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Submission to:

The Gender Apartheid Inquiry

Afghan LGBT Organization (ALO), Afghanistan Women's Studies Academy, an Anonymous Afghan Women's Organization,* MADRE, Outright International, and Southern Africa Litigation Center respectfully make this submission to the honorable members of the Gender Apartheid Inquiry conducted by a U.K. Parliamentary Panel and the International Bar Association's Human Rights Institute (IBAHRI).¹

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¹ Submission content is written by and based on work of Prof. Lisa Davis, CUNY Law School and JM Kirby, Advocacy Director, MADRE. All rights reserved. This submission discusses the current situation of women, girls and/including LGBTQI+ persons in Afghanistan. It does not discuss the situation of women, girls and/including LGBTQI+ persons in Iran.

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1. Consider the situation of women, girls, and/including LGBTQI+ persons in Afghanistan²

“[T]he worst country in the world to be a woman or a girl,” is how the United Nations (UN) Special Rapporteur on the situation of human rights in Afghanistan recently described Afghanistan.³ After seizing power, the Taliban banned women from political participation and from most jobs, and excluded most women and girls from education past grade six.⁴ They all but eliminated gender-based violence services and legal protections,⁵ called for full cover burqas,⁶ imposed *mahrams* or male guardians on girls and women leaving their homes,⁷ and punished those who protested the new restrictions.⁸ Lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI+)⁹ persons in Afghanistan have no legal protections and face heightened danger. The Taliban’s stated policy is to flog, stone or otherwise kill people deemed “homosexual.”¹⁰

From its initial period in power in the 1990s through to today, the Taliban has used violence to enforce these discriminatory gender regulations and policies against women, girls and LGBTQI+ persons.¹¹ Punishable infractions include purportedly not having a *mahram* or an adequate hijab,

² Excerpt from, Lisa Davis & JM Kirby, THE CRIME AGAINST HUMANITY OF GENDER PERSECUTION SERIES, VOL. ONE: [GENDER PERSECUTION IN AFGHANISTAN](#): A CRIME AGAINST HUMANITY, PART ONE: SEVERE DEPRIVATION OF THE FUNDAMENTAL RIGHTS TO EDUCATION, ASSEMBLY, AND EXPRESSION, 2-4 CUNY Law School & MADRE (March 2023).

³ United Nations (UN) General Assembly, Third Committee Highlights Human Rights Violations in Several Nations, Underscoring School Attacks, Arbitrary Arrests, Detentions, UN Doc. [GA/SHC/4359](#) (Oct. 26, 2022).

⁴ Amnesty Int’l, “Death in slow motion: Women and girls under Taliban rule” (July 2022), pgs 5-6; Alissa J. Rubin, “Taliban Complete Interim Government, Still Without Women”, *New York Times* (Sept. 21, 2021); Amnesty Int’l, “Afghanistan: Taliban’s backtrack on school re-opening for girls irreversibly impacts their future” (March 28, 2022); Stefanie Glinski and Ruchi Kumar, “Taliban U-turn over Afghan girls’ education reveals deep leadership divisions”, *The Guardian* (March 25, 2022); “Afghanistan: Taliban ban women from universities amid condemnation”, *BBC* (Dec. 21, 2022).

⁵ Amnesty Int’l, “Afghanistan: Survivors of gender-based violence abandoned following Taliban takeover – new research” (Dec. 6, 2021).

⁶ Arwa Ibrahim, “In Afghanistan, Taliban diktat sparks debate about women’s attire”, *Al Jazeera* (Jan. 26, 2022); Human Rights Watch, “Afghanistan: Taliban Deprive Women of Livelihoods, Identity” (Jan. 18, 2022); Belquis Ahmadi and Mohammad Osman Tariq, “How the Taliban’s Hijab Decree Defies Islam”, *United States Institute of Peace* (May 12, 2022).

⁷ UN Human Rights Council, Situation of human rights in Afghanistan: Report of the Special Rapporteur on the situation of human rights in Afghanistan, UN Doc. [A/HRC/51/6](#) (Sept. 9, 2022), para. 24; Amnesty Int’l, “Death in slow motion: Women and girls under Taliban rule: Women and girls under Taliban rule” (July 2022), p. 30.

⁸ Akhtar Mohammad Makoi, Peter Beaumont and Patrick Wintour, “Taliban ban protests and slogans that don’t have their approval”, *The Guardian* (September 8, 2021); Zeba Siddiqui and Parniyan Zemaryalai, “Protests get harder for Afghan women amid risks and red tape”, *Reuters* (October 4, 2021); David Zucchino and Yaqoob Akbary, “Threatened and Beaten, Afghan Women Defy Taliban With Protests”, *New York Times* (January 24, 2022); “Taliban disperses Afghan women’s march for ‘work and freedom’”, *Al Jazeera* (August 13, 2022).

⁹ The plus sign represents people who identify with the broader LGBTQI community, but use other terms for self-identification. While the acronym LGBTQI+ is inclusive of a broad range of persons, it is not exhaustive, nor is it a universally standard acronym. For the purposes of this report, LGBTQI+ includes nonbinary persons.

¹⁰ E.g., Paul Ronzheimer and Giorgos Moutafis, “This Taliban judge orders stoning, hanging, hands chopped off”, *BILD* (July 12, 2021); Vic Chiang, “Afghanistan: LGBTQ people fear for their lives under Taliban rule”, *Deutsche Welle* (Oct. 8, 2021).

¹¹ While LGBTQI+ persons can belong to women, girls, men and boys groups, they can also be targeted for belonging to LGBTQI+ groups. [Policy on the Crime of Gender Persecution](#), para. 5.

