

The Next Chapter of Apartheid Is “Gender Apartheid”

By NAHEED A. FARID*

Introduction

IN 2020, WITH OVER TWELVE YEARS of serving as a lawmaker in Afghanistan, I was driven by a strong desire to do something meaningful for the women of my country. This fight was rooted in the blunt reality that Afghan women were demanding their rights and recognition of their social identity, and they entrusted me to be their representative. One example that deeply resonated with me was Susan Ghairat, a teacher and a fellow advocate, who said, “Why as a mother, I do not have the right to obtain a national ID card or passport for my child, but my father-in-law has the authority to decide whether my child, who was born from my womb, can get an ID card? Why his name is in my son’s ID but not mine?”¹ This powerful question ignited my passion and led me to join the “#WhereIsMyName?” campaign established by Laleh Osmani² in July 2020, where I spoke in the Afghan Parliament about the critical need for the inclusion of mothers’ names in our national

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1. Interview by Naheed A. Farid with Susan Ghairat (May 9, 2019).

2. Mahjooba Nowrouzi, *WhereIsMyName: Afghan Women Campaign for the Right to Reveal Their Names*, BBC (July 24, 2020), <https://www.bbc.com/news/world-asia-53436335> [<https://perma.cc/3D7L-A8YH>].

identity cards—an identity that, until then, was only recognized under the names of fathers and grandfathers.³

As the chairperson of the Afghan Women’s Affairs Commission, I submitted the draft law that advocated for this change and stood firmly in front of my colleagues, declaring:

A woman, as an independent human being, possesses an independent identity. Our campaign, #WhereIsMyName, fights to shatter the taboo of erasing women’s names from society. We strive for the inclusion of mothers’ names alongside fathers’ names in identity cards. It is the responsibility of all of us to recognize half of our society and guide it toward genuine progress.⁴

The campaign sought to end the erasure of women’s identities. I was the first Afghan Parliamentarian to join this campaign but not the last. The movement garnered support all over the nation, and many men proudly posted their mother’s names and photos on social media or even adding their mother’s name to their last name.⁵ In a society where women were often referred to solely as mothers, sisters, or daughters of men in public life, this campaign sought to dismantle the shame surrounding the public acknowledgment of female family members. From the wedding cards of brides listing them only as the daughters of their fathers to gravestones that leave off women’s names, this cultural and systemic invisibility had to end.

In that 2020 campaign, Susan and many like her had an opportunity to ask the hard questions before the Afghanistan Parliament and to see their social and political desires turn into government policy. Women could openly post their demands on social media and debate their right to be “recognized” as half of society.⁶ This political climate persisted while I served in Parliament as a representative of my home in Herat. But one year later, in 2021, everything changed.⁷

3. See generally *id.* (explaining that the #WhereIsMyName campaign is fighting to amend the Population Registration Act to allow mothers’ names on Afghan national identity cards).

4. Naheed A. Farid, Chairperson, Afghan Woman Affs. Comm’n, #WhereisMyName Speech to the 17th House of Representatives (July 11, 2020).

5. Mujib Mashal, *Their Identities Denied, Afghan Women Ask, ‘Where Is My Name?’*, N.Y. TIMES (July 30, 2017), <https://www.nytimes.com/2017/07/30/world/asia/afghanistan-womens-rights-whereismyname.html> [<https://perma.cc/GLS5-RDPV>].

6. Mujib Mashal & Najim Rahim, *After Afghan Women Asked #WhereIsMyName, a Small Victory*, N.Y. TIMES (Sept. 2, 2020), <https://www.nytimes.com/2020/09/02/world/asia/afghanistan-id-mothers-names.html> (last visited Oct. 29, 2024).

7. Press Release, Off. U.N. High Comm’n Hum. Rts., Afghanistan: U.N. Experts Say 20 Years of Progress for Women and Girls’ Rights Erased Since Taliban Takeover, U.N. Press Release (Mar. 8, 2023), <https://www.ohchr.org/en/press-releases/2023/03/afghanistan-un-experts-say-20-years-progress-women-and-girls-rights-erased> [<https://perma.cc/4KTY-LSJL>].

