be significant in demonstrating a direct link between the current position of women and girls in Afghanistan and the policies of the Taliban regime. The situation is not one in which discriminatory practices have grown up within a society and the government's wrongdoing lies in failing to address that discrimination (although, as noted below, such failures also appear to exist). On the contrary, the key aspects of the treatment of women and girls in Afghanistan appear to be enshrined in legal instruments promulgated by the Taliban itself, along with announcements and "guidance" which are clearly intended to be, and enforced as, mandatory rules. From the materials we have considered, it appears that the relevant edicts are not only put in place by the Taliban, but: (a) strongly defended by them as necessary and justified; and (b) enforced in practice, including through the use of violence. Their very purpose is to bring about the situation which now pertains (i.e., seriously discriminatory treatment of women and girls in Afghanistan), and they appear to be effective in doing so.

18. The *de jure* nature of this discriminatory framework is of significance to the legal analysis below, and in particular to: (a) the strength of the legal analogy between the current position of women and girls in Afghanistan and the crime of apartheid as hitherto applied to situations where race, rather than gender, has been the relevant factor; and (b) the question of whether such treatment could also fall within the crime against humanity of persecution, including inferring the necessary *mens rea* from any individual defendant's knowing participation in the overall mechanism by which the group is oppressed.

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[7] UNAMA Report, pp. 22-23.
[8] The report refers to the "*de facto* MPVPV", consistent with its reference to the *de facto* nature of the Taliban regime as a whole, so the reference to *de facto* here does not refer to any informality of the relationship between the personnel in question and the MPVPV, but rather the nature of the MPVPV and the Taliban regime as a whole.
[9] UNAMA Report, p. 23.

(3) The current position of women and girls in Afghanistan

19. Turning to the concrete ways in which the position of women and girls has been affected by the Taliban regime since 2021, the overall picture can be summarised as the almost-complete exclusion of women and girls from participation in the life of society outside the home, and, even within the sphere of private life, the severe deprivation of numerous basic rights. As the UNAMA Report expresses it:

> "Women and girls comprise half the population of Afghanistan. The *de facto* authorities' continued restriction of their enjoyment of their rights and freedoms has effectively marginalized and rendered Afghan women voiceless and unseen."[10]

20. The UN Women Report states:

> "Women are systematically excluded from public and political life, and restricted in their access to education, humanitarian assistance, employment, justice and health services. In short, women and girls' lives and prospects are confined to the home."[11]

21. The same report notes[12] that Afghanistan is ranked 156th out of 156 countries by the Global Gender Gap Index 2021.[13] The UN Special Rapporteur has expressed "grave concern about the staggering regression in women and girls' enjoyment of civil, political, economic, social and cultural rights since the Taliban took power", stating that "[i]n no other country have women and girls so rapidly disappeared from all spheres of public life, nor are they as disadvantaged in every aspect of their lives".[14]

22. We note that the Taliban issued a decree on women's rights in December 2021, which was widely regarded as: (a) lacking in substance; and (b) even within its limited terms, not addressing the restrictions in fact being placed on the rights of women and girls.[15] UNAMA notes that the decree "was followed … by a series of edicts that had the effect of excluding women and girls from many aspects of daily and public life by limiting their access to education, restricting their freedom of movement and requiring them to be fully covered in public".[16]

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[10] UNAMA Report, p. 41.
[11] UN Women Report, p. 1.
[12] UN Women Report, p. 3.
[13] This index is produced by the World Economic Forum to measure gender inequality by reference to a range of measures: Afghanistan remains bottom of the list in the 2022 report: https://www.weforum.org/reports/global-gender-gap-report-2022/in-full/1-benchmarking-gender-gaps-2022#1-2-global-results
[14] SR Report, para. 21. We consider it important to note that, as the Special Rapporteur records (at para. 25), "Notwithstanding these discriminatory measures, even in the face of threats, detention and violence, Afghan women continue non-violent protest and resistance. ... One woman who the Special Rapporteur met in Kabul said 'We will keep our head high, we do not deserve to be imprisoned in our homes, without work or education; we will keep raising our voices until we are heard. We will keep fighting for our rights and dignity.'"
[15] https://edition.cnn.com/2021/12/03/asia/afghanistan-taliban-decree-womens-rights-intl/index.html
[16] UNAMA Report, p. 8.

23. The evidence indicates that the key areas in which the lives of women and girls in Afghanistan have been affected include the following.

24. **Representation in government**: UNAMA notes:

> "The first indication of the curtailment of [women's] rights was the 7 September 2021 establishment of an all-male caretaker Cabinet; there was, and remains, no room for any negotiation on gender inclusivity. By extension and through their decisions thereafter, the *de facto* authorities have failed to include women in any decision-making forum at both national and sub-national levels. This was followed by the 18 September [2021] physical takeover and conversion of the premises of the former Ministry of Women's affairs to that of the now *de facto* Ministry for the Propagation of Virtue and Prevention of Vice (MPVPV). Together, the two actions effectively removed women's right to political participation and representation in decision-making, including the loss of any opportunity to be consulted on matters that affect them and their families."[17]

25. The MPVPV was apparently in charge of enforcing the Taliban's view of religious doctrine during its previous period in power;[18] as noted above, it has been responsible for a number of the policies which now contribute to the exclusion of women and girls from society. The UN Special Rapporteur has stated that he is "deeply concerned about the virtual erasure of women from all areas of public life", writing:

> "Women held parliamentary seats, ministerial and diplomatic posts and senior offices, including as judges and chairs of independent commissions before the Taliban takeover. None remain in these positions."[19]

26. **Education**: The exclusion of women and girls from education has progressed in stages. It began with the banning of co-education and of men from teaching girls, shortly after the Taliban came to power.[20] This was followed soon afterwards by the banning of girls from secondary education;[21] followed by banning female students from attending (or teaching at) Kabul University.[22] In March 2022, it was announced that girls' secondary schools would reopen that term;[23] this announcement was, however, reversed a week later,[24] and girls have never returned to secondary education. In December 2022, the Taliban announced a

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[17] UNAMA Report, p. 31.
[18] https://www.cbsnews.com/news/afghanistan-taliban-women-girls-work-school-sharia-rules/
[19] SR Report, para. 22.
[20] https://www.republicworld.com/world-news/rest-of-the-world-news/taliban-declare-ban-on-co-education-in-afghanistan-prohibit-men-from-teaching-girls.html
[21] https://www.theguardian.com/world/2021/sep/17/taliban-ban-girls-from-secondary-education-in-afghanistan
[22] https://www.washingtonpost.com/world/asia_pacific/kabul-university-taliban-women-students/2021/09/29/1d34873c-20b4-11ec-a8d9-0827a2a4b915_story.html
[23] https://www.reuters.com/world/asia-pacific/taliban-open-high-schools-girls-next-week-official-says-2022-03-17/
[24] https://edition.cnn.com/2022/03/23/asia/taliban-girls-school-delay-afghanistan-intl/index.html

complete and indefinite ban of all women from university education.[25] There are also reports that at the same time the Taliban, for the first time, banned girls from attending primary school,[26] although this is less clear from our research.

27. The current position therefore appears to be that women and girls in Afghanistan are completely excluded from secondary and tertiary education, with potentially also restrictions on primary education. The UNAMA Report notes that denial of access to basic education "has innumerable physical and psychosocial costs and risks including: suicides; early and child marriage; early child-bearing; poverty-related losses with regard to health, nutrition, well-being and wealth due to lower earnings; diminished agency, decision-making and related social capital; and increased risk of being a victim of domestic violence and/or sexual exploitation and abuse".[27] It notes that, while these restrictions have been inflicted on women and girls, "boys continue to enjoy full access to primary and secondary education, and young men to tertiary education".[28]

28. **Freedom of movement**: shortly after the Taliban took power, it appears that they ordered women and girls to stay at home, ostensibly on the basis that the Afghan armed forces posed a threat to their safety.[29] It is not clear whether there remains a formal order for women to stay at home: however, the MPVPV on 7 May 2022 issued a directive on the *hijab* which also "recommended that 'the best form of observance of the Sharia *hijab*' was for women to avoid leaving the house altogether, unless absolutely necessary".[30] The confinement of women to the home is not only promoted as a matter of principle, but also in practice through the bans on attendance at education, work, and in a wide range of public places.

29. The UNAMA Report records that, in December 2021, the MPVPV issued 'guidance' limiting women's freedom of movement to no further than 78 kilometres, unless accompanied by a *mahram* (male guardian), and prohibited vehicle owners from taking female passengers not wearing *hijab*.[31] UNAMA has documented instances of women being beaten by local *de facto* authorities for being without a *mahram*.[32] It also appears that the Taliban authorities have sent official letters to travel agencies in Afghanistan ordering them not to sell travel tickets, including plane tickets, to women without a *mahram*, and to officials at Kabul International Airport instructing them not to allow women to travel without a *mahram*. This amounts to a severe restriction on women's freedom of movement, including their ability to escape the situation which they face in Afghanistan.[33]

[25] https://www.theguardian.com/world/2022/dec/20/taliban-ban-afghan-women-university-education
[26] https://www.telegraph.co.uk/world-news/2022/12/21/taliban-bans-girls-primary-school-closing-university-doors-female/
[27] UNAMA Report, p. 33.
[28] UNAMA Report, p. 33.
[29] https://edition.cnn.com/2021/08/25/asia/taliban-women-workplaces-afghanistan-intl/index.html
[30] UNAMA Report, p. 33.
[31] UNAMA Report, p. 32.
[32] UNAMA Report, p. 32.
[33] See further https://www.theguardian.com/world/2022/aug/15/taliban-rules-trap-afghan-women-no-male-guardian

30. **Freedom of dress**: The UN Women report, among other sources, records that:

> "On 7 May 2022 the de facto authorities issued a directive requiring all women to wear Islamic *hijab* and fully cover their faces except the eyes when outside the house. The most effective form of Islamic *hijab*, the directive noted, was not to leave home except in cases of necessity. Violations of this decree lead to punishment of male relatives – essentially making male relatives responsible for enforcing the hijab decree."[34]

Thus the restrictions on freedom of dress are, in practice, closely linked to the restrictions on freedom of movement discussed above. UNAMA has also documented instances of women being beaten by the Taliban authorities for not complying with the *hijab* regulations.[35]

31. **Forced marriage and child marriage**: UNAMA documents a number of instances where Afghan authorities including judges and provincial governors have been involved in upholding forced marriages and/or denying women their choice of partner.[36] The UN Special Rapporteur records that children's rights organisations in Afghanistan have also reported a sharp increase in child marriage, in part because "livelihood and educational opportunities [have] evaporated"; this includes "girls being forced to marry members of the Taliban as a safety measure for families".[37] He also notes that there is no legal minimum age for marriage, and that girls under the age of 15 may be married under the Shia Personal Status Law.