“running away,” and protesting their discriminatory restrictions.¹² Taliban members have killed teachers, tortured demonstrators, and sprayed acid in students’ faces to enforce the prohibition on girls’ and women’s education. They have also routinely beaten, unlawfully arrested, held incommunicado, raped and tortured women, girls and LGBTQI+ people, that they believe transgress their imposed gender behavior and dress regulations. Lesbians, trans persons and other LGBTQI+ persons have faced detention, rape, torture, forced marriage and death sentences because of their gender expression, sexual orientation and/or gender identity, as part of the Taliban’s system of oppression and domination.¹³

The UN Special Rapporteur on the situation of human rights in Afghanistan has said the Taliban’s “large-scale systematic violations of women’s and girls’ fundamental rights in Afghanistan ... constitute[] gender persecution” and has characterized it as “an institutionalized framework of gender apartheid.”¹⁴ The Rapporteur has also noted that “[l]esbian, gay, bisexual, trans and other gender-diverse persons and intersex Afghans continue to be persecuted for not conforming to gender stereotypes and have no safe spaces,”¹⁵ and that “[t]hey live in fear of being identified as queer persons, which can result in extreme violence and death.”¹⁶

2. Assess the scale and nature of the situation and analyse it against the existing legal definitions of crimes

The crime against humanity of persecution based on gender (gender persecution) is defined as the severe deprivation of fundamental rights contrary to international law.¹⁷ By definition, gender persecution crimes target persons on the basis of gender. Gender persecution crimes are often used as punishments against those who are perceived to deviate from gender policies that designate “accepted” forms of gender expression.¹⁸ Such policies may regulate every aspect of people’s lives, including the extent of their freedom of movement, their reproductive and marriage options, their ability to access work or education, their right to choose how to dress, and even their ability to simply exist.¹⁹ In some cases, the perpetrator may not view their persecutory acts as a punishment per se, but may impose, for example, enslavement or forced marriage with the belief that this is the “natural role” for women and girls, or those they perceive as such.

¹² Conversations with trans persons and other LGBTQI+ Afghan refugees, Sept. & Oct. 2023. Names, dates and locations omitted for safety reasons.

¹³ Conversations with LGBTQI+ Afghan refugees, Sept. & Oct. 2023. Names, dates and locations omitted for safety reasons. *See* Human Rights Watch & OutRight Action Int’l, “Even If You Go to the Skies, We’ll Find You’: LGBT People in Afghanistan After the Taliban Takeover” (Jan. 2022).

¹⁴ Richard Bennett, Report of the Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls, UN Doc. A/HRC/53/21 (June 20, 2023), para. 97; Richard Bennett, Report of the Special Rapporteur on the situation of human rights in Afghanistan, UN Doc. A/HRC/52/84 (Feb. 9, 2023), para. 88.

¹⁵ Richard Bennett, Situation of human rights in Afghanistan, UN Doc. A/78/338 (Sept. 1, 2023), para. 55.

¹⁶ Richard Bennett, Report of the Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls, UN Doc. A/HRC/53/21 (June 20, 2023), para. 91.

¹⁷ Rome Statute, Art. 7(2)(g) (2003).

¹⁸ *See* ICC [Policy on the Crime of Gender Persecution](#), p. 4 (2022).

¹⁹ *Id.*

Under modern international criminal law, persecution has been recognized as a crime against humanity since the Nuremberg trials. Gender persecution as a crime against humanity was later codified under Rome Statute of the International Criminal Court (ICC).

Acts discussed under question one may amount to the crime against humanity of gender persecution. As the only holistic charge that recognizes crimes committed on the basis of gender in the context of conflict and other atrocities, gender persecution is a vital tool for holding perpetrators accountable.²⁰ In light of gender persecution's legal elements, it is clear that the Taliban's discriminatory policies, acts and other conduct may amount gender persecution, for which accountability mechanisms should ensure victims²¹ receive justice and recognition.

The Taliban's conduct has also been committed in the context of an institutionalized regime of systematic oppression and domination based on gender in Afghanistan. This calls for the recognition and codification of gender apartheid as a crime against humanity. Once codified as a crime under international law, gender apartheid charges could also be used to hold accountable perpetrators who maintain institutionalized systems of oppression based on gender, like that under the Taliban. While the principle of liability generally prohibits the newly codified crimes from applying to alleged criminal conduct that happened prior to codification, perpetrators of acts such as those committed by Taliban members could still be held accountable through gender persecution charges.

Persecution has been a defining feature of many conflicts and atrocities, and persecution charges have been used to capture its institutionalized nature. For example, persecution charges were fundamental at Nuremberg, which found that systemic oppression including discriminatory policies depriving Jewish people the rights to access education, to work, and to be recognized as citizens were among acts that amounted to persecution.²² These policies, persecutory in themselves, also built towards the persecutory and systematic acts of ghettoization, torture, enslavement, forced displacement, and mass murder.²³ In this way, successful charges of gender persecution can unveil systems of institutionalized gender oppression and hold perpetrators accountable for them. Through such charges, the world can condemn the policies and actions that constitute the oppressive systems. Honorable members of the Gender Apartheid Inquiry should therefore support accountability mechanisms to investigate and hold accountable perpetrators of gender persecution crimes, and support the codification of gender apartheid as a crime against humanity.

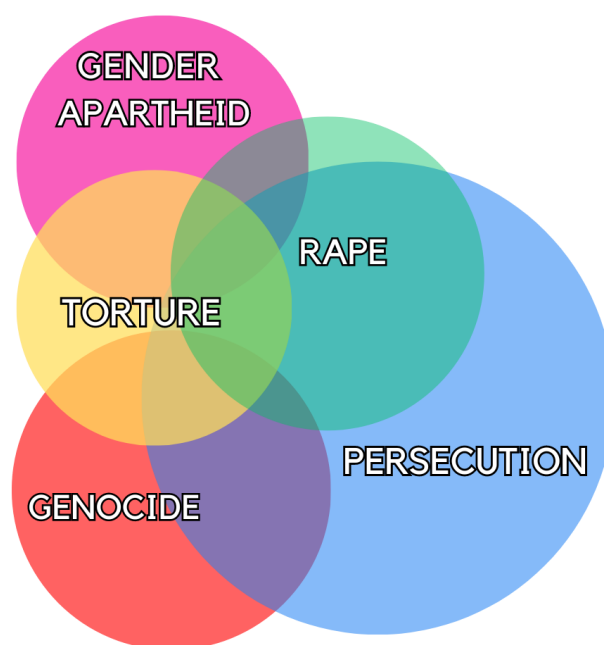
²⁰ Other charges may also recognize discriminatory intent to commit prohibited acts, such as torture as a war crime. However, gender persecution is the only holistic charge available to uphold accountability for such crimes. Lisa Davis, "[Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTI Persons](#)", *William & Mary Journal of Women and the Law*, Vol. 24 (2018), pgs 544-547. See generally, Lisa Davis, [Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities](#), 20 Nw. J. Hum. Rts 1 (2021).

²¹ This Submission uses the term "victim" and acknowledges that persons who experience crimes or harms may identify with the term "victim" or with the term "survivor."

²² The Ministries Case, Case No. 11, *United States v. Weizsaecker et al.*, Judgment, Green Series, Mil. Trib. No. 41949-04-13, Vol. 14 at p. 471.