Following the Taliban's assumption of power in Afghanistan in August 2021, women and girls experienced a profound regression of their rights, ranging from educational denials to mobility restrictions and economic exclusion.⁸ These legal and social advancements were tragically undone when the Taliban took control, reducing the achievements of Afghan society in a matter of hours.⁹ I, along with my other sixty-eight female representatives, was no longer allowed to serve in Parliament, attend school, or travel alone.¹⁰ Once the Taliban took over, it was not a fight for recognition on ID cards but a fight for our lives. My family fled the country with only the clothes on our backs.¹¹

As United Nations ("U.N.") Secretary-General António Guterres highlighted in January 2023, "[I]n Afghanistan, unprecedented, systematic attacks on women's and girls' rights and the flouting of international obligations are creating gender-based apartheid."¹² The secretary-general's remarks underscored that authoritative edicts issued by the Taliban towards women and girls are indicative of gender apartheid.

The Taliban's gender-based oppression, embodied by nearly 150 directives and codified by the Prevention of Vice and Promotion of Virtue ("PVPV") law, represents a calculated form of enslavement that flagrantly violates international law.¹³ This oppression is not merely a byproduct of the Taliban's rule but a deliberate policy rooted in

8. See generally U.S. Dep't of State, Bureau of Democracy, H. R. and Lab., Afghanistan 2022 Human Rights Report 28–36 (2022) [hereinafter Afghanistan 2022 Human Rights Report], https://www.state.gov/wp-content/uploads/2023/03/415610_AFGHANISTAN-2022-HUMAN-RIGHTS-REPORT.pdf [<https://perma.cc/6E64-WYAR>].

9. See Melanie Vermeer et al., Opinion, *The Taliban's Oppression of Women Is Apartheid. Let's Call It That*, WASH. POST (Apr. 1, 2024, 6:15 AM), <https://www.washingtonpost.com/opinions/2024/04/01/taliban-women-gender-apartheid/> (last visited Oct. 29, 2024).

10. See generally *id.*

Before the Taliban took over, there were 69 female parliamentarians, more than 250 female judges, hundreds of thousands of women-owned businesses, more than 100,000 women in universities and about 2.5 million girls in primary schools. Now, the parliament has been replaced by a Taliban "leadership council," and women's courts have been dissolved.

Id.

11. Lyse Doucet & Naheed Farid, *Former Member of Afghan Parliament: 'The Taliban Would've Killed Me if They Found Me'*, BBC (Sept. 10, 2021), <https://www.bbc.com/news/av/world-asia-58513998> [<https://perma.cc/KKF4-E6MM>].

12. U.N. Secretary-General, The Secretary-General's Remarks to the Security Council on the Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security: The Rule of Law Among Nations (Jan. 12, 2023), <https://www.un.org/sg/en/content/sg/statement/2023-01-12/the-secretary-generals-remarks-the-security-council-the-promotion-and-strengthening-of-the-rule-of-law-the-maintenance-of-international-peace-and-security-the-rule-of> [<https://perma.cc/R6F3-H6G4>].

13. Da Ufghanstan Rasmi Jareda [The Official Gazette of the Islamic Republic of Afghanistan], The Propagation of Virtue and Prevention of Vice Law of 31 July 2024,

discrimination, a central organizing principle of their regime.¹⁴ As such, their blatant violations of international law and the U.N. Charter serve both as a means and an end, designed to erase the autonomy of Afghan women completely.

It is crucial to draw parallels between these actions and established examples of systemic oppression, particularly the edicts that were issued by the South African apartheid regime (1948–1994).¹⁵ This Article examines the shared elements of oppression and violations across both contexts of the Taliban and South African apartheid regimes and advocates that precedented measures against racial apartheid can be utilized in addressing gender apartheid in Afghanistan.¹⁶

The term “apartheid” originates from the Afrikaans word for “apart.”¹⁷ The word was born out of the Apartheid in South Africa and its institutionalized racial segregation and subjugation that sought to establish and entrench the dominance of white South Africans over Black South Africans and other people of color.¹⁸ When apartheid was recognized and criminalized, it triggered international action and legal, diplomatic, and political resistance against the South African apartheid regime that eventually came to an end.¹⁹ This was due in large part to the codification of apartheid under the International Convention on the Suppression and Punishment of the Crime of Apartheid Conviction.²⁰

The Taliban’s perverse and dystopian vision of the complete subjugation of women and girls is legally characterized by two defining

1452 (Afg.), translated in AFG. ANALYSTS NETWORK, THE PROPAGATION OF VIRTUE AND PREVENTION OF VICE LAW (Aug. 2024), <https://www.afghanistan-analysts.org/en/wp-content/uploads/sites/2/2024/08/Law-on-Virtue-and-Vice-Basic.pdf> [<https://perma.cc/PRR3-GCPF>].