32. **Gender-based violence**: UNAMA documents numerous cases of violence against women and girls, including murders. While the State is not typically directly responsible for such acts where they are committed by private actors, UNAMA notes that "[n]one of the cases have been processed through the formal justice system" and that "[s]pecialised police and prosecution units, and courts, established by previous governments as part of the implementation of the 2009 Violence Against Women Law were removed from the *de facto* authority's budget for 2022".[38] Similar points are made by the UN Special Rapporteur, who also notes that "the *mahram* policy makes it harder for survivors of gender-based violence to seek help".[39]

33. **Healthcare and reproductive freedom:** The UN Women Report notes that "[t]he health system is plagued by service gaps and inequalities, including access issues in rural areas, shortages of staff, supplies and equipment, and limited specialized care for women, particularly around reproductive health".[40] While some of these limitations may stem from

[34] UN Women Report, p. 3.
[35] UNAMA Report, p. 32.
[36] UNAMA Report, pp. 31-32.
[37] SR Report, para. 31.
[38] UNAMA Report, p. 34.
[39] SR Report para. 33 (and generally paras. 33-35). We assume that the concern being expressed by the Special Rapporteur may be that the *mahram* requirement makes it difficult for women to speak to others in conditions of confidentiality, and/or that the person who may act as a *mahram* may also be the perpetrator of the violence.
[40] UN Women Report, p. 5.

the challenges that the country faces as a whole, a number of specific government policies clearly target or exacerbate the situation of women specifically. These include:

i. The application of gender segregation to health workers, prohibiting them from treating patients of the opposite sex. This restriction, coupled with the severe difficulty faced by women in accessing medical training and employment which leads to a complete absence of women nurses and doctors in many areas, results in a situation where there are no doctors or nurses who are permitted to treat women.[41] In the longer term, the ban on women attending secondary and tertiary education will lead, we assume, to a total absence of women doctors and nurses: coupled with the ban on women being treated by male medical staff, this would create the risk of an almost-complete inability for women to see a health professional (other than, potentially, a woman who had trained abroad: but see further below on the additional ban on female staff in both foreign and domestic NGOs working in Afghanistan).

ii. Specific measures targeting women, including a recently imposed ban on contraception, reportedly enforced forcibly against pharmacies and midwives suspected of having supplies of such medication.[42]

A detailed report by Human Rights Watch ("HRW") also explains the multiple challenges faced by women in Afghanistan in accessing healthcare, including contraception, and addresses the ways in which those challenges are specifically exacerbated and/or created by the policies of the Taliban.[43]

34. We also note that, in December 2022, the Taliban banned women from working in NGOs in Afghanistan.[44] While this ban applies to both national and international NGOs, and thus affects a large number of non-Afghan women, the impact on Afghan women has been severe since: (a) the assistance of NGOs was vital in a number of spheres of life; and (b) NGOs relied on a large number of female staff to provide their services, particularly to women, given the overall effects of gender segregation.[45]

[41] UN Women Report, p. 5.
[42] https://www.theguardian.com/global-development/2023/feb/17/taliban-ban-contraception-western-conspiracy
[43] Human Rights Watch, "'I Would Like Four Kids – If We Stay Alive' – Women's Access to Health Care in Afghanistan" (2021), in particular pp. 46-48.
[44] https://www.unwomen.org/en/news-stories/statement/2022/12/statement-the-decree-barring-women-in-afghanistan-from-working-in-non-governmental-organizations-is-yet-another-stark-violation-of-womens-rights
[45] https://www.unwomen.org/en/news-stories/statement/2022/12/statement-the-decree-barring-women-in-afghanistan-from-working-in-non-governmental-organizations-is-yet-another-stark-violation-of-womens-rights

C. Whether a specific crime of gender apartheid is currently recognised under international law

35. This section is structured as follows:

    i. First, it makes some preliminary observations on the definition of a crime of gender apartheid.

    ii. Second, it explains our view that there is currently no treaty law basis for such a crime.

    iii. Third, it addresses whether there is currently a customary international law basis for such a crime, concluding that there is not.

(1) The definition of a crime of gender apartheid

36. For the purposes of this advice, we proceed on the assumption that a crime of gender apartheid as may exist under international law currently or in the future would mirror the crime of apartheid (on the ground of race) as currently established under international law. That is to say, a crime of gender apartheid would comprise the elements of apartheid currently established under international law with the references to 'race' replaced with references to 'gender'.

37. Reference could be made to the definition of the crime of apartheid found in the International Convention on the Suppression and Punishment of the Crime of Apartheid (Article II),[46] or to the Rome Statute of the International Criminal Court ("the Rome Statute") (Article 7(2)(h)).[47] Given the recent and clear consensus on Article 7 of the Rome Statute as reflecting customary international law,[48] we set out below an amended version of the definition therein (showing insertions in bold and deletions struck through):

> "The crime of **gender** apartheid means inhumane acts of a character similar to those referred to in paragraph 1 [of Article 7 of the Rome Statute], committed in the context of an institutionalized regime of systematic oppression and domination by one ~~racial~~ **gender** group over ~~any other racial~~ **another gender** group ~~or groups~~ and committed with the intention of maintaining that regime".

38. With respect to the use of the term "gender" we note two concerns.

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[46] "For the purpose of the present Convention, the term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following 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:…" https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.10_International%20Convention%20on%20the%20Suppression%20and%20Punishment%20of%20the%20Crime%20of%20Apartheid.pdf

[47] https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf

[48] See the recent debates concerning the Draft Articles on Prevention and Punishment of Crimes Against Humanity (discussed at para. 53 below).

39. The first concern relates to the definition of "gender". This term appears in the Rome Statute[49] and the Draft Articles on Prevention and Punishment of Crimes Against Humanity.[50] The definition of "gender" is not, however, settled under international law. This is evident from the relatively recent debates on the Draft Articles on Prevention and Punishment of Crimes Against Humanity.[51] A pragmatic solution in the context of a definition of a crime of gender apartheid may be to use the term "gender" but not to include a definition of that term, allowing it to be applied based on any evolution in understanding as to its meaning. That was the approach taken in the Draft Articles on Prevention and Punishment of Crimes Against Humanity.[52] See further the discussion of the term "gender" at paragraphs 94–95 below.

40. The second concern is whether defining a crime of apartheid with reference to "gender" would capture the oppression of groups based on sexual orientation and gender identity (i.e those who identify as lesbian, gay, bisexual, transgender, queer or intersex). As set out below, the "Policy on the Crime of Gender Persecution" published by the ICC's Office of the Prosecutor in December 2022 ("the Policy Paper") suggests that the ICC's Office of the Prosecutor considers the definition to be sufficiently wide to cover crimes committed on the basis of sexual orientation and gender identity. It states that "[g]roups targeted for gender persecution include, for example, women, girls, men, boys and LGBTQI+ persons, and subsets of these groups". It further specifies that "[w]hile LGBTQI+ persons can belong to women, girls, men and boys groups, they can also be targeted for belonging to LGBTQI+ groups". Although we recognise the importance and complexity of this issue, and the gravity of discrimination based on multiple characteristics, including gender and sexual orientation, as our instructions have asked us to focus on the oppression of women and girls, we do not address it at any length in this advice.

(2) Treaty law

41. There is currently no treaty in existence that provides for a crime of gender apartheid.

42. Notably:

    i. Treaty law currently addresses the crime of apartheid only on the ground of race, not gender. We refer to the definitions of the crime of apartheid set out in: (a) the Rome Statute, Article 7(2)(h); and (b) the International Convention on the Suppression and Punishment of the Crime of Apartheid, Article II.

    ii. The Draft Articles on Prevention and Punishment of Crimes Against Humanity (currently under consideration by the Sixth Committee of the United Nations General

[49] Article 7(1)(h). See also Article 7(3) of the Rome Statute provides "For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above".
[50] Article 2(1)(h).
[51] See para. 53 below. See also Bennoune, Colombia Human Rights Law Review (2022), fn 3: https://hrlr.law.columbia.edu/files/2022/12/Bennoune-Finalized-12.09.22.pdf
[52] See para. 53 below.

Assembly ("UNGA")) adopt Article 7 of the Rome Statute, i.e. they provide for the crime of apartheid only on the ground of race, not gender.

(3) Customary international law

43. The question, then, is whether a crime of gender apartheid exists under customary international law. To establish a rule of customary international law there must be: (a) general practice consistent with that rule (primarily practice of States, but in certain cases also international organisations); and (b) acceptance by States (and in the relevant situations international organisations) of that practice being required by international law (this acceptance of its status as law being referred to as *opinio juris*).[53]

44. We set out below: (a) the lack of practice evidencing a crime of gender apartheid under customary international law; (b) other significant indications that there is no such crime under customary international law; and (c) the limited significance of the references that we have identified asserting a crime of gender apartheid.

(a) No practice evidencing a crime of gender apartheid under customary international law

45. We have not identified a body of relevant practice positively affirming a crime of gender apartheid. In the absence of such practice, the presumption is that no such rule of customary international law exists (with the absence of clear evidence supporting the existence of a customary rule particularly significant in the context of international criminal law, given the importance of non-retroactivity of criminal law[54]).

46. This lack of practice is all the more striking given two factors.

47. First, there have been calls for 'gender apartheid' to be recognised since the 1990s (in response to the Taliban rule in Afghanistan at that time[55], and also with respect to Iran[56] and Saudi Arabia[57]).

48. Secondly, there have been clear opportunities to refer to, perform and/or establish practice relevant to a crime of gender apartheid, notably when debating the UNGA resolutions on Afghanistan (see paragraphs 49–51 below), when discussing the Draft Articles on Prevention and Punishment of Crimes Against Humanity (see paragraphs 52–53 below) and during the recent work of the International Law Commission ("ILC") with respect to

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[53] See e.g. ILC, Draft Conclusions on the Identification of Customary International Law (2018), Conclusion 2: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf "To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (opinio juris)."

[54] See as reflected in, e.g., Rome Statute, Articles 22-24.

[55] N. Gallagher, *The International Campaign Against Gender Apartheid in Afghanistan*, 5 UCLA J. INT'L L. & FOREIGN AFF. 367, 378 (2000).

[56] International Association of Democratic Lawyers, 2005 (before the HRC with respect to Iran): "Iran should be condemned in the strongest terms possible in a substantive resolution by this Commission for its continued gender apartheid, violence and discrimination against women": https://www.ohchr.org/en/taxonomy/term/1167?page=25

[57] Harvard Law Review, (2008) 121(8), 2254–2261: https://harvardlawreview.org/wp-content/uploads/pdfs/saudi_courts_womens_rights.pdf .

international legal rules with the status of *jus cogens* (see paragraphs 54–56 below). For the reasons explained at paragraphs 58–63 below, we do not consider that 'inaction' of States can be relied upon as evidence of relevant practice in this context.