²³ *Id.*

Codifying the crime of gender apartheid would help to ensure its availability as a tool for holding accountable future perpetrators who maintain such systems on the basis of gender. Like other crimes, gender apartheid could be cumulatively charged with other crimes. Were gender apartheid codified as a crime against humanity, gender persecution and gender apartheid charges could complement one another and be charged together,²⁴ re-affirming the gender discrimination in each crime with each providing evidence of the other. This would help more holistically convey what happens to victims during conflict and other atrocities, pointing to the need to uproot discrimination to break cycles of violence. Codification of gender apartheid would also send an explicit message that the global community rejects institutionalized regimes of systematic oppression and domination based on gender. The overlaps in the below diagram indicate possibilities for cumulative charging of gender apartheid:



Unique to gender persecution is its focus on fundamental human rights. Persecution as a crime against humanity creates a bridge to international human rights law, given that it requires the perpetrator deprive people of a fundamental right or rights. A violation of the fundamental right to education, for example, may amount to an act of persecution under international criminal law. A dearth of jurisprudence, however, marks gender persecution, despite its decades-long recognition as a crime. Fortunately, the ICC Office of the Prosecutor issued a detailed policy paper on gender persecution²⁵ to help guide accountability processes, and this policy is being utilized by other accountability mechanisms. The ICC Policy on the Crime of Gender Persecution has also spurred a recently-launched effort to establish Principles on Gender Persecution to guide the international community on prevention, protection, and ensuring survivors' meaningful participation in peacebuilding and transitional justice.²⁶

²⁴ Note that an accountability mechanism would need to recognize the crimes against humanity of gender persecution and gender apartheid.

²⁵ ICC [Policy on the Crime of Gender Persecution](#) (2022).

²⁶ ICC Prosecutor, [The Office of the Prosecutor launches public principles to advance understanding of the crime of gender persecution](#).

3. Explore the concept of gender apartheid and how it fits within the existing legal crimes, what the shortfalls are, and how they could be addressed

Currently, gender apartheid is neither legally recognized as a human rights violation (under international human rights law) nor as a crime or prohibited act (under international criminal law) and would need to first be codified as such. One possibility would be its inclusion in the proposed Prevention and Punishment of Crimes Against Humanity Convention (CAH treaty). When considering the codification of gender apartheid as a crime under international law, the definition of the crime of gender apartheid must be considered with great care. This is because the term “groups” found in the definition of apartheid has never been tested in a court, but has been the subject of debate outside of the South African context (explained in further detail below). If the term “groups” is adopted into the definition of “gender apartheid” without further clarity, it could be invoked to mischaracterize gender discrimination in an attempt to exclude some women and all LGBTQI+ victims from justice.

Crimes must be defined in order to hold perpetrators accountable. As new crimes in international law are contemplated, it is typical to begin by turning to previous definitions of crimes. This is because the recognition of rights (and the prohibitions of acts that violate them) must be grounded in understandings that have evolved in international law. Examining the one codified form of apartheid—racial apartheid—can help inform a definition of the crime of gender apartheid. Racial apartheid’s current definition under international criminal law found in the Rome Statute is derived from the International Convention on the Suppression and Punishment of the Crime of Apartheid. Under the Rome Statute, apartheid is understood as inhumane acts “committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.”²⁷ If we exchange the word “racial” for “gender,” the definition reads: “...an institutionalized regime of systematic oppression and domination by one gender group over any other gender group or groups....”

The critical question with this definition version is how the legal term “gender groups” would be understood under international criminal law. This is of utmost importance because a prosecutor will have to define and prove the existence of “gender groups” when bringing charges of gender apartheid. Like any new term, if not properly defined, the introduction of “gender groups” under apartheid will open the door to debates about its meaning. These could include questions about what a legally defined “gender group” is and “how many” exist. If “gender groups” under apartheid is left opaque and interpreted narrowly, some women, girls and other LGBTQI+ persons may be left out. The opaque term may also invite regressive arguments in favor of limiting “gender” to an outdated binary or biological understanding. Such regressive interpretations would counter decades of legal advances regarding recognition of discrimination based on gender, and could undermine hard-fought wins for women’s, girls’ and LGBTQI+ persons’ rights.

A proper definition of gender apartheid under the draft crimes against humanity treaty or other instrument would ensure that all victims of such crimes are recognized under law. For example, the definition of gender apartheid could read: “... inhumane acts ... committed in the context of

²⁷ Rome Statute Art. 7(2)(h) (2003).

an institutionalized regime of systematic oppression and domination by one **group** over any other **group** or **groups based on gender ...**". This would mirror historical statutory language that broadly defines the legal understanding of "groups" under international criminal law.

Another option would be to edit this definition of gender apartheid to read: "...inhumane acts ... committed in the context of an institutionalized regime of systematic oppression and domination **based on gender...**". This definition avoids the need to define "groups" in the draft definition. These draft definitions are two examples that demonstrate possible language adoptions that may ensure better adherence to customary international law's recognition of gender as a social construct. However, any draft definition of gender apartheid should be workshopped with a broad global swath of women's, girls', LGBTQI+ rights and international criminal law experts and other key stakeholders.²⁸ (See discussion under question 3(C) below).

A. Defining the legal term "gender groups" under the proposed crime of gender apartheid

When defining "gender groups" the key word for legal definition is the subject "groups," whereas "gender" is the adjective that describes "groups." While over the last few decades the terms "race" and "gender" have come to be understood broadly and as social constructs under international law,²⁹ at issue here is how "protected groups" are understood under international criminal law.

"Protected groups" are enumerated in three crimes that explicitly address discrimination under international criminal law: persecution, apartheid and genocide. While both genocide and persecution overlap in their recognition of four protected groups (racial, national, ethnic and religious), the understanding of membership in a protected group differs between these two crimes. For example, "racial groups" protected from the crime of genocide are defined more narrowly, with membership depending in part on whether the victim holds criteria based on outdated and debunked biological theories of race. "Racial groups" (victims targeted on racial grounds) under the crime of persecution, however, are understood as broad and based on social constructs, thus recognizing a broader swath of victims than under genocide.

Since racial apartheid has yet to be tried, there is no formal jurisprudence available to interpret how protected "groups" are legally understood under the crime of apartheid. There are, however, *travaux préparatoires* and UN accountability mechanisms that have either discussed or applied an understanding of racial apartheid. In both of these contexts, "racial groups" has been understood to follow the meaning posed by genocide—not persecution. This means that when trying perpetrators accused of apartheid, prosecutors and courts may be inclined to follow the outdated understanding of "groups" under genocide, unless lawmakers incorporate the contemporary understanding of "groups" found under persecution into its definition. Without a contemporary understanding of "protected groups," some women and girls and all LGTBQI+ victims of apartheid will be at risk of exclusion. Understanding the crime of (both racial and gender) apartheid to

²⁸ This submission is not proposing a particular definition.