14. Mariam Safi & Ayesha Khan, *New Morality Law in Afghanistan Is Not Just Silencing Women’s Voices: It’s Gender Apartheid*, ODI Global (Oct. 11, 2024), <https://odi.org/en/insights/new-morality-law-in-afghanistan-is-not-just-silencing-womens-voices-its-gender-apartheid/> [<https://perma.cc/B366-DGDD>].

15. See *infra* Part II. The term gender apartheid is understood by legal scholars to mean “the use of the systematic segregation of the sexes imposed through law and policy as a governing ideology.” Karima Bennoune, *The International Obligation to Counter Gender Apartheid in Afghanistan*, 54 COLUM. HUM. RTS. L. REV. 1, 16 (2022).

16. See, e.g., Bennoune, *supra* note 15. “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.” *Id.* at 15.

17. *Apartheid*, BLACK’S LAW DICTIONARY (12th ed. 2024).

18. Bennoune, *supra* note 15, at 17.

19. See, e.g., Enuga S. Reddy, *The Struggle Against Apartheid: Lessons for Today’s World*, U.N. CHRON. (June 27, 2013), <https://www.un.org/en/chronicle/article/struggle-against-apartheid-lessons-todays-world> [<https://perma.cc/X4YC-PVLA>].

20. Bennoune, *supra* note 15, at 22; G.A. Res. 3068 (XXVIII), International Convention on the Suppression and Punishment of the Crime of Apartheid (Dec. 16, 1973) [hereinafter ICSPCA].

features shared with apartheid, whether racial or gender-based: (1) a contextual aspect involving an institutionalized regime of systematic oppression and domination and (2) an intentional aspect aimed at sustaining and maintaining that regime.²¹ The term “gender apartheid,” which is borrowed from its racial equivalent, aptly describes the systematic, gender-based segregation, rights violations, and denial of education occurring under patriarchal regimes like the Taliban in Afghanistan that sustains itself through suppression.²² The international response to apartheid in South Africa provides a framework and precedent for conceptualizing, criminalizing, and codifying issues of discrimination against women, including gender apartheid in Afghanistan.

Gender apartheid is not a new term; it has been used for decades, including by prominent women’s rights defenders in Afghanistan during the first Taliban takeover (1996–2001).²³ This Article argues to move the term from a political rhetorical device to a legal, normative one with concrete legal consequences.

As women across the world face severe oppression by apartheid-style regimes, perpetrators of their rights enjoy the absence of effectual measures like sanctions from the international community, including but not limited to an asset freeze, embargoes, or travel bans to hold them accountable.²⁴ The perpetrators also relish diplomatic credentials and economic ties with their sympathizers.²⁵ There is a pressing need for criminalization and codification of gender apartheid in international laws and frameworks. It requires an abrupt standpoint of the

21. Int’l Law Comm’n, Rep. on the Work of Its Seventy-First Session, ch. IV(E), U.N. Doc. A/74/10, at 11–21 (2019) [hereinafter Draft CAH].

22. Bennoune, *supra* note 15, at 24.

23. See D. Lyn Hunter, *Gender Apartheid Under Afghanistan’s Taliban: Refugee and Women’s Rights Advocate Simi Wali Sheds Light on Abuses*, BERKELEYAN (Mar. 17, 1999), <https://newsarchive.berkeley.edu/news/berkeleyan/1999/0317/taliban.html> [<https://perma.cc/X5PX-8SUF>]; Ann Elizabeth Mayer, *A “Benign” Apartheid: How Gender Apartheid Has Been Rationalized*, 5 UCLA J. INT’L L. & FOREIGN AFFS. 237, 252 (2001).