UNGA resolutions on Afghanistan

49. The UN resolutions on Afghanistan make no reference to a crime of gender apartheid. Notably, the recent UNGA resolution on the situation in Afghanistan (A/77/L.11 (2022)) does not refer to a crime of gender apartheid.[58] We are not aware of any previous UNGA resolution referring to a crime of gender apartheid (and note that, if it had, this would almost certainly have been accompanied by media attention).

50. However, with a view to informing the discussion as to whether, in the longer term, a crime of gender apartheid might crystallise under international law, it is instructive to identify certain points of consensus arising from that 2022 UNGA resolution. We note in this regard that, in assessing the legal status of the prohibition of apartheid and racial discrimination under customary international law, the ILC Special Rapporteur (Tladi) had regard to earlier statements from the UNGA that "did not address apartheid and racial discrimination specifically" but "laid the foundation" for such declarations expressly rejecting a policy of apartheid.[59]

51. Noting that the 2022 UNGA resolution was adopted with 116 votes in favour, 0 against and 10 abstentions,[60] the points of consensus are as follows:

    i. Opposition ("deep concern") to the abuse of human rights of women and girls and affirmation of the need to ensure respect for their "human rights and fundamental freedoms": see paragraphs 1,[61] 9[62] and 10[63] of the resolution.

    ii. Framing the abuse of human rights of women and girls as acts in violation of international law: see paragraph 9 of the resolution.[64]

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[58] UN Doc. A/77/L.11 (November 2022).

[59] Fourth Report at para. 94: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/024/33/PDF/N1902433.pdf?OpenElement

[60] The abstentions were: Belarus, Burundi, China, Democratic People's Republic of Korea, Ethiopia, Guinea, Nicaragua, Pakistan, Russian Federation, Zimbabwe.

[61] "Expresses deep concern over the developments and the volatility in Afghanistan since the takeover of the Taliban, and the dire economic, humanitarian and social conditions, persistent violence and the presence of terrorist groups, the absence of political inclusivity and representative decision-making, as well as abuse of human rights, including those of women, girls and persons belonging to minorities"

[62] "Expresses its deep concern about abuse of human rights, especially those of women and girls, including sexual violence, and persons belonging to minorities, and about the growing repression of fundamental freedoms, recalls the obligations of Afghanistan under international law, in particular human rights, refugee and humanitarian law, and stresses the need to ensure respect for human rights and fundamental freedoms, in particular the full enjoyment by women and girls, children, persons with disabilities and persons belonging to minorities of their human rights"

[63] "emphasizing the importance of the meaningful participation of women in all spheres of life and of upholding human rights, including for women, children and persons belonging to minorities, expresses, in particular, its serious concern about the situation of women and girls, the imposition of restrictions on their full, equal, meaningful and safe participation in public life, including their freedom of movement, and the lack of equal access to education, especially the decision by the Taliban not to reopen secondary schools to Afghan girls, economic and job opportunities, justice and other services, and calls upon the Taliban to reverse the policies and practices restricting the enjoyment of human rights and fundamental freedoms by Afghan women and girls"

[64] Set out at fn 62 above.

iii. Framing the abuse of human rights of women and girls as being implemented as part of the "policies and practices" of the Taliban regime:

a. See paragraph 10 of the resolution referring to "the decision by the Taliban not to reopen secondary schools to Afghan girls, economic and job opportunities, justice and other services" and calling upon "the Taliban to reverse the policies and practices restricting the enjoyment of human rights and fundamental freedoms by Afghan women and girls".

b. See also the comments of certain States expressly[65] or implicitly[66] framing the oppression of women by the Taliban as 'systematic'.

Draft Articles on Prevention and Punishment of Crimes Against Humanity

52. The Draft Articles on Prevention and Punishment of Crimes Against Humanity do not provide for a crime of gender apartheid.[67]

53. From the relevant records, we note the following key points:

i. It was expressly agreed that codification of the existing law was not the objective. Rather, the objective of the draft articles concerned preventing and punishing crimes against humanity and promoting inter-State cooperation in that regard.[68]

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[65] *Germany* ("Extremely worrying is the systematic oppression of women and girls, who cannot enjoy their civil, political, economic, social and cultural rights") https://new-york-un.diplo.de/un-en/news-corner/-/2562734; *Afghanistan* ("More than 24 million people need humanitarian assistance, terrorist attacks on civilian targets and minority groups have increased, women and girls are being systematically erased from all areas of public life, and human rights violations are ongoing") https://press.un.org/en/2022/ga12469.doc.htm; *Chile* (representative "expressed her concerns over the continued and severe restrictions on women and girls. Despite the promises in principle of the de facto authorities that women and girls could exercise their rights, they continue to be systematically excluded from public life. The ban on attending secondary school makes Afghanistan the only country in the world to deny girls their full right to education. She referenced several of the Taliban's decrees restricting their movements and noted that decades of progress on gender equality and women's rights disappeared within a few months") https://press.un.org/en/2022/ga12469.doc.htm.

[66] *United States* ("the Taliban have severely restricted women's exercise of their rights in Afghanistan. … The Taliban have rolled back women's and girls' right to education, women's right to work, and women's freedom of movement and assembly. Rates of gender-based violence are skyrocketing. Independent media – and particularly female journalists – have been censored. … [W] e recall that the UN Charter affirms the faith of all peoples of the United Nations, 'in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.' These are universal rights that all UN Member States are supposed to subscribe to") https://usun.usmission.gov/remarks-at-a-un-general-assembly-meeting-on-the-situation-in-afghanistan/.

[67] At the time of writing, the next discussion of the Draft Articles before the Sixth Committee is tabled for 10-14 April 2023. See UNGA resolution 77/248 (2022) para. 4: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N23/004/85/PDF/N2300485.pdf?OpenElement . See also the ILC Analytical Guide available here: https://legal.un.org/ilc/guide/7_7.shtml

[68] Report of the ILC work of the seventy-first session (A/74/10) (2019), p. 23 ("While some aspects of these draft articles may reflect customary international law, codification of existing law is not the objective of these draft articles; rather, the objective is the drafting of provisions that would be both effective and likely acceptable to States, based on provisions often used in widely adhered to treaties addressing crimes, as a basis for a possible future convention") https://legal.un.org/ilc/reports/2019/english/chp4.pdf; Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-fourth session, prepared by the Secretariat (2019) (A/CN.4/734) para. 130 ("It was emphasized that such a convention would fill an important gap in the existing legal framework, contributing to the fight against impunity for crimes against humanity") https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/026/16/PDF/N2002616.pdf?OpenElement; Statement of the Chairman of the Drafting Committee (Forteau) (2015) ("The title of the project, "Crimes against humanity", is relatively general and the Drafting Committee found it appropriate to clarify at the outset that the draft articles apply to the "prevention and punishment" of such crimes. As

ii. Reflecting that objective, it was expressly agreed that the definition of crimes against humanity contained in Article 7 of the Rome Statute would be adopted with no relevant modification.[69] The reasoning for this was articulated by the UK as follows:

> "in order to ensure consistency between the two instruments and to avoid any confusion over which crimes do or do not fall within the scope of 'crimes against humanity'. Further, many of the States Parties to the Rome Statute of the International Criminal Court will have given effect to the Rome Statute definition in their domestic law and may be disinclined from making substantive amendments to that definition".[70]

iii. Consistent with that approach of simply adopting the definition of crimes against humanity from Article 7 of the Rome Statute, we have not identified any discussion of a crime of gender apartheid.

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highlighted by the Special Rapporteur during the Plenary Debate, as well as by several Members of the Commission, there already exists a legal framework for dealing with crimes against humanity, which resides in various international conventions, national laws, and prior instruments of this Commission, as well as the various international criminal courts and tribunals' statutes and jurisprudence. Against this background, the Drafting Committee was of the view that the present draft articles do not intend to replace or compete with this framework, but to complement it by filling an existing gap relating to the prevention and punishment of crimes against humanity") https://legal.un.org/ilc/documentation/english/statements/2015_dc_chairman_statement_crimes_against_humanity.pdf; Report of the ILC at its sixty-seventh session (2015), A/CN.4/689, para. 31 ("A number of delegations expressed their appreciation for the adoption by the Commission of draft articles 1 to 4, welcoming in particular the focus on prevention and punishment of crimes against humanity, and the fact that these draft articles largely reflected existing State practice and the case law of international courts and tribunals") https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/021/62/PDF/N1602162.pdf?OpenElement. See also the HRW Q & A (question 3): https://www.hrw.org/news/2022/10/06/qa-towards-crimes-against-humanity-treaty.

[69] Report of the ILC work of the seventy-first session (A/74/10) (2019), p. 28 ("The first two paragraphs of draft article 2 establish, for the purpose of the present draft articles, a definition of 'crime against humanity'. The text of these two paragraphs is almost verbatim the text of article 7 of the Rome Statute, with just a few changes as discussed below"), p. 30 ("The definition of 'crime against humanity' in article 7 of the Rome Statute has been accepted as of mid-2019 by 122 States parties to the Statute and is now being used by many States when adopting or amending their national laws. The Commission considered article 7 to be an appropriate basis for defining such crimes in paragraphs 1 and 2 of draft article 2. Indeed, the text of article 7 is used verbatim except for three changes"), p. 44 ("The remaining subparagraphs (b)–(i) of draft article 2, paragraph 2, define further terms that appear in paragraph 1, specifically: 'extermination'; 'enslavement'; 'deportation or forcible transfer of population'; 'torture'; 'forced pregnancy'; 'persecution'; 'the crime of apartheid'; and 'enforced disappearance of persons'. These definitions also appear in article 7 of the 1998 Rome Statute and were viewed by the Commission as relevant for retention in draft article 2"); Statement of the Chairman of the Drafting Committee (Forteau) (2015) ("The title of Draft article 3 is 'Definition of crimes against humanity', which corresponds to the proposal made by the Special Rapporteur in his First Report for a draft article 2. The purpose of this draft article is to provide a definition of crimes against humanity, as well as a 'without prejudice' clause to any broader definition provided for in any international instrument or national law. Paragraphs 1, 2 and 3 essentially reproduce Article 7 of the Rome Statute. There was a general agreement in the Plenary and in the Drafting Committee that the definition of crimes against humanity contained in the Rome Statute should not be modified by the Commission in the context of the work on this topic") https://legal.un.org/ilc/documentation/english/statements/2015_dc_chairman_statement_crimes_against_humanity.pdf; Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventieth session (2015) ("Delegations generally welcomed the approach of the Commission to the topic, and in particular its objective to avoid any conflict between the draft articles and obligations of States arising under the constituent instruments of international or 'hybrid' international courts or tribunals, especially the Rome Statute of the International Criminal Court; Delegations generally supported the decision of the Commission to base the definition of crimes against humanity, contained in draft article 3, on the definition set out in article 7 of the Rome Statute, which enjoyed broad consensus. Some delegations, however, indicated that this definition could be more precise and that it could take into account additional elements, such as the International Criminal Court Elements of Crimes, or that it could include definitions for the crime of genocide and war crimes. While several delegations supported draft article 3, paragraph 4, which stated that the definition was without prejudice to any broader definition provided for in any international instrument or national law, some other delegations questioned the usefulness of such a provision") https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/021/62/PDF/N1602162.pdf?OpenElement.