²⁹ For example, under international criminal law, "gender refers to sex characteristics and social constructs and criteria used to define maleness and femaleness, including roles, behaviours, activities and attributes. As a social construct, gender varies within societies and from society to society and can change over time." ICC [Policy on the Crime of Gender Persecution](#), p. 3 (2022).

include all victims targeted because of their race or gender would lead to broader victim inclusion and greater accountability.

i. How are protected “groups” defined under genocide?

Four groups are protected from genocide: “national, ethnical, racial or religious group[s].” When writing the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), drafters believed that group members had a certain inevitability to be in their group; that most were born into it and thus membership identity was beyond their control. In other words, the groups were understood as retaining key features of “permanence” or “immutability.” For example, drafters who understood “race” as biologically determined (a stance that has since been scientifically debunked), believed that members of “racial groups” could be determined by characteristics such as skin color or other physical features. Nationality and religion, however, were less clear to them. While drafters determined that a person’s nationality or religion were less immutable, they assumed that such change would be highly challenging and thus unlikely, based on the idea that people were not, for example, easily able to leave or change the faith they were raised in. Drafters also discussed the inclusion of political groups, but those group members were not considered “stable” or “permanent”, which led to their exclusion as protected “groups” under genocide, as opposed to persecution (which does protect political groups).

While the definition of the crime of persecution was available, drafters made apparent their intent to differentiate standards under genocide and persecution: “Genocide is the deliberate destruction of a human group. This literal definition must be rigidly adhered to; otherwise there is a danger of the idea of genocide being expanded indefinitely to include the law of war, the right of peoples to self-determination, the protection of minorities, the respect of human rights, etc.”³⁰

The 1948 definition of the crime of genocide eventually made its way into the statutes for the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as other tribunals. The ICTR’s *Akayesu* Court produced the first genocide conviction by an international tribunal, applying an “objective evaluation” to determine groups protected from genocide. The Court held that it was “particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group.”³¹ In other words, the Court decided that members should “belong to [the group] automatically, by birth, in a continuous and often irremediable manner.”³² Applying this, the Court laid out its “objective criteria” for determining group membership. For example, racial groups were “based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national, or religious factors.”³³

Because of the problematic nature of applying “objective criteria” to social constructs, international courts started moving away from *Akayesu*’s pure “objective approach,” and towards subjective criteria, which look to the perpetrator’s understanding of the victim group. The ICTY

³⁰ 4 UN ESCOR, UN Doc. E/447 (1947).

³¹ Prosecutor v. Akayesu, Case No. ICTR-96-4- T (ICTR Trial Chamber Sept. 2, 1998) para. 516.

³² Id. at para. 511.

³³ Id. at para. 514.

Jelisić Court for example, relied exclusively on the perpetrator’s perception for group determination. “[T]o attempt to define a ... racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a ... racial group from the point of view of those persons who wish to single that group out from the rest of the community.”³⁴ While courts should follow in the footsteps of the *Jelisić* holding, the overwhelming majority of more recent genocide cases under the *ad hoc* tribunals have not exclusively relied on a subjective approach. Instead, courts have relied on a mix of subjective and objective elements. They posit that determination of the relevant protected group should be made on a case-by-case basis, and include both objective and subjective criteria. If “gender groups” under gender apartheid are determined with an objective-subjective approach, this would risk excluding LGBTQI+ victims. (See discussion under question 3(B) below).

Despite decades of scholarly literature examining the deeply problematic nature of the outdated definition of “groups” under the Genocide Convention, it was not amended when the crime of genocide was codified again in 2003 under the Rome Statute. Instead, drafters once more relied on the *travaux préparatoires* for the Genocide Convention as the principal source. Like the drafters of the ICTY and the ICTR statutes, the Rome Statute drafting committee included the definition of genocide adopted from the 1948 Convention without modification.

ii. How are protected “groups” defined under persecution?

Persecution is defined as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”³⁵ The Rome Statute prohibits persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined by the Statute, or other grounds that are universally recognized as impermissible under international law.

To determine group membership, courts examine the perpetrator’s perceptions of the victim (subjective criteria). “Objective criteria” for the victims’ group membership is irrelevant. What matters is that the perpetrator targeted the victim with the intent to discriminate (based on a protected ground). Take, for example, a case where a perpetrator beats two victims because they are wearing clothing that the perpetrator considers improper for women. Here the perpetrator targets the victims with the intent to discriminate based on gender (because the perpetrator perceives the victims as being out of a discriminatory, gendered dress code assigned to women). It is irrelevant whether the victims identify as women or are “biologically defined” as women because there is no need to apply any sort of objective criteria to determine their membership in the targeted group.³⁶ The ICC Policy on the Crime of Gender Persecution underscores this, noting when a “perpetrator targets a person for being perceived as a gay man or lesbian, it is irrelevant that the person does not personally identify as homosexual. That the perpetrator wrongly perceived the person as belonging to the targeted group, does not deprive such conduct of its discriminatory

³⁴ Prosecutor v Jelisić, Case No IT-95–10-T (14 Dec. 1999), para. 70.

³⁵ Rome Statute Art. 7(2)(g) (2003).

³⁶ ICC [Policy on the Crime of Persecution](#), para. 44 (2022). “If a perpetrator targets a person he perceives as a gay man, and the person also personally identifies as gay, this may provide evidence of the perpetrator’s targeting of gay men. However, such an overlap is not required.” Id. at n. 57.

character.”³⁷ This means that persecution maintains a broad and inclusive understanding of “targeted groups”, and centers this understanding from the perception of the perpetrator. Unlike the understanding of “groups” under genocide, the understanding of targeted “groups” under persecution does not provoke questions regarding whether and what objective criteria may be needed to identify group members. Importantly, criteria required for targeted groups under persecution is subjective, meaning it is understood from the point of view of the perpetrator. It is sufficient that the perpetrator perceives the victim as a member of the targeted group or as a sympathizer or affiliate of the targeted group. Under persecution, the understanding of victims’ membership to targeted groups is broad and inclusive, and because of the language “based on” a protected “ground,” persecution does not require that a group member meet “objective” criteria.

iii. How are protected “groups” defined under apartheid?