24. See, e.g., *Afghanistan: Three Years of Taliban Rule and International Inaction Have Left Afghan Community with Little Hope*, AMNESTY INT’L (Aug. 15, 2024), <https://amnesty.org/en/latest/news/2024/08/afghanistan-three-years-of-taliban-rule-and-international-inaction-have-left-afghan-community-with-little-hope/> [<https://perma.cc/N8W7-FXFW>]; Akmal Dawi, *UN Experts Push to Criminalize Gender Apartheid*, VOA NEWS (Feb. 20, 2024, 3:50 PM), <https://www.voanews.com/a/un-experts-push-to-criminalize-gender-apartheid-7495545.html> [<https://perma.cc/9EBX-2J3A>]; see also Kenneth A. Rodman, *Public and Private Sanctions Against South Africa*, 109 POL. SCI. Q. 313, 322 (1994) (discussing the sanctions the international community took against South Africa in the 1980s during apartheid).

25. See, e.g., Samira Abrar, *Don’t Look Away: The Taliban’s Mistreatment of Women Has Global Ramifications*, ATL. COUNCIL (Apr. 30, 2024), <https://www.atlanticcouncil.org/content-series/inside-the-talibans-gender-apartheid/dont-look-away-the-talibans-mistreatment-of-women-has-global-ramifications/> [<https://perma.cc/H7F5-BBQW>].

global community to recognize and address the issue to hold the perpetrators of gender apartheid accountable by the same measures as apartheid perpetrators were punished in South Africa. By replicating the pathway of apartheid codification, this Article aims to contextualize gender apartheid and explores the politically expedient pathways for the codification of gender apartheid by comparing the edicts issued by both regimes and consequent violations of international human rights standards.

Part I focuses on the lack of international documentation of the most blatant apartheid instance in recent history. Part II explores through legal analysis nine different areas that demonstrate racial apartheid in South Africa's similarity to gender apartheid in Afghanistan. Part III identifies gaps in existing frameworks and proposes amendments. It seeks to build international consensus and lobby for government support to endorse and prioritize the issue. Advocacy efforts include criminalizing gender apartheid in the draft articles on Prevention and Punishment of Crimes Against Humanity ("draft articles on crimes against humanity") as well as U.N. resolutions and international sanctions against perpetrators. Implementation involves internalizing the crime of gender apartheid in the national legal system by member states to strengthen international efforts against gender apartheid until meaningful change is achieved.

I. The Absence of Gender Apartheid Codification

A. Gender Persecution in Convention on Elimination of All Forms of Discrimination Against Women

International human rights law currently lacks fairness by not criminalizing systematic gender discrimination or gender apartheid, a situation that closely resembles the extent and impact of racial apartheid.²⁶ Unlike the Apartheid Convention, the Convention on Elimination of All Forms of Discrimination Against Women ("CEDAW"), as the most crucial international framework and benchmark on women's rights, does not criminalize gender discrimination or gender apartheid.²⁷

26. *Global: Gender Apartheid Must Be Recognized as a Crime Under International Law*, AMNESTY INT'L (June 17, 2024), <https://www.amnesty.org/en/latest/news/2024/06/gender-apartheid-must-be-recognized-international-law> [<https://perma.cc/VJA4-DBXG>]; Bennoune, *supra* note 15, at 18.

27. Convention on the Elimination of All Forms of Discrimination Against Women pmbl. and art. 1, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13, 14–16 (entered into force Sept. 3, 1981) [hereinafter CEDAW]. CEDAW explicitly bans "sex" discrimination but there is no mention of gender in the law. *Id.*

Even so, CEDAW has enormous significance as a benchmark for gauging progress toward women's rights. Interestingly, the U.N. General Assembly was addressing apartheid issues during the period when CEDAW came into existence.²⁸ The opening of CEDAW for signature, ratification, and accession occurred on December 18, 1979, which virtually coincided with the General Assembly resolution for Policies of *apartheid* of the Government of South Africa on December 12, 1979.²⁹ The Declaration called on U.N. members to "recognize the right of the oppressed people of South Africa to choose their means of struggle" and to take various actions to isolate the South African regime and impede its attempts at aggression and subversion.³⁰ Since apartheid was a central concern of the U.N. in the years when CEDAW was being prepared, the absence in the text of CEDAW of any reference to gender apartheid proves that treatment targeting women was not recognized as criminally comparable to what was being perpetrated in South Africa.³¹