[70] https://legal.un.org/ilc/sessions/71/pdfs/english/cah_uk.pdf

iv. The Draft Articles on Prevention and Punishment of Crimes Against Humanity does not *exclude* the possibility of a crime of gender apartheid. It was expressly agreed that the definition in the draft was without prejudice to existing customary international law[71] and did not affect any broader definitions provided for in customary international law.[72] However, the concern informing that 'proviso' was that the definition of "enforced disappearances" in the Convention for the Protection of All Persons from Enforced Disappearances is broader than that contained in the Rome Statute.[73] There is no reference to a crime of gender apartheid.

v. Where there was express engagement on the issue of gender, this was with respect to the definition of that term, specifically that the definition provided in Article 7(3) of the Rome Statute did not reflect the current understanding of "gender".[74] It was not with respect to a crime of gender apartheid.

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[71] Report of the ILC work of the seventy-first session (A/74/10) (2019), p. 23 ("While some aspects of these draft articles may reflect customary international law, codification of existing law is not the objective of these draft articles. … [T]he draft articles are without prejudice to existing customary international law").

[72] Report of the ILC work of the seventy-first session (A/74/10) (2019), p. 28 ("this definition does not affect any broader definitions provided for in international instruments, customary international law or national law"), p. 46 ("Paragraph 3 is meant to ensure that the definition of 'crimes against humanity' set forth in the first two paragraphs of draft article 2 does not call into question any broader definitions that may exist in international law, in particular in international instruments or in customary international law, or in national legislation. 'International instrument' is to be understood as being broader than just a legally binding international agreement, but as being limited to instruments developed by States or international organizations, such as the United Nations. To the extent that the definition of crimes against humanity is broader in certain respects under customary international law, then here too the present draft articles are without prejudice to such law. States also may adopt national laws that contain a broader definition of crimes against humanity, perhaps under the influence of broader definitions that may exist in international instruments or in customary international law. Thus, notwithstanding that an important objective of the draft articles is the harmonization of national laws, so that they may serve as the basis for robust inter-State cooperation, if a State wishes to adopt or retain a broader definition in its national law, the present draft articles do not preclude it from doing so"); Statement of the Chairman of the Drafting Committee (Forteau) (2015) ("The purpose of paragraph 4 is to indicate that the definition adopted for these draft articles has no effect upon broader definitions that may exist currently in other instruments, such as the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, or in national laws. It also makes clear that the present draft articles have no effect on the adoption, in the future, of a broader definition of crimes against humanity in an international instrument or a national law").

[73] Report of the ILC work of the seventy-first session (A/74/10) (2019), p. 47 (internal citations omitted) ("For example, the definition of 'enforced disappearance of persons' as contained in draft article 2 follows article 7 of the 1998 Rome Statute, but differs from the definition contained in the 1992 Declaration on the Protection of All Persons from Enforced Disappearance, in the 1994 Inter-American Convention on Forced Disappearance of Persons and in the 2006 International Convention for the Protection of All Persons against Enforced Disappearance"). No other examples are cited.

[74] Report of the ILC work of the seventy-first session (A/74/10) (2019) ("Since the adoption of the Rome Statute, several developments in international human rights law and international criminal law have occurred, reflecting the current understanding as to the meaning of the term 'gender'. … Accordingly, the Commission decided not to include the definition of 'gender' found in article 7, paragraph 3, of the 1998 Rome Statute, thereby allowing the term to be applied for the purposes of the present draft articles based on an evolving understanding as to its meaning. While the term is therefore undefined in the present draft articles, the same is true as well for various other terms used in draft article 2, paragraph 1 (h), such as 'political', 'racial', 'national', 'ethnic', 'cultural', or 'religious'. States, however, may be guided by the sources indicated above for understanding the meaning of the term 'gender'); Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-fourth session, prepared by the Secretariat (2019) (A/CN.4/734), para. 134 ("Several delegations welcomed the Commission's decision not to define the term 'gender', which would allow the term to be applied based on an evolving understanding as to its meaning, although other delegations criticized such an approach. While some delegations appreciated the inclusion of paragraph 3, it raised concerns about legal certainty. It was suggested that paragraph 3 adopt a more dynamic formulation to incorporate amendments to the Rome Statute"); Written Comments of the UK (29 November 2018) ("Draft Article 3(3) defines 'gender' as referring to two sexes – male and female. Consequently, persecution of persons who do not consider themselves as male or female in connection with another crime referred to in draft Article 3(1) would potentially fall outside the scope of crimes against humanity. There is therefore the question of whether or not this definition of gender is appropriate despite the fact that it follows the wording of the Rome Statute. In the UK's view, it is no longer appropriate and therefore should be dropped from the draft Articles. States may then, if necessary, negotiate a new definition should they decide to pursue a convention based on the draft Articles") https://legal.un.org/ilc/sessions/71/pdfs/english/cah_uk.pdf . See also the comments of Canada: https://legal.un.org/ilc/sessions/71/pdfs/english/cah_canada.pdf.

ILC work on *jus cogens*

54. The ILC has recently considered "peremptory norms of general international law (*jus cogens*)".[75] In providing a list of rules of international law with the status of *jus cogens* – that is, rules from which no derogation is permitted – the ILC did not include a crime of gender apartheid.

55. From the relevant records, we note the following key points:

    i. The question of whether to provide a list of *jus cogens* rules (illustrative or not) was contentious.[76]

    ii. The list provided in the annex to the draft conclusions of the ILC is non-exhaustive. Draft Conclusion 23 provides:

> "Without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*), a non-exhaustive list of norms that the International Law Commission has previously referred to as having that status is to be found in the annex to the present draft conclusion".[77]

    iii. The list does not include any reference to gender apartheid (or indeed gender discrimination more generally) – but does include reference to the prohibition of crimes against humanity and the prohibition of racial discrimination and apartheid.

    iv. In his fourth report[78] the Special Rapporteur (Tladi) stated with respect to "racial discrimination and apartheid" that:

> "The phrase is not meant, in this context, to indicate separate prohibitions, namely the prohibition of racial discrimination and the prohibition of apartheid (or for that matter the prohibition of racial discrimination or the prohibition of apartheid). Rather it is intended to signify a composite act, namely the prohibition of apartheid with racial discrimination as an integral part of that. …
>
> As a second preliminary point, acts of apartheid are prohibited as crimes against humanity. If, as the analysis above illustrates, crimes against humanity are *jus cogens*,

[75] https://legal.un.org/ilc/guide/1_14.shtml

[76] Fifth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, A/CN.4/747, (2022), para. 218 https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/284/83/PDF/N2128483.pdf?OpenElement; Statement of the Chairperson of the Drafting Committee (2022) pp. 27-28 https://legal.un.org/ilc/documentation/english/statements/2022_dc_chairman_statement_jc.pdf.

[77] See also the Fifth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, A/CN.4/747, (2022), para. 217 ("First, the list of norms is without prejudice to other norms that the Commission may have referred to as having a peremptory character. Second, the list of norms contained in the annex is without prejudice to the emergence of *jus cogens* in the future. Third, the list is without prejudice to other norms that currently have the status of *jus cogens* but that have not been referred to previously by the Commission").

[78] Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, A/CN.4/727, (2019), paras. 91-94: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/024/33/PDF/N1902433.pdf?OpenElement

> then it stands to reason that acts of apartheid, which constitute crimes against humanity, would themselves also be prohibited as *jus cogens*. …
>
> There is also ample State practice recognizing the prohibition of apartheid and racial discrimination as a peremptory norm of general international law. There have, for example, been many General Assembly and Security Council resolutions which attest to the non-derogability of the prohibition of apartheid and racial discrimination. … The complete and total rejection of the policy of apartheid and the discriminatory policies attendant to it, as a crime against humanity and the conscience of mankind, was codified in the International Convention on the Suppression and Punishment of the Crime of Apartheid. … The peremptory character of the prohibition of apartheid and racial discrimination has also been recognized in judicial decisions of national courts."

56. The survey of practice in his report (resolutions, treaty practice, judicial decisions of national courts) stands in stark contrast as to the current position on the concept of gender apartheid.

Domestic laws

57. With respect to domestic laws, while we are aware of domestic legislation implementing the Rome Statute,[79] we are not aware of any domestic law providing for a crime of gender apartheid.[80]

Observations relating to 'inaction' of States

58. We note that, under certain circumstances, inaction can constitute State practice that is relevant to the formation or identification of a rule of customary international law.[81] The ILC commentary to its Draft Conclusions on the Identification of Customary International Law states that "only a deliberate abstention from acting may serve such a role: the State in question needs to be conscious of refraining from acting in a given situation, and it cannot simply be assumed that abstention from acting is deliberate".[82]

59. Turning to the types of human rights abuses under consideration here, it can reasonably be said that a number of States abstain from implementing/permitting an "institutionalized regime of systematic oppression and domination" against women and/or girls because they consider that such a regime would be internationally unlawful.

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[79] E.g. in the UK, the International Criminal Court Act 2001.

[80] We have not conducted a comprehensive search of all domestic legislation. We are proceeding on the assumption that, if there was such legislation, it would have been referred to in at least one of: (i) press articles available online; (b) in the discussions relevant to the Draft Articles on Prevention and Punishment of Crimes Against Humanity; (c) in the ILC's recent consideration of jus cogens.

[81] ILC, Draft Conclusions on the Identification of Customary International Law (2018), Conclusion 6(1) ("Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction") https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf

[82] ILC, Draft Conclusions on the Identification of Customary International Law (2018), p. 133, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf

60. However, assuming the inference is correct (i.e. that there is a deliberate abstention from such acts based on a belief as to their unlawfulness), that does not assist on establishing a *specific* crime of gender apartheid. This is because of three contextual points.

61. First, such oppression and domination would be unlawful under other rules of international law, notably the crime against humanity of persecution on the ground of gender and rules of international human rights law (see Section D below).