Under the Rome Statute, the crime against humanity of apartheid is defined as “inhumane acts ... committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.”³⁸ The prosecutor must prove the “racial group” and victims’ membership in the group in order to demonstrate apartheid. Since racial apartheid has yet to be tried, there is no formal jurisprudence available to interpret how protected “groups” are legally understood under the crime of apartheid. There are, however, *travaux préparatoires* and UN accountability mechanisms that have discussed or applied an understanding of racial apartheid. In both of those contexts, “racial groups” has been generally understood to follow the meaning posed by genocide—not persecution. This is discussed in two conflict and atrocity contexts: Myanmar and Palestine.³⁹

The Independent International Fact-Finding Mission on Myanmar (IFFMM) provides a detailed examination of the crimes of genocide, apartheid and persecution. When discussing the crime of persecution, the IFFMM applies “subjective criteria” to define the targeted group, relying on factors such as attitudes and behaviors of the perpetrators. When discussing the scope and application of the term “racial groups” under apartheid, the IFFMM elects not to refer to the understanding of targeted “groups” under persecution. Instead, it refers to the understanding of racial “groups” as it applies the term under its examination of genocide, which requires both objective and subjective factors.

The UN Special Rapporteur on Palestine has sought to overcome these strictures on the meaning of “racial groups” to apply the crime of apartheid to Israel’s actions against Palestinians. The Rapporteur notes that the initial understanding of “racial groups” under the Apartheid Convention may have been informed by supposed physiological or biological characteristics.⁴⁰ However, he also points to advances in the understanding of race as a social construct, and to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) arguing that “racial

³⁷ Id. at para. 44.

³⁸ Rome Statute Art. 7(2)(h) (2003). This definition is also found in the draft CAH treaty (as of April 2023).

³⁹ In 2014, apartheid was also raised in the context of North Korea by the Commission of inquiry on human rights in the Democratic People's Republic of Korea.

⁴⁰ Michael Lynk, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, UN Doc. A/HR/C/49/87 (Aug. 12, 2022), para. 32.

groups” under the Apartheid Convention and the Rome Statute should be understood as a social construct.

ICERD does not define the terms “race” (or “apartheid”) and instead defines “racial discrimination” as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin,”⁴¹ thus placing “race” alongside other categories that may be subject to racial discrimination. While the Special Rapporteur’s mandate does not include international criminal law liability, this analysis lends support to the notion that “racial groups” should be understood as a social construct.

This speaks to a need for adequate legal language that would make clear the understanding of “race” as a social construct under the crime of apartheid. It also underscores the barriers to justice that may be posed by creating the legal term “gender groups” under apartheid if explicit language demonstrating that “gender groups” is understood as a social construct is not included.

B. What would happen if the objective-subjective approach to defining protected “gender groups” is applied to LGBTQI+ victims?

Under the objective-subjective approach, “gender groups” runs the risk of being defined as including only two categories: “women” and “men”, or, “male” and “female”. “Objective criteria” for “female” or “male” may, for example, lead to the erroneous exclusion or degrading categorization of transgender persons in a way that denies their true identity. For example, “objective criteria” such as physical or biological characteristics, applied to a “women/female” group, would likely lead to the exclusion of trans women. Similar challenges arise in applying “objective” criteria to define other LGBTQI+ groups (or LGBTQI+ persons as a whole group).

The “objectivized-subjective” (a subset of “objective-subjective”) approach would also lead to the exclusion of LGBTQI+ persons. The objectivized-subjective approach takes the victim’s perspective into consideration, with the view that subjective beliefs over time may become “objectivized,” in that both the perpetrators and the victims believe the distinctions between the groups have always existed. This approach is also problematic for LGBTQI+ persons who may not want to be (or do not feel safe being) publicly identified as members of such groups. Families may also not want their deceased loved ones identified as LGBTQI+ persons for a variety of reasons. In any case, a limited number of accountability mechanisms examining the issue of genocide or apartheid have applied the “objectivized-subjective” approach, and it is not representative of the trend in “objective-subjective” evaluations used by courts.

Most importantly, any degree of “objective” criteria would reinforce outdated understandings of “gender” as “binary” and “biological” and feed fundamentalist tropes about gender that fuel attacks on the LGBTQI+ community. Proponents of these tropes conflate sex characteristics and social constructs, selectively labeling some as objective characteristics and calling those who articulate the difference “gender ideologists.” Fundamentalists argue that “objective criteria” defines the term “gender,” and claim the existence of only two gender categories, “male” and “female.” They further argue that “objective” criteria assigned to men and women are also biologically determined, conflating social constructs with physical traits. For example, some fundamentalists have

⁴¹ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Art. 1(1) (1965).

contended that men are more capable decision makers than women and that this is biologically dictated. This erroneous argument, based on the belief that selective physical characteristics and social constructs “objectively” determine “gender groups” mischaracterizes “sex” and “gender” while simultaneously conflating them. Fundamentalist organizations continue to argue against the subjective understanding of “gender.” Some of these organizations are actively calling for the reinstatement of the outdated definition of “gender” that was removed from the draft articles of the CAH treaty. (See discussion under question 4(A)(ii)).

While both scientifically and legally erroneous, mischaracterizations like these could receive unmerited weight in a debate on “gender groups” under apartheid. It therefore would better serve justice to make clear from the outset of the development of gender apartheid’s legal definition that inhumane acts committed in the context of an institutionalized regime of systematic oppression and domination are committed on the *basis of gender*. This will ensure the application of broad and inclusive language on targeted groups recognized under gender persecution, and reflect the understanding of “gender” under customary international law.

C. How do we ensure a legal definition that is inclusive of all women, girls and/including LGBTQI+ persons?

Any draft definition of gender apartheid should be workshopped with a broad global swath of women’s, girls’, LGBTQI+ rights advocates, international criminal law experts and other key stakeholders. There is great value in civil society groups being able to weigh in on policies that may impact them. They have the expertise that comes from living the reality of conflict or atrocities. They can offer solutions to overcome the practical and academic challenges to ensuring justice. For example, when the ICC Office of the Prosecutor (OTP) announced that it was going to draft a Policy on the Crime of Persecution, in a novel approach, the Prosecutor called for comments before the drafting process began. Instead of only opening a technical draft for comments, the OTP asked for civil society input on what should be included in the policy. Over 500 organizations, institutions, states, UN experts, independent experts, activists, scholars and academics, representing over 100 countries and territories, submitted input, helping to ensure a stronger, more inclusive policy.