Subsequently, while the Apartheid Convention condemns discrimination forcefully, CEDAW's Article II encourages member states to take appropriate measures to address it.³² CEDAW's language does not explicitly denounce gender discrimination in strong terms, allowing for varied interpretations of women's status as cultural or religious rather than a systematic patriarchal political oppression.³³

B. Gender Apartheid as a Crime Against Humanity

The term "crime against humanity" means a "brutal crime that is not an isolated incident but that involves large and systematic actions," typically identified by "inhumane" acts that "shock the conscience" regardless of whether they are legalized by the country at the time.³⁴ Some scholars link the term's origins to atrocities like slavery in America and European colonialism, while other scholars find the term stems

28. G.A. Res. 34/93, Policies of Apartheid of the Government of South Africa (Dec. 12, 1979) [hereinafter 1979 Apartheid Resolution].

29. *See id.* *See generally* CEDAW, *supra* note 27.

30. 1979 Apartheid Resolution, *supra* note 28.

31. Bennoune, *supra* note 15, at 29.

32. CEDAW, *supra* note 27, art. 2; 1979 Apartheid Resolution, *supra* note 28. The resolution states that the General Assembly is "gravely concerned" of the "policies and actions of the apartheid regime, in particular its efforts to perpetuate and consolidate racist domination in the country, its policy of 'bantustanization,' its brutal repression of opponents of apartheid and its constant acts of aggression against neighbouring States." 1979 Apartheid Resolution, *supra* note 28.

33. Mayer, *supra* note 23, at 237–388; *see also* Bennoune, *supra* note 15, at 29.

34. *Crime Against Humanity*, BLACK'S LAW DICTIONARY (12th ed. 2024).

from the 1915 condemnation of the mass killing of Armenians by Allied governments as the first use of the term “crimes against humanity” to describe international crimes.³⁵ Since then, the concept of crimes against humanity has evolved within the realm of international customary law and through the adjudication of international courts such as the Rome Statute of the International Criminal Court (“ICC”),³⁶ the International Criminal Tribunal for the former Yugoslavia,³⁷ and the International Criminal Tribunal for Rwanda.³⁸ Numerous states have also incorporated crimes against humanity into their domestic legal frameworks.³⁹

Crimes against humanity, unlike genocide and war crimes, have not been formally codified in a dedicated international treaty, although efforts to achieve this are ongoing.⁴⁰ The 1998 Rome Statute, which established the ICC, embodies the most recent consensus among the international community on crimes against humanity.⁴¹ It also provides the most comprehensive enumeration of specific acts that may constitute crimes against humanity.⁴² Nevertheless, the prohibition of crimes against humanity, akin to the prohibition of genocide, is regarded as a fundamental principle of international law, binding on all states without exception.⁴³

If codified, any act classified as gender apartheid must adhere to the criteria set for crimes against humanity based on the parameters outlined in the draft articles of the Crimes Against Humanity Convention, which mirror the definitions specified in the Rome Statute of the ICC and the provisions of the crimes against humanity principles.⁴⁴ The perpetrator of gender apartheid targets the civilian population intentionally while acknowledging their assault on individual rights. This interpretation of gender apartheid as a crime against humanity

35. See, e.g., U.N. Off. on Genocide Prevention & Resp. to Protect, Definitions of Genocide and Related Crimes, <https://www.un.org/en/genocide-prevention/definition> [<https://perma.cc/M9B2-LDLD>] (follow “Crimes Against Humanity” tab).

36. See generally Rome Statute of the International Criminal Court art. 7(1), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90, 93 (entered into force July 1, 2002) [hereinafter Rome Statute].

37. See, e.g., S.C. Res. 827 (May 25, 1993).

38. See, e.g., S.C. Res. 955 (Nov. 8, 1994).

39. U.N. Off. on Genocide Prevention & Resp. to Protect, *supra* note 35.

40. *Id.* (“Crimes against humanity have not yet been codified in a dedicated treaty of international law, unlike genocide and war crimes, although there are efforts to do so.”).