62. Second, as explained above, there have been obvious and numerous recent opportunities to assert a crime of gender apartheid if States considered that it existed under international law. We recognise that the absence of any consideration on gender apartheid during the recent work of the ILC with respect to international legal rules with the status of *jus cogens*, and when discussing the Draft Articles on Prevention and Punishment of Crimes Against Humanity, may in part be explained because it is only recently that there have been well-documented and publicised examples of institutionalised gender-based oppression.

63. Third, there are a number of other indications that no such customary international law rule of a crime of gender apartheid currently exists (see paragraphs 64–67 immediately below).

(b) Other significant indications that no such rule of customary international law

64. The other significant indications that no such customary international law rule of a crime of gender apartheid currently exists are as follows.

65. First, Mr. Richard Bennett, the Special Rapporteur on the situation of human rights in Afghanistan, speaking in 2022, stated that: "International law at the moment provides that apartheid is for the issue of race but not for gender".[83] We note also his latest report on the human rights situation.[84] That report expressly refers to the attacks against ethnic and religious communities as bearing the hallmarks of crimes against humanity.[85] With respect to women, he refers to the Convention for the Elimination of All Forms of Discrimination Against Women ("CEDAW") and the International Covenant on Civil and Political Rights ("the ICCPR"),[86] with no reference to any concept of gender apartheid.

66. Second, the Policy Paper of the ICC's Office of the Prosecutor makes no reference to a crime of gender apartheid.[87] That Paper focuses on the crime against humanity of persecution on the ground of gender. If there was a crime of gender apartheid, or even an emerging rule to that effect, it is a reasonable inference that it would have been referred to.

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[83] See also Bennoune, who does not frame her recent analysis in the Colombia Human Rights Law Review in terms of a crime of gender apartheid currently established: https://hrlr.law.columbia.edu/files/2022/12/Bennoune-Finalized-12.09.22.pdf

[84] Report of the Special Rapporteur on the situation of human rights in Afghanistan, (2022) A/HRC/51/6 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/483/43/PDF/G2248343.pdf?OpenElement

[85] Paras. 97 and 98.

[86] Para. 29.

[87] https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf

67. Third, the HRW analysis is framed in terms of gender persecution, not a crime of gender apartheid.[88]

(c) Limited significance of references to gender apartheid

68. Finally, we note that when we have identified express reference to a crime of gender apartheid, the reference is: (a) not used in a legally precise way; (b) is asserted without providing any basis in State practice; and/or (c) is advanced in aspirational terms (i.e. as to what *should* be the position under international law, as opposed to what *is* the current position).

69. We refer to the following:

i. Article by Bennoune (Colombia HRLW (2022)): "the robust international legal framework that helped end racial apartheid should be urgently adapted to address gender apartheid and concert the responses of other states to it";[89] "International law has a paradigm for dealing with apartheid, but it is explicitly drafted to respond only to racial apartheid and has not been deployed to address gender apartheid. This article argues that it should be".[90]

ii. Statement of UN human rights experts in September 2021: "This pronouncement that women do not need sports and may not participate in sports suggests a return to the Taliban's grim history of systematically excluding women from public life and practicing gender apartheid".[91]

iii. UN Women Chief statement 8 March 2022: reportedly expressing "particular concern about the impact of a new 'gender apartheid' in Afghanistan, where women's employment has plummeted sharply since the Taliban takeover".[92]

iv. Executive Director of UN Population Fund, article of 1 March 2011 entitled "confronting gender apartheid in 21st century".[93]

v. S. Akbar, Former chairperson, Afghanistan Independent Human Rights Commission, April 2022: "The Taliban are implementing a gender apartheid. Women and girls are deprived of their basic human rights".[94]

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[88] See e.g: C. Baldwin, "Apartheid and Persecution: the Forgotten Crimes Against Humanity" (30 April 2021): https://www.hrw.org/news/2021/04/30/apartheid-and-persecution-forgotten-crimes-against-humanity
[89] https://hrlr.law.columbia.edu/files/2022/12/Bennoune-Finalized-12.09.22.pdf
[90] Page 15.
[91] https://www.ohchr.org/en/press-releases/2021/09/afghanistan-un-experts-deplore-women-sports-ban-call-vigorous-response
[92] https://www.ungeneva.org/en/news-media/news/2022/03/investing-womens-empowerment-yields-major-peace-prosperity-dividend
[93] https://www.reuters.com/article/uk-women-unfpa-idUSLNE72007J20110301
[94] https://www.ibanet.org/Afghanistan/Schoolgirl/ban/is/gender%20apartheid

vi. Former Afghan MP, statement of September 2022: "Taliban is a 'gender apartheid' regime".[95]

vii. Afghan scholar, article dated 28 March 2022: referring to the "Taliban's gender apartheid".[96]

viii. Former Afghanistan Researcher for Amnesty International and Founder, War Victims Network (2021): "The Taliban are known for being a gender apartheid group".[97]

ix. Renew Europe (2022): "Women in Afghanistan are suffering a gender apartheid. The Taliban have imposed a system whose aim is to expel women from public spaces".[98]

D. The extent to which there is a need for the future recognition or development of a crime of gender apartheid

70. As to the implications and advantages of recognition of a crime of gender apartheid, below we address the following: (1) whether there is currently a 'gap' in international law which means that there is no avenue for accountability for conduct of the sort in which the Taliban is engaging; (2) the best use of resources to achieve such accountability; (3) the significance of the term "apartheid"; and (4) issues of principle. We note that our area of expertise lies in legal, rather than policy, issues, so while we provide some analysis of the issues we have identified in this section, we do not address these in detail or advise on what weight, if any, should be given to these various considerations.

(1) A 'gap' in international law as it currently stands?

71. A key pragmatic question is whether there is currently a 'gap' in the international law framework for ensuring accountability that needs to be filled, i.e whether, in practice, the *existing* international law framework is capable of addressing the conduct with which this advice is concerned.

(a) Article 7(1)(h) of the Rome Statute

72. In our view, the most important question is whether the existing crime against humanity of "persecution" is able to capture the regime of oppression which the Taliban has constructed and is implementing. This crime is set out in Article 7(1) of the Rome Statute as follows:

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

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95 https://apnews.com/article/afghanistan-race-and-ethnicity-racial-injustice-united-nations-taliban-e545022f191d5b5f00af82231915a7e5

96 https://globalhealthsciences.ucsf.edu/blog/taliban's-gender-apartheid-threat-afghan-women's-political-and-social-identity-and-hidden

97 Cited by Bennoune p. 1: https://hrlr.law.columbia.edu/files/2022/12/Bennoune-Finalized-12.09.22.pdf

98 https://www.reneweuropegroup.eu/news/2022-11-24/afghanistan-the-taliban-regime-must-put-an-end-to-gender-apartheid

…

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court".

73. The Assembly of States Parties has agreed "Elements of Crimes" which, pursuant to Article 9 of the Rome Statute, are to assist the Court in interpreting and applying Article 7 (along with the other crimes within the Court's jurisdiction). The Elements of the crime set out in Article 7(1)(h) are identified as follows:

> "1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
> 2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
> 3. Such targeting was based on political, racial, national, ethnic, cultural, religious gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
> 4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.
> 5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
> 6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."[99]

74. In analysing this existing crime and its potential application to the conduct of members of the Taliban, we address in turn: (a) the chapeau paragraph of Article 7(1) which applies to all crimes against humanity; (b) the definition of "persecution"; (c) the definition of "gender"; and (d) the requirement that the conduct be "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court".

75. In carrying out this analysis, we refer in particular to the "Policy on the Crime of Gender Persecution" published by the ICC's Office of the Prosecutor in December 2022 (i.e. the Policy Paper, as defined above).[100] We note that the Policy Paper was published in response to the Office of the Prosecutor's view that this international crime has received insufficient attention to date and that it indicates that the Office of the Prosecutor has "committed to paying particular attention to the commission of … gender persecution, at all stages of its work from preliminary examination, investigation, to trial, sentencing, appeal and

[99] Internal citations omitted.
[100] Available at https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf.

reparations".[101] Consideration of prosecutions in respect of the Taliban's conduct would appear to come within the scope of this policy, especially as the Policy Paper expressly refers to Afghanistan as a State which has seen "[r]ecent examples of acts that may amount to gender persecution".[102]

76. We wish to emphasise that it is beyond the scope of this opinion to provide advice on the likelihood of any individual members of the Taliban being successfully prosecuted for the crime against humanity of persecution on the ground of gender. Instead, our purpose is to advise on whether there is any legal basis on which conduct which could fall within the scope of a crime of gender apartheid would *not* be captured by the crime of persecution on the ground of gender, such that recognition of a separate crime of gender apartheid would materially improve the international framework of legal accountability in terms of the ability to secure convictions. As to the distinct question of whether, aside from the bare question of securing convictions, it would be desirable for the Taliban's conduct to be characterised as a form of 'apartheid' given the particular repugnance attached to that term, this is a matter we address in sub-section (3) below.

The chapeau of Article 7(1)

77. As we have set out above, in this advice we have proceeded on the assumption that any crime of gender apartheid would be identical to the existing crime of apartheid, save that it would refer to gender rather than race as the basis for "systematic oppression and domination". On that assumption, a crime of gender apartheid would also be characterised as a crime against humanity and thus subject to the requirements set out in the chapeau paragraph of Article 7(1), which are applicable to all crimes against humanity. In other words, it would be necessary to show that the conduct said to constitute gender apartheid was carried out by the perpetrator "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". Indeed, Elements 5 and 6 of the Elements of Crimes for the crime of persecution are identical to Elements 6 and 7 for the crime of apartheid as currently defined.

78. Given that these requirements would apply identically to a potential crime of gender apartheid, it is not necessary to consider at length whether they contribute to any 'gap' in accountability. If there is a current 'gap', it would also apply to gender apartheid.

79. Nonetheless, on the materials that we have seen, it appears to us that the conduct of the Taliban would be likely to fulfil these requirements and therefore their existence does not create a 'gap' in accountability for members of the Taliban.