Unfortunately, it is more common for drafters of pivotal international legal documents like that in the proposed CAH treaty to issue drafts *before* soliciting civil society input. Once drafts are produced, experts have often already negotiated their wording and such drafts reflect little change in their final product. At this moment, there is no gender apartheid definition in the draft CAH treaty. If and when gender apartheid is added to the treaty, civil society will lose the space to workshop it. This is why civil society movements need to work together now, while negotiations are underway—not just to rally support for gender apartheid’s codification, but to discuss its provisions and ensure its inclusivity via a strong definition in the draft treaty.

Bringing together key stakeholders to discuss simple language revisions for the definition of gender apartheid can help ensure that all victims are included. See examples of potential definitions on page six above. These examples demonstrate possible language changes that may ensure better adherence to customary international law’s recognition of gender as a social construct and should be discussed with key stakeholders.

Furthermore, the recognition of women, girls and LGBTQI+ persons who are victims of gender apartheid requires an examination of other forms of discrimination in regimes of systematic oppression and domination. It should account for compounding forms of gender discrimination as well as intersecting forms of discrimination, based on, for example, race, ethnicity, religion, age, disability and health status. The CAH treaty drafters should therefore consult a broad range of civil society groups as they review the language of apartheid, such as women, girls and LGBTQI+ groups, as well as disability, Indigenous, aboriginal, youth, caste, racial and ethnic minority rights organizations and organizations working to end conflict-related sexual violence.

4. Assess how the situation of women and girls in Iran and Afghanistan fits into the concept of gender apartheid

All women and girls who are victims of gender apartheid in Afghanistan need to be recognized under the law as victims. This calls for gender apartheid to be codified as a crime with an inclusive definition that reflects customary international law.

One consideration under apartheid, (which would also apply to gender apartheid if it is framed similarly to racial apartheid), is whether trans persons and other LGBTQI+ victims could be recognized as such if they are victims of inhumane acts meant to uphold discriminatory systems of oppression. In brief, LGBTQI+ persons and others may be recognized as victims of gender apartheid without establishing their membership in the protected group. However, this is a problematic approach for achieving holistic justice.

Under the Rome Statute, the crime of apartheid prohibits conduct that is committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups. It defines such conduct as inhumane acts committed against one or more persons. Such inhumane acts include those recognized by the Rome Statute under article 7 on crimes against humanity (such as rape, torture, murder, persecution, etc.) or an act that is similar in character to those referenced. Thus, a prosecutor does not necessarily need to prove group membership to recognize a victim of apartheid—so long as the perpetrator intended to maintain such a regime when committing the inhumane act against the victim.⁴²

One of the great values of recognizing apartheid, however, is that it can help visibilize systems of oppression and domination based on discrimination and hold perpetrators accountable for them. For gender apartheid, this would mean visibilizing the longstanding and structural discrimination that women and girls face acutely when it is enforced through inhumane acts as part of a system of domination and oppression, and visibilizing longstanding anti-LGBTIQ+ oppression.

Recognition of the group is what reflects the context of an institutionalized regime of systematic domination and oppression. Including LGBTQI+ persons as individual victims of inhumane acts, but excluding the recognition of such acts as part of the Taliban's targeted oppression towards them as a group is highly problematic. This would work to not only further entrench the invisibility of gender crimes committed against LGBTQI+ persons, but its omission could also be

⁴² Note that under the Rome Statute, to bring charges of the crime of apartheid all relevant elements should be established, including the chapeau elements for crimes against humanity.

mischaracterized as affirming the exclusion of LGBTQI+ persons from recognition as victims of gender discrimination.

In Afghanistan, the Taliban have committed inhumane acts against women, girls, and/including LGBTQI+ persons in an effort to enforce an institutionalized regime of systematic oppression and domination. As one example, they have deprived the fundamental right to freedom of expression through restrictive, gendered policies on dress and appearance, severely punishing those who fail to comply.⁴³ Taliban fighters have targeted women, girls and/including LGBTQI+ persons perceived to transgress their gender regulations on dress and appearance with violence, subjecting them to arbitrary detention, sexual violence, torture and inhumane acts.⁴⁴ Human Rights Watch and OutRight Action International have reported on abuses LGBTQI+ Afghans have endured, including being “attacked, sexually assaulted, or directly threatened by members of the Taliban because of their sexual orientation or gender identity.”⁴⁵ Since their takeover of the country, Taliban authorities have enforced arrests, detentions and executions of LGBTQI+ Afghans.⁴⁶ Even before the fall of Kabul in August 2021, a Taliban members called for punishment for behavior perceived as “homosexual.”⁴⁷ For example, a Taliban judge stated, “For homosexuals, there can only be two punishments: either stoning, or he must stand behind a wall that will fall down on him.”⁴⁸

The narrowing of “gender groups” under apartheid to “men” and “women” or “male” and “female” in the Afghanistan context may invisibilize key aspects of the Taliban’s systematic oppression and domination in an artificial way that erases a large swath of their ideological beliefs and enforcement of them. Failing to criminalize systems that oppress all women, girls and/including LGBTQI+ persons, reinforces the already entrenched invisibility many of these victims already face. “Gender groups” could also be mischaracterized by extremists to reinforce binary and debunked biological framings of “gender” that are still utilized today to enforce gender oppression. This, in turn, may reinforce the idea that only some—not all—women and girls face gender discrimination and that other LGBTQI+ persons should be excluded from protection altogether. Ultimately, this could be used in calls to roll back hard-fought achievements in the gender justice movement.

⁴³ Arwa Ibrahim, “In Afghanistan, Taliban diktat sparks debate about women’s attire”, *Al Jazeera* (Jan. 26, 2022); “Afghanistan: Taliban Deprive Women of Livelihoods, Identity”, *Human Rights Watch* (Jan. 18, 2022); “A timeline of the Taliban’s assault on women’s and human rights”, *Onward for Afghan Women* (last visited March 26, 2023).

⁴⁴ Human Rights Watch & OutRight Action Int’l, “Even If You Go to the Skies, We’ll Find You’: LGBT People in Afghanistan After the Taliban Takeover” 1-2 (Jan. 2022).

Human Rights Watch, “‘You Have No Right to Complain’: Education, Social Restrictions, and Justice in Taliban-Held Afghanistan” (June 30, 2020), pgs 38 and 39. See Human Rights Watch & OutRight Action Int’l, “Even If You Go to the Skies, We’ll Find You’: LGBT People in Afghanistan After the Taliban Takeover” (Jan. 2022).