41. *Id.*; see also Rome Statute, *supra* note 36.

42. U.N. Off. on Genocide Prevention & Resp. to Protect, *supra* note 35.

43. *Id.*

44. Draft CAH, *supra* note 21, art. 2.

mirrors the construct of racial apartheid and incorporates gender as an additional dimension for its perpetration.⁴⁵

Codification of gender apartheid through a draft treaty of the crimes against humanity is an indispensable avenue for advancing gender equality in alignment with international human rights standards. With the escalating costs of inaction and the Taliban's unyielding stance,⁴⁶ the codification of gender apartheid can prevent the interconnected civil, political, economic, social, and cultural gender-based human rights violations in Afghanistan and hold the Taliban accountable through actionable measures like sanctions.⁴⁷

The U.N.'s Sixth Committee held two interactive sessions on the draft crimes against humanity treaty in April 2023 and April 2024, with a decision on next steps in the fall of 2024.⁴⁸ The committee adopted resolution 77/249 in 2022 to move the draft treaty forward, and the resolution outlines a timeline for substantive discussion. The United Nations General Assembly's Sixth Committee will convene again in November 2024 to decide on the CAH Convention.⁴⁹

In January 2024, the U.N. published Member State's written comments on the potential crimes against humanity treaty.⁵⁰ Out of thirty comments, six member states specifically mentioned the potential inclusion of gender apartheid as a crime against humanity,⁵¹ and sixteen raised other gendered considerations. As the decision approaches, it is paramount that member states recognize the need to codify gender-based crimes in the potential treaty, including the crime of gender

45. *Id.* ("The crime of apartheid' means inhumane acts of a character . . . 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 . . .").

46. See Yvonne Murray, *UN Short on Solutions to 'Gender Apartheid' in Afghanistan*, RTE (Aug. 15, 2023, 9:09 AM), <https://www.rte.ie/news/world/2023/0815/1399766-taliban-two-years-on-abuses-continue-while-power-grows/> [<https://perma.cc/TK3R-M9GQ>].

47. See Dipanjan Roy Chaudhury, *All Eyes on UN Sanctions Panel's Move on Taliban's Top Leaders*, ECON. TIMES (Aug. 22, 2021, 7:35 AM), <https://economictimes.indiatimes.com/news/india/all-eyes-on-un-sanctions-panels-moves-on-talibans-top-leaders/articleshow/85519099.cms?from=mdr,%20for%20more%20recent%20developments> [<https://perma.cc/NP3W-RH7Y>].

48. See *UN Decision to Advance Crimes Against Humanity Treaty*, HUM. RTS. WATCH (Nov. 18, 2022), <https://www.hrw.org/news/2022/11/18/un-decision-advance-crimes-against-humanity-treaty> [<https://perma.cc/3779-N7AC>]; Draft CAH, *supra* note 21.

49. *UN Decision to Advance Crimes Against Humanity Treaty*, *supra* note 48.

50. Paloma van Groll, *Signals of Support for Gender Justice in the Draft Treaty on Crimes Against Humanity*, JUST SEC. (Jan. 19, 2024), <https://www.justsecurity.org/91335/signals-of-support-for-gender-justice-in-the-draft-treaty-on-crimes-against-humanity/> [<https://perma.cc/5P47-HNSJ>].

51. *Id.* (listing Afghanistan, Australia, Brazil, Malta, Mexico, and the United States).

apartheid, before the Sixth Committee. This framework to codify gender apartheid underscores the gravity of gender-based oppression and aligns with efforts to address systemic injustices against women through legal means.

To codify gender apartheid as a crime against humanity in a treaty would formally recognize gender-based oppression and discrimination as a grave violation of international law.⁵² This action would establish a legal framework for prosecuting individuals or entities responsible for perpetrating such acts, ensuring greater accountability for gender-based atrocities.⁵³ Additionally, codifying gender apartheid as a crime against humanity would send a clear message that systemic gender discrimination and oppression are unacceptable on a global scale, reinforcing the commitment