80. As regards the requirement of "a widespread or systematic attack directed against any civilian population", the ILC indicates that this requirement is intended to exclude "isolated

[101] Policy Paper, para. 3. See also para. 16, which identifies among the objectives of the Policy Paper as being to "[a]ffirm the commitment of the Office to pay particular attention to addressing sexual and gender-based crimes in line with its statutory mandate" and to "[c]ontribute, through the implementation of this Policy, to the ongoing development of international jurisprudence regarding gender persecution".
[102] Policy Paper, para. 11.

or unconnected acts of violence".[103] It is well established that it is not necessary that the "attack" be of a military nature,[104] and it can include a system of institutionalised discrimination such as apartheid.[105] Article 7(2)(a) of the Rome Statute defines "attack directed against any civilian population" as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack". Therefore, beyond the commission of an act referred to in one of the sub-paragraphs of Article 7(1), the additional requirements imposed by the chapeau paragraph are as follows: (a) there must be "a course of conduct involving the multiple commission of [such] acts": (b) those acts must be committed against a civilian population; and (c) those acts must be "pursuant to or in furtherance of a State or organizational policy to commit such attack". As to this third requirement, the ILC has confirmed that, in order to establish a policy, "it need be demonstrated only that the State or organization meant to commit an attack against a civilian population", and that this element "does not require formal designs or pre-established plans … and can be inferred from the circumstances".[106]

81. Applying those requirements to the Taliban's conduct:

    i. The oppression inflicted by the Taliban clearly consists of multiple acts. While (as highlighted by the Policy Paper) to make out the crime of persecution it is not necessary that all of those multiple acts fall within the definition of "persecution" provided that they fall within one of the sub-paragraphs of Article 7(1),[107] we nonetheless consider that there have been multiple acts of persecution and/or inhumane acts within the meaning of Article 7(1)(k), as set out below;

    ii. The acts have unquestionably been committed against Afghan civilians; and

    iii. Those acts have clearly been committed as a matter of State or organizational policy, as is clear from Section B above.

82. A further requirement of the chapeau paragraph is that the accused must have had "knowledge of the attack". According to the Elements of Crimes, the knowledge requirement "should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization".[108] In this case, we consider it inconceivable that those within the Taliban who could potentially be charged with this crime against humanity could deny that they had the requisite knowledge of the "attack" – namely, the Taliban's policy pursuant to which the persecutory measures against women and girls have been imposed and implemented.

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[103] Report of the ILC work of the seventy-first session (A/74/10) (2019), pp. 32–33.
[104] Elements of Crimes, Article 7 Introduction, para. 3.
[105] *Prosecutor v. Museuma*, ICTR-96-13-T, Judgment and Sentence, 27 January 2000, para. 205.
[106] Report of the ILC work of the seventy-first session (A/74/10) (2019), p. 39.
[107] Policy Paper, para. 59.
[108] Elements of Crimes, Article 7, Introduction, para. 2.

83. It is also a requirement under the chapeau paragraph that the individual act for which a defendant is being tried has a "nexus" with the widespread and systematic attack on the civilian population[109] – it must be "part" of the attack. According to the ILC, ascertaining whether the necessary nexus exists requires "an objective assessment, considering, in particular, the characteristics, aims, nature and/or consequences of the act", whereas "[i]solated acts that clearly differ in their context and circumstances from other acts that occur during an attack" are not captured.[110] In the case of the Taliban's conduct, we consider that any individual act of persecution is very likely to be characterised as "part" of the broader campaign to suppress the fundamental rights of women and girls on the basis of their gender.

84. For those reasons, the requirements in the chapeau paragraph of Article 7(1) do not, in our view, create a 'gap' in the current international regime for protection and accountability for the Taliban's conduct with reference to the existing crime of persecution on the ground of gender. Further, even if they did, the same 'gap' would arise if a crime against humanity of gender apartheid were recognised in international law (based on our assumed definition as set out at paragraph 37 above).

"Persecution"

85. A crime of gender apartheid would (as per our assumed definition set out above[111]) require proof of "inhumane acts" which were "committed in the context of an institutionalized regime of systematic oppression and domination by one gender group over another gender group". In our view, conduct on the part of the Taliban which was capable of meeting this definition would be very likely also to qualify as "persecution" within the meaning of Article 7(1)(h) of the Rome Statute.

86. For the purposes of Article 7(1), Article 7(2)(g) defines "persecution" as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity". It is instructive to identify how each of the elements of this definition may apply to the conduct of the Taliban which could, hypothetically, alternatively be framed as constituting a crime of gender apartheid.

87. There is no exhaustive catalogue of "fundamental rights", the intentional and severe deprivation of which can amount to persecution. The Policy Paper,[112] reflecting case law of the Pre-Trial Chamber of the ICC,[113] makes clear that fundamental rights include those set out in (non-exhaustively) the Universal Declaration of Human Rights and major United Nations human rights treaties,[114] along with rights existing under customary international

[109] See *Situation in the Republic of Côte d'Ivoire*, ICC-02/11, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 29.
[110] Report of the ILC work of the seventy-first session (A/74/10) (2019), p. 43.
[111] See para. 37 above.
[112] Policy Paper, para. 37.
[113] *Situation in the Republic of Burundi*, ICC-01/17-X, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi, 25 October 2017, para. 132, fn. 331.
[114] These include the ICCPR; the International Covenant of Economic, the Social and Cultural Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; CEDAW; the Convention on the Rights of the Child;

law. In previous cases highlighted in the Policy Paper,[115] a variety of fundamental rights have been recognised as potentially grounding a charge of persecution, including rights to freedom of expression, freedom of association and assembly, and freedom of movement, the right to equality, the right to education, the right to privacy, the right to personal dignity, the right to property and the right to choose one's spouse. That a broad range of fundamental rights are captured in this definition has been confirmed by a Pre-Trial Chamber of the ICC in its first case in which a charge of persecution on the ground of gender was brought, *Al-Hassan*,[116] which recognised (for example) that persecution encompassed the imposition of gender-specific clothing requirements and restrictions on the interactions between men and women.[117] The Policy Paper recognises that deprivations of fundamental rights "may be enforced by means of violence or destruction, or occur via the imposition of regulations that can impact persons in every aspect of life", such as restrictions on individuals' "reproductive and family options, who they can marry, whether they can attend school, where they can work, how they can dress and whether they are simply allowed to exist".[118]

88. It appears to us that the forms of Taliban conduct which could ground a charge of gender apartheid (giving rise to "an institutionalized regime of systematic oppression and domination") would be very likely also to qualify as violations of fundamental rights for the purposes of the crime of persecution. These would include restrictions on the ability of women and girls to seek an education, to own property, to choose their spouse, to move freely in public, to access healthcare, to seek employment, and to participate in public life (among others).[119] The fact that these human rights violations have been directed against women and girls gives rise to an independent violation of the right to equality and freedom from discrimination – a fundamental right on its own – and also contribute to establishment of the requisite "discriminatory intent" for the crime of persecution, as set out below.[120]

89. As to the threshold of "severity" of the violations of fundamental rights, case law suggests that a denial of human rights will qualify as persecution if it reaches "the same level of gravity as the other crimes against humanity".[121] The severity of the deprivation can be established with reference to a number of different acts: it is necessary to examine the relevant acts "in their context and with consideration of their cumulative effect" in order to "ascertain whether taken alone or in conjunction with other acts, [the relevant acts] resulted in the 'gross or blatant denial' of fundamental rights".[122]

90. We note that our presumptive definition of gender apartheid (based on the existing definition of apartheid) includes a requirement of "inhumane acts of a character similar to

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the International Convention for the Elimination of Racial Discrimination; and the Convention on the Rights of Persons with Disabilities.

115 Policy Paper, para. 38, fn. 48.

116 See *Prosecutor v. Al Hassan*, ICC-01/12-01/18, Confirmation of Charges, 30 September 2019, para. 664.

117 *Prosecutor v. Al Hassan*, ICC-01/12-01/18, Confirmation of Charges, 30 September 2019, paras. 689, 690, 697.

118 Policy Paper, para. 24.

119 See Section B above.

120 See paras. 92–93 below.

121 *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgment, 14 January 2000, para. 621.

122 *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2359, Judgment, 8 July 2019, para. 992.

those referred to in [Article 7(1)]". This would, in practice, impose similar requirements to the "severity" threshold for persecution in Article 7(1)(h). Further, we note that a crime of gender apartheid would require an "institutionalized regime" where the oppression and domination are "systematic". The evidence that could satisfy those criteria would, in our view, be very likely to assist in proving "severity" for the purposes of persecution, given the possibility of taking the cumulative effect of multiple human rights violations into account in determining the gravity of the deprivations of fundamental rights. Indeed, this focus on "cumulative effect" may be particularly pertinent in the case of the Taliban, given the holistic impact of the broad range of restrictions which the regime has placed on women and girls.[123]

91. The definition of "persecution" in Article 7(2)(g) also requires that the deprivations of fundamental rights be "intentional". Again, evidence of oppression and domination that is both "institutionalized" and "systematic" for the purposes of gender apartheid would appear to us also very likely to support an allegation that the conduct in question must have been "intentional".

92. Finally, persecution requires conduct targeting one group "by reason of the identity of the group or collectivity". This "discriminatory intent" has been characterised by one eminent author as imposing "a significant restriction" on the crime against humanity of persecution, including because "[t]he discriminatory intent must be present in every single individual perpetrator and with regard to the persecutory conduct, not just with regard to a possibly discriminatory policy within the framework of the context element".[124] Nonetheless, it is possible for discriminatory intent to be inferred "from the perpetrator's wilful or knowing participation in a campaign of systematic abuse" against a specific group.[125]

93. There is an obvious resonance between the requirement of discriminatory intent and the requirement, in the assumed definition of gender apartheid which we set out at paragraph 37 above, that the relevant acts be "committed with the intention of maintaining" the institutionalised regime of systematic oppression and domination. In practice, evidence of that intention for the purposes of gender apartheid would, in our view, very likely also support a finding of the discriminatory intent required for persecution. Indeed, the discriminatory intent for persecution may, in our view, be easier to establish than the "intention of maintaining" a regime of gender apartheid. Therefore, this element of the crime of persecution on the ground of gender does not appear to present a 'gap' which needs to be (or even necessarily could be) filled by recognition of a crime of gender apartheid.

[123] With reference to the previous Taliban regime, see the analysis at A. Widney Brown and Laura Grenfell, "The International Crime of Gender-Based Persecution and the Taliban" (2003) *Melbourne Journal of International Law* 347, at p. 364.
[124] Kai Ambos, *Treatise on International Criminal Law* (OUP, 2022), pp. 124–125, citing *Prosecutor v. Kordić and Čerkez*, No. IT-95-14/2-T, Judgment, 26 February 2001, para. 217.
[125] *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgment, 2 November 2001, para. 201.

The definition of 'gender'

94. For the purposes of the Statute, the term "gender" is defined in Article 7(3) as "refer[ring] to the two sexes, male and female, within the context of society". Article 7(3) enigmatically proceeds to state: "The term 'gender' does not indicate any meaning different from the above."