⁴⁵ Human Rights Watch & OutRight Action Int’l, “Even If You Go to the Skies, We’ll Find You’: LGBT People in Afghanistan After the Taliban Takeover” 1-2 (Jan. 2022).

⁴⁶ Conversations with LGBTQI+ Afghan refugees, Sept. & Oct. 2023. Names, dates and locations omitted for safety reasons.

⁴⁷ Human Rights Watch & OutRight Action Int’l, “Even If You Go to the Skies, We’ll Find You’: LGBT People in Afghanistan After the Taliban Takeover” 1-2 (Jan. 2022).

⁴⁸ Id., (citing Paul Ronzheimer, “This Taliban judge orders stoning, hanging, hands chopped off” *Bild* (July 13, 2021). In 2020, the Taliban’s Ministry of Vice and Virtue issued a manual prohibiting same-sex relations (noting that “‘strong allegations’ of homosexuality shall be referred to the ministry’s district manager for adjudication and punishment”). Id.

A. Gender apartheid “groups” may be invoked to mischaracterize gender discrimination in an attempt to exclude victims from justice and roll back gender justice

For decades, right-wing fundamentalists have argued that there are only two “genders”—“male” and “female.” They argued this in the 1990’s, during the formation of the Rome Statute in the discussions concerning the inclusion of gender persecution as a crime, and they continue to do so today, including in relation to the draft CAH treaty. Without ensuring an accurate and inclusive legal definition of gender apartheid, the draft CAH treaty may invite regressive and erroneous interpretations of gender that can be used to deny victims justice.

i. Attack on gender persecution during the formation of the Rome Statute⁴⁹

During the drafting of the Rome Statute, MADRE housed the Women’s Caucus for Gender Justice, a worldwide coalition of women’s rights activists working to address gender gaps in the Statute draft. The Human Rights and Gender Justice (HRGJ) Clinic at CUNY Law School (known then as the International Women’s Human Rights (IWHR) Clinic, led by Professor Rhonda Copelon), served as secretariat for the Caucus and coordinated the effort to ensure the Statute accounted for gender in all aspects: crimes, procedure, evidence and ICC composition.

The Caucus successfully called for the drafters to replace “sex” with “gender” as a protected ground from persecution. A socially conservative opposition objected, fearing that the term “gender” would increase protections for women and LGBTQI+ persons. They argued there are only two genders—“male” and “female”—and that advocates were attempting to expand these two groups to five or six groups, (which at the time they defined as male, female, gay, lesbian, and transgender, and the offensive term “hermaphrodite”).⁵⁰ At stake in the debate over the term was not only the risk of further concretizing women’s rights as secondary rights, but the exclusion of LGBTQI+ persons’ rights altogether.

While these bigoted viewpoints were consistently present in the negotiations, the overwhelming majority of delegates embraced the recognition of gender as a social construct. Swapping “sex” for “gender” has been hailed as one of the most important safeguards secured in the Rome process. However, the term “gender” was opaquely defined in a footnote that would come to confound scholars and deprive victims of justice. The definition reads: “it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society.”⁵¹ No other protected ground under persecution has a definition and the definition of gender was never adopted again in any subsequent legal instrument, until the proposed CAH treaty was drafted.

Decades of international human rights law since the formation of the Rome Statute has confirmed the understanding of gender as a social construct. However, the slow turning wheels of justice under international criminal law left a gap in the case law on gender persecution. This has

⁴⁹ Section taken from, Lisa Davis, “[Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTI Persons](#)”, *William & Mary Journal of Women and the Law*, Vol. 24 (2018), pgs 536-544.

⁵⁰ Doris E. Buss, *Rethinking Rape as a Weapon of War*, 17 *Feminist Legal Studies*, 145 (2009).

⁵¹ Rome Statute, Art. 7(3) (2003).

contributed to this crime's lack of visibility in historical records and deprived victims of justice, despite its consistent occurrence. For this reason, in 2022, the ICC Prosecutor published the Policy on the Crime of Gender Persecution⁵² to solidify and confirm the understanding of gender under customary international law and as applied to the crime of gender persecution under the Rome Statute.

ii. Attack on gender during the drafting of the proposed CAH treaty⁵³

In December 2017, the International Law Commission (“the Commission”) announced the new draft CAH treaty, and with it, the adoption of the Rome Statute’s outdated definition of gender.⁵⁴ After the Commission announced a one-year deadline for civil society submissions on the draft articles, a civil society coalition came together to ensure that the draft treaty reflected the progress made since the Rome Conference and affirmed the understanding of gender as a social construct.⁵⁵

The coalition rallied supportive states, UN agencies, and civil society organizations to make submissions to the Commission and organized workshops and briefings with LGBTQI+ and women’s rights activists and lawyers around the world. Informed by these workshops, the Coalition called for full removal of the definition, or alternatively, for the Commission to replace it with the understanding of the definition from ICC Prosecutor’s 2014 Policy Paper on Sexual and Gender-based Crimes.⁵⁶

Because of the Coalition’s work, by December 2018, hundreds of activists, states, UN experts and individuals had made their voices heard to the Commission. Nearly 600 organizations and academics, representing over 100 countries and territories, signed an open letter circulated by the Coalition.⁵⁷ Nineteen states made submissions to the Commission affirming that the rights of women and LGBTQI+ people are protected under international criminal law and asserted that a new CAH treaty must reflect this principle.⁵⁸ Additionally, in response to these advocacy efforts, over 35 UN Special Rapporteurs and experts made a submission calling on the Commission to either revise or remove the outdated definition of gender.⁵⁹ Some UN Experts not only called to remove the outdated definition of gender, but also to expand the grounds for persecution to include additional grounds recognized as protected from discrimination under international law. Twenty

⁵² ICC [Policy on the Crime of Gender Persecution](#) (2022).

⁵³ For a full account of how the campaign to remove the outdated definition of gender from the crimes against humanity treaty was won, see, Lisa Davis and Danny Bradley, “Victory for Women and LGBTQI+ Rights Under International Criminal Law: Gender in the Draft Crimes Against Humanity Treaty”, Oxford University Press (July 14, 2022), found in, *GENDER AND INTERNATIONAL CRIMINAL LAW*, Indira Rosenthal, (Valerie Oosterveld, and Susana SáCouto, eds., Oxford University Press) (2022).

⁵⁴ Int’l Law Commission, ‘Report of the International Law Commission Sixty-ninth session’ (2017) UN Doc. A/72/10, 5, 10.

⁵⁵ See CUNY Law School, “[A New Treaty on Crimes Against Humanity](#)”.