95. It would appear that the groups with which this opinion is primarily concerned – namely, women and girls – would fall squarely within this definition. Nonetheless, we note that this definition, which was disputed during the discussions surrounding the Draft Articles on Prevention and Punishment of Crimes Against Humanity,[126] has been widely criticised for its vagueness, as well as the ambiguity over whether it encompasses persecution on the grounds of sexual orientation and gender identity,[127] and this could be said to result in a 'gap' in the protection currently provided by this crime. However:

    i. The Policy Paper suggests that the ICC's Office of the Prosecutor considers the definition to be sufficiently wide to cover crimes committed on the basis of sexual orientation and gender identity. It states that "[g]roups targeted for gender persecution include, for example, women, girls, men, boys and LGBTQI+ persons, and subsets of these groups".[128] It further specifies that "[w]hile LGBTQI+ persons can belong to women, girls, men and boys groups, they can also be targeted for belonging to LGBTQI+ groups".[129] On the basis of this Policy Paper there is thus reason to think that there may not in fact be any potential 'gap' relating to persecution on the grounds of sexual orientation and gender identity.

    ii. It is difficult to anticipate how "gender" may be defined if a crime of gender apartheid were to be recognised, but there is a strong possibility that the existing definition in Article 7(3) would apply to this crime as well. Therefore, if there is currently a 'gap' created by the definition of "gender", it is not clear that procuring recognition of this separate crime would assist in closing that 'gap'.

The requirement for a "connection" to another crime

96. Uniquely among the crimes against humanity enumerated in Article 7(1) of the Rome Statute, the crime of persecution requires that the relevant acts of persecution be carried out "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court". Some scholars have suggested that this apparent condition on the establishment of the crime of persecution was a novelty in the Rome Statute which does not exist in the crime against humanity of persecution as recognised under customary international law and further that this condition imposes an additional burden on the

[126] See para. 53 above.
[127] See Kai Ambos, *Treatise on International Criminal Law* (OUP, 2022), p. 124.
[128] Policy Paper, para. 5. See also paras. 11, 45.
[129] Policy Paper, para. 5, fn. 12.

prosecution, in that it requires establishment of not only the crime of persecution but also some other crime identified in the Rome Statute.[130]

97. Despite these concerns, this "connection" requirement in Article 7(1)(h) has not been interpreted as imposing a significant additional burden in proving the crime of persecution. In the context of the Draft Articles on Prevention and Punishment of Crimes Against Humanity, the ILC has explained the "connection" requirement as follows:

> "[T]he clause 'in connection with any act referred to in this paragraph' has been retained due to: (a) a concern that otherwise the text would bring within the definition of crimes against humanity a wide range of discriminatory practices that do not necessarily amount to crimes against humanity; and (b) a recognition that subparagraph 1 (k) encompasses, in accordance with its terms, other inhumane acts. As such, the 'in connection with any act referred to in this paragraph' clause provides guidance as to the nature of the persecution that constitutes a crime against humanity, specifically persecutory acts of a similar character and severity to those acts listed in the other subparagraphs of paragraph 1."[131]

98. Echoing the ILC's explanation, the International Criminal Tribunal for the Former Yugoslavia considered that the "connection" requirement could easily be satisfied by charging persecution "in connection with" other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health, which is the crime against humanity articulated in Article 7(1)(k) of the Rome Statute.[132]

99. Further guidance on the "connection" requirement was provided by the Pre-Trial Chamber confirming the charges in *Al-Hassan*. There, the Chamber explained that it is not necessary that each underlying act of persecution itself constitutes an act referred to in Article 7(1) or elsewhere in the Statute (which would make it redundant), provided that the underlying acts of persecution were committed in connection with a crime within the jurisdiction of the Court.[133] This supports the ILC's view that the function of the "connection" requirement is simply to exclude acts of persecution which do not have the requisite severity. On these grounds, it has been posited by one scholar that the "connection" requirement in fact creates "a low threshold" for prosecutors to meet.[134]

100. On that basis, we do not consider that the "connection" requirement creates a significant 'gap' in existing international law that necessitates the recognition of a crime of gender apartheid. In reality, where acts are sufficiently grave to qualify as persecutory, they will

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[130] See, e.g., Antonio Cassese, "Crimes against Humanity" in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court* (OUP, 2002), p. 376. See also Gerhad Werle and Florain Jeßberger, *Principles of International Criminal Law* (4th ed, OUP, 2020), p. 427.
[131] Report of the ILC work of the seventy-first session (A/74/10) (2019), p. 44 (internal citations omitted).
[132] *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgment, 14 January 2000, para. 580; *Prosecutor v. Kordić and Čerkez*, No. IT-95-14/2-T, Judgment, 26 February 2001, para. 197.
[133] *Prosecutor v. Al Hassan*, ICC-01/12-01/18, Confirmation of Charges, 30 September 2019, para. 673.
[134] Kai Ambos, *Treatise on International Criminal Law* (OUP, 2022), p. 121.

almost certainly also qualify as other inhumane acts falling within Article 7(1)(k) of the Rome Statute and the "connection" requirement would thus be satisfied. Further, given that, in any event, the presumptive definition of a crime of gender apartheid would also require proof of "inhumane acts of a character similar to those referred to in Article 7(1)", it is unlikely that recognition of this separate crime would fill any such 'gap' if it did exist because the same basic severity requirement would need to be fulfilled.

Conclusion on persecution on the ground of gender

101. Our view is that, in relation to a possible prosecution of members of the Taliban for conduct against women and girls, there is no significant 'gap' left by the current international criminalisation of persecution on the ground of gender which could be filled through recognition of a crime of gender apartheid. It is very likely that the evidence used to prove the commission of a crime of gender apartheid would be highly relevant to establishing the commission of the crime of persecution, and it is difficult to imagine a scenario where a conviction for gender apartheid could be secured but a conviction for persecution could not. We consider this to be an important factor in considering whether the recognition of a separate crime of gender apartheid is necessary in order to hold accountable, in international criminal law, the perpetrators of the current situation in Afghanistan.

102. If the Office of the Prosecutor acts on its intention to treat the crime of persecution on the ground of gender as an area of focus for future prosecutions, it may be that new international jurisprudence will expose 'gaps' in the accountability regime. That may present an appropriate opportunity to revisit the question of whether it would be advantageous to recognise a new crime of gender apartheid, or to advocate for an amendment to the existing crime in Article 7(1)(h), that could address any such gap.

(b) Protections under international human rights treaties

103. We have also considered the extent to which international human rights law (as distinct from international criminal law) provides protection against the Taliban's conduct in respect of women and girls and/or accountability of its perpetrators.

104. There are a number of human rights treaties to which Afghanistan is a party, which contain provisions with which the Taliban's conduct is manifestly incompatible. These include, non-exhaustively:

i. CEDAW, including Article 2 (general prohibition of discrimination against women), Article 5 (duty to take measures to eradicate prejudices and stereotypes regarding women and the sexes), Article 7 (right to vote), Article 8 (right to participation in the work of international organisations), Article 10 (right to equality in education), Article 11 (right to equality in relation to work), Article 12 (right to equality in relation to healthcare), Article 13 (right to equal participation in economic and social life), Article

15 (right to equality before the law), and Article 16 (equality in relation to marriage and family relations);

ii. The ICCPR, including Article 2 (right to freedom from discrimination), Article 3 (duty to ensure equal enjoyment of rights by men and women), Article 7 (right to freedom from torture and cruel, inhuman or degrading treatment or punishment – subject to the caveat at sub-paragraph (v) below), Article 9 (right to liberty and security of person), Article 12 (right to freedom of movement), Articles 14 and 26 (right to equality before the law), Article 16 (right to recognition as a person before the law), Article 17 (right to freedom from interference with privacy, family, home or correspondence and to unlawful attacks on honour and reputation), Article 18 (right to freedom of thought, conscience and religion), Article 19 (right to freedom of expression), Articles 21 and 22 (right to freedom of peaceful assembly and of association), Article 23 (right to protection of the family), including in particular Article 23(3) (prohibition on non-consensual marriage), and Article 25 (right to participate in public affairs and to vote);

iii. The International Covenant on Economic, Social and Cultural Rights, including Article 2(2) (right to freedom from discrimination), Article 3 (duty to ensure equal enjoyment of rights by men and women), Article 6 (right to work), Article 10 (right to protection of the family, including a prohibition on non-consensual marriage), Article 12 (right to highest attainable standard of mental and physical health), Article 13 (right to education), and Article 15 (right to participate in cultural life and enjoy the benefits of scientific progress);

iv. The Convention on the Rights of the Child, including Article 2 (right to freedom from discrimination), Article 3 (duty to ensure paramountcy of the interests of the child), Articles 12 and 13 (right to freedom of expression), Article 14 (right to freedom of thought, conscience and religion), Article 15 (right to freedom of association and peaceful assembly), Article 16 (right to freedom from interference with privacy, family, home or correspondence and to unlawful attacks on honour and reputation), Article 24 (right to enjoy the highest attainable standard of health), Articles 28 and 29 (right to education), Article 34 (freedom from sexual exploitation and abuse), Article 37(a) (right to freedom from torture and cruel, inhuman or degrading treatment or punishment – subject to the caveat at sub-paragraph (v) below), and Article 37(b) (right to liberty);

v. The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, including potentially Articles 2 and 4 (the duties to prevent and punish torture) and Article 16 (the duty to prevent other acts of cruel, inhuman or degrading treatment or punishment), although we have not considered in detail whether any of the Taliban's conduct may meet the high threshold of torture and/or cruel, inhuman or degrading treatment or punishment.

105. Further, we consider that the Taliban's conduct is very likely to breach various provisions of the Universal Declaration of Human Rights, including Article 2 (right to freedom from discrimination), Article 3 (right to liberty and security of person), Article 5 (right to freedom from torture and cruel, inhuman or degrading treatment or punishment – subject to the caveat at sub-paragraph (v) immediately above), Article 6 (right to recognition as a person before the law), Article 7 (right to equality before the law), Article 12 (right to freedom from interference with privacy, family, home or correspondence and to unlawful attacks on honour and reputation), Article 13 (right to freedom of movement), Article 16 (rights concerning marriage, including prohibition on non-consensual marriage), Article 17 (right to own property), Article 18 (right to freedom of thought, conscience and religion), Article 19 (right to freedom of opinion and expression), Article 20 (right to freedom of peaceful assembly and association), Article 21 (right to take part in government), Article 23 (right to work), Article 25 (right to adequate standard of living, including access to medical care), Article 26 (right to education), Article 27 (right to participate in cultural life).

106. The engagement of so many different human rights treaties with relevant substantive rights may create the impression that this is a useful framework for holding Taliban agents to account. However, the significant 'gap' in the system of human rights protection enshrined in these instruments is that it lacks meaningful enforcement mechanisms. Despite Afghanistan having ratified all of the treaties listed above, aside from the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, it is not a party to any of the optional protocols to these treaties which would permit individual communications (complaints of breaches of the treaties) to be brought. Thus, the only accountability mechanism is regular country reports, which have no legal effect (and arguably minimal political effect, especially for a regime such as the Taliban which has little regard for its international obligations). For its part, the Universal Declaration of Human Rights is now taken as largely reflecting rules of customary international law, but it has no binding legal effect in its own right and there is no mechanism for enforcement against Afghanistan of the rules of customary international law it reflects.