⁵⁶ The 2014 ICC Policy Paper on Sexual and Gender-Based Crimes was updated with the 2023 [Policy on Gender-Based Crimes](#). The [Policy on the Crime of Gender Persecution](#) was not written until 2022.

⁵⁷ HRGJ Clinic at CUNY Law School, MADRE, OutRight Action Int’l et al., [Open Letter to the International Law Commission: ‘Gender’ in the Draft Crimes Against Humanity Convention](#), Dec. 3, 2018.

⁵⁸ Int’l Law Commission, Crimes against humanity: comments and observations received from Governments, international organizations and others, UN Doc. [A/CN.4.726](#) (January 21, 2019), pgs 24, 30-43.

⁵⁹ UN High Commissioner for Human Rights (OHCHR), [Re: Comments to the Draft Crimes Against Humanity Convention](#), Nov. 30, 2018.

UN Special Rapporteurs and Experts signed on to a second submission calling on the Commission to expand the list of grounds protected from persecution to include disability, health, Indigenous and refugee status, among other categories.⁶⁰

Recognizing the real threat that, under an outdated definition, gender could be mischaracterized and rights curtailed, the Commission's Special Rapporteur for the draft CAH treaty, in his final report, stated that gender under the Rome Statute should be read with a broader interpretation and recommended the definition of gender adopted from the Rome Statute be removed.⁶¹ The Commission subsequently removed the definition from the draft CAH treaty, affirming that gender is understood as a social construct. Shortly after, the same arguments were submitted to the Mutual Legal Assistance Initiative, which also removed the same outdated definition from its draft treaty.

Since 2017, anti-gender rights lobbyists continue to pose arguments similar to those they made a generation ago in Rome. They continue to argue against the understanding of gender under customary international law, and are calling for the outdated gender definition to be reinstated in the draft CAH treaty.

It therefore would better serve justice to make clear from the outset of the development of gender apartheid's legal definition that inhumane acts committed in the context of an institutionalized regime of systematic oppression and domination are committed on the *basis of gender*. This would spur a large coalition to ensure application of the broad and inclusive language on targeted groups recognized under gender persecution and reflected under customary international law.

5. Identify justice and accountability avenues for legal recourse and engage them with the evidence gathered and outline international responsibility thereof

Diverse forms of accountability may occur in response to conflicts and atrocities. However, before any accountability mechanism may commence there must first be agreement on what constitutes a crime or wrongdoing.⁶² It is not enough to hold perpetrators accountable for the harms they cause; we must also understand why crimes happen if we are to root out cycles of violence. The recognition of gender persecution as a crime can help visibilize victims/survivors who are targeted because of gender and other intersecting identities. As The ICC's Office of the Prosecutor's (OTP) Policy on the Crime of Gender Persecution (Policy on Gender Persecution) reminds us, "such crimes can reflect the continuum of historical and longstanding structural discrimination and fundamental rights deprivations experienced by women, girls and LGBTQI+ persons."⁶³ By shedding light on gender persecution, we help unearth the discrimination underlying these crimes and fueling conflicts, and demonstrate to the world that targeting persons because of their gender is a crime against humanity.⁶⁴

⁶⁰ OHCHR, [Re: Comments Regarding Persecutory Grounds in the Draft Crimes Against Humanity Convention](#), Nov. 30, 2018.

⁶¹ Sean D. Murphy, "Fourth Report of the Special Rapporteur on Crimes Against Humanity," UN Doc. A/CN.4/725 (Feb. 18, 2019), paras 101-103.

⁶² Lisa Davis, [Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities](#), 20 Nw. J. Hum. Rts 3-4 (2021).

⁶³ ICC [Policy on the Crime of Gender Persecution](#), para. 9 (2022).

⁶⁴ Excerpt from Lisa Davis & JM Kirby, THE CRIME AGAINST HUMANITY OF GENDER PERSECUTION SERIES, VOL. ONE: [GENDER PERSECUTION IN AFGHANISTAN](#): A CRIME AGAINST HUMANITY, PART ONE: SEVERE DEPRIVATION OF

In the immediate, the honorable members of the Inquiry on Gender Apartheid should support investigations by current accountability mechanisms such as the International Criminal Court, and by human rights investigators such as the UN Special Rapporteur on the situation of human rights in Afghanistan, to document and hold accountable perpetrators of gender persecution crimes and other severe rights deprivations against women, girls and/including LGBTQI+ persons. The Inquiry on Gender Apartheid should also consider supporting the creation of additional accountability mechanisms with the capacity to document such crimes.

In order to ensure future accountability for gender crimes and other harms in the context of Afghanistan as well as other conflicts or atrocities, the Inquiry on Gender Apartheid should also support the codification of a clear understanding of gender apartheid as a crime against humanity in the draft crimes against humanity treaty as well as its recognition as a human rights violation within international human rights mechanisms.

This is a pivotal moment in the discourse on gender crimes accountability—one that offers a new opportunity to create the tools needed to ensure recognition for all victims. The proposed draft CAH treaty, currently circulating among legal experts, civil society, and states, will impact victims’ access to justice for years to come. Its years-long drafting process invariably includes edits and language revisions which offer a chance to codify progressive understandings of international customary law. Codification of a clear understanding of gender apartheid as a crime against humanity in the treaty would contribute to the progressive development of international law, and should be fully supported with a contemporary definition. However, if codified with an opaque definition that erases developments in customary international law, the treaty could negatively impact decades of hard-won rights for women, girls and LGBTQI+ persons, and lead to the exclusion of victims. An opaque definition would risk exclusion that may hamper the movement for legal recognition of gender apartheid by alienating key allies, ultimately undermining the broad support necessary to achieve codification.

While it has important momentum, the struggle for recognition of gender apartheid faces hurdles, making unified movement building ever more crucial. States historically de-prioritize gender justice. However, by ensuring LGBTQI+ inclusion, states that have taken public stances to protect LGBTQI+ rights may be further induced to support codification of gender apartheid as a crime. Furthermore, a clear definition of apartheid that recognizes the social construction of both gender and race, could bring in states that support the recognition of intractable apartheid in other contexts. Intersectional and inclusive movement building could therefore lead not only to a larger base of support, but to a winning strategy for garnering states’ buy-in to codification of gender apartheid as a crime against humanity.

We therefore urge policy makers and other key stakeholders to support the adoption of gender apartheid in the new draft crimes against humanity treaty with an inclusive definition that ensures better adherence to customary international law’s recognition of gender as a social construct.