107. Further, the nature of international human rights law is fundamentally different to international criminal law. International human rights law focuses on harms caused to individuals, but not on the culpability of individual perpetrators of abuses – instead, the respondent is simply the State in question. To that extent, international human rights law does not provide the same individualised accountability for atrocities that international criminal law provides.

108. Accordingly, we do not see these human rights treaties as obviating or even attenuating the need for an effective international criminal law framework capable of punishing the authors of the Taliban's conduct. However, as we have identified above, these human rights instruments would play an important role in establishing the commission of the crime against humanity of persecution on the ground of gender, which requires the violation of "fundamental human rights", including the rights set out in these instruments. They would therefore form an important backdrop to any prosecution for that offence.

(2) Resources and objectives

109. A related pragmatic question about the necessity for the future recognition or development of a crime of gender apartheid concerns resources. Specifically, it needs to be considered whether trying to progress acceptance on the international law plane of a crime of gender apartheid is the best use of resources at this time. For example, a campaign for recognition of gender apartheid may risk creating divisions/distractions to the detriment of building on the current momentum regarding the condemnation of treatment of women and girls within the existing framework of international law, with a particular focus on persecution on the ground of gender as a crime against humanity.[135]

110. Relevant to this assessment is a precise identification of the objective(s). For example, if the primary objective is to ensure accountability for the conduct of the Taliban against women and girls in Afghanistan as soon as possible,[136] then using the existing international law framework may more realistically achieve that objective. If, however, ISHR's primary objective were a significantly longer-term goal of achieving change in the treatment of women and girls across the world rising to this level, it could take the view that harnessing the potency of the term "apartheid"[137] would be an effective contribution to doing so.

111. Also relevant is 'lessons learned' with respect to the Draft Articles on Prevention and Punishment of Crimes Against Humanity, notably the paralysis in the UNGA Sixth Committee. This shows the regrettable but likely delays that would accompany an effort to develop a specific crime of gender apartheid. That is not a reason not to try to do so if the attainment of the goal is considered sufficiently important, but it is relevant to the assessment of whether resources are best focused on using tools already available to ensure accountability for the conduct currently under consideration.

(3) Significance of the term "apartheid"

112. As to the significance of the term "apartheid", on the one hand it has a resonance/gravitas that may be seen as important given the gravity and scale of the human rights abuses under consideration. As Bennoune observes, it is a term that "carries appropriate stigma".[138] The term 'apartheid' is not infrequently used alongside that of 'genocide', suggesting that it has a particularly distinctive and heinous character and is subject to universal condemnation. The crime against humanity of persecution on the ground of gender requires a 'connection' to another crime which may, presentationally, suggest that it is somehow a 'lesser' or secondary crime than one which 'stands on its own', such as apartheid.[139]

113. On the other hand, there may be certain States/groups that perceive formulations of a crime of 'gender apartheid' as a form of appropriation of a particular framework with

[135] Consolidated by the recent consideration of the Draft Articles on Prevention and Punishment of Crimes Against Humanity.
[136] See our Instructions referring to the desire to "promote accountability for the Taliban and other states and regimes that systematically discriminate against and oppress women".
[137] See further paras. 112-113 below.
[138] Page 8: https://hrlr.law.columbia.edu/files/2022/12/Bennoune-Finalized-12.09.22.pdf
[139] On the requirement for a 'connection' with respect to the crime against humanity of persecution on the ground of gender, see paras. 96-100 above. See also the fact that this crime does not expressly refer to an "institutionalised regime".

specific historical roots. Apartheid is an Afrikaans word meaning separation, coined by South African Prime Minister Daniel Malan "to denote South African policies of racial segregation between whites and various non white racial groups".[140] Such 'ownership' of the term "apartheid" may give rise to both ethical concerns and pragmatic considerations regarding how most effectively to garner widespread support for efforts to hold the Taliban accountable for their oppression of women and girls.

114. It should also be recognised, however, that the use of the term "apartheid" has evolved over the decades. We note, for example, that the Apartheid Convention specifically references South Africa,[141] whilst the Rome Statute (Article 7) omits any specific reference to South Africa (plainly contemplating its application in other contexts), and it is a term that has been referred to subsequently in other contexts (for example, by the Independent International Fact-Finding Mission on Myanmar[142]).

(4) Point of principle

115. There is also arguably a point of principle to consider – namely, how best to combat the perception that egregious discrimination on the basis of gender is less serious than that based on race. Shaharzad Akba, the Former Chairperson of the Afghan Independent Human Rights Commission, asked rhetorically: "If the same restrictions were applied to men, or on the basis of race, what would we do?". It has been observed that "[t]here is no rational justification for failing to use the heightened approach developed to combat governance on the basis of systematic racial discrimination for similar practices on the basis of sex".[143]

116. This point of principle could be said to support a long-term approach which seeks to set the foundations for the eventual crystallisation of a crime of gender apartheid (e.g. through securing relevant statements of States before the UNGA). As to a more focused campaign pushing for the crystallisation of a crime of gender apartheid in the short term, the factors relating to how accountability may be secured within the existing framework (see subsection (1) above) and the risks of creating divisions/distractions (see subsection (2) above) need to be taken into account.

E. Avenues available to develop recognition of a crime of gender apartheid

117. Finally, we consider the potential avenues which may be available to develop recognition of a crime of gender apartheid, should the development of such a crime be considered to

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[140] Page 17 https://hrlr.law.columbia.edu/files/2022/12/Bennoune-Finalized-12.09.22.pdf

[141] Article II.

[142] A/HRC/39/64, para. 88: https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf). See also the statement of HRW: https://www.amnesty.org.uk/myanmar-apartheid-against-rohingya

[143] Bennoune, Col HRLR p. 16: https://hrlr.law.columbia.edu/files/2022/12/Bennoune-Finalized-12.09.22.pdf See also p. 24 "Gender apartheid is anathema to these foundational norms of international law, every bit as much as racial apartheid was to the analogous principles prohibiting race discrimination". See also "gender apartheid" is the right term, not just segregation alone. They think of women as less than the other half of society – men": Zarqa Yaftali, Executive Director, Women and Children Legal Research Foundation (Oct. 16, 2021) cited by Bennoune above.

be a valuable objective. We do so in overview rather than with consideration of the practical mechanics of any one of these avenues, or their prospects of success.

118. The first avenue would be the express inclusion of gender apartheid as a crime in an international treaty, either by way of amendment to the existing text or by the conclusion of an additional protocol.[144] The obvious candidates would be:

    i. The Rome Statute.

    ii. The Apartheid Convention.

    iii. The Draft Articles on the Prevention and Punishment of Crimes Against Humanity, produced by the ILC[145] and currently under consideration by the Sixth Committee of the UNGA.[146]

119. In respect of each of these instruments, we note that the text of the treaty (or, in the case of the Draft Articles, the draft) is the product of intensive negotiations between States and that there may be little appetite by States to reopen those negotiations so as to amend the text. The very slow and contentious passage of the Draft Articles through the Sixth Committee also illustrates how difficult and time-consuming such negotiations can be. It is therefore, in our view, unlikely that gender apartheid could achieve recognition in an international treaty in the short-term, even assuming the political will was there on the part of a large body of States to make such amendments.

120. Alternative means by which the concept of gender apartheid could be developed with a view to its eventual crystallisation as an international crime recognised by States would include:

    i. Statements and resolutions of UN bodies (both political bodies and treaty-monitoring bodies), including the General Assembly, the Human Rights Council, the Human Rights Committee and the CEDAW Committee. It may be that such bodies could be asked to pursue a dual approach, urging the international community to make use of existing tools to address the conduct of the Taliban (including, where appropriate, prosecutions for the crime against humanity of persecution) while also considering whether recognition/development of a crime of gender apartheid would increase protection and/or have additional value.

    ii. Statements, reports and communications by senior UN office-holders, including the Secretary General and the High Commissioner for Human Rights.

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[144] For an example of the expansion of the ambit of a treaty by way of a protocol, see the 1967 Protocol to the Refugee Convention 1951, which removed restrictions on the temporal and geographical scope of the original treaty.
[145] Text available here: https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf
[146] For the drafting history and up to date position in relation to the UN General Assembly, see: https://legal.un.org/ilc/guide/7_7.shtml.

iii. Also within the UN framework, reports, communications and statements of independent UN-appointed experts. This would include the Special Rapporteur on the situation of human rights in Afghanistan, whose 2022 report we cite above, and whose work is likely to be of ongoing significance in relation to the treatment of women and girls in Afghanistan. This could also include any Special Procedures or Commissions of Inquiry which the UN may establish to consider the human rights situation in Afghanistan generally (in which case they could be asked to comment in particular on the situation of women and girls), or in relation specifically to the treatment of women and girls.

iv. The contributions of individual Member States, including statements (individual or joint) made in UN fora such as the General Assembly and the Human Rights Council, along with unilateral statements of condemnation of the treatment of women and girls in Afghanistan.

v. The work of the ILC, in particular on the Draft Articles on the Prevention and Punishment of Crimes Against Humanity (although as noted above, the text of the Draft Articles is currently making very slow progress in the Sixth Committee and there may be limited will by the ILC and/or States to reopen the text for amendments in any substantive way).

121. Turning to judicial fora, options would include:

i. Investigations and, where appropriate, prosecutions brought by the Prosecutor of the ICC for the crime against humanity of persecution under Article 7 of the Rome Statute. While this would be a use of the *existing* legal framework, such prosecutions could give the Court an opportunity to comment on the concept of gender apartheid and its relationship with crimes against humanity, and/or to expose any 'protection gap' in the definition of crimes against humanity as it currently stands. (Action by the ICC would, of course, also serve the objective of achieving accountability, under the existing legal framework, for the current actions of the Taliban regime.)

ii. Investigations and, where appropriate, prosecutions for the crime against humanity of persecution in the domestic courts of States which exercise universal jurisdiction over crimes against humanity. Again, this could promote accountability for the current acts of the Taliban regime as well as exposing any 'protection gap' requiring the development of a specific crime of gender apartheid.

iii. An advisory opinion of the International Court of Justice. This would of course require a referral by the UNGA, and thus the marshalling of sufficient votes. It is likely to be a more effective option at a future point when State practice has had a chance to develop in relation to the issue.

Conclusion

122. We have summarised our advice in Section A above; we would of course be pleased to discuss these important issues further with those instructing us.

Alison Macdonald KC
Ben Juratowitch KC
Amy Sander
Naomi Hart

Essex Court Chambers
6 March 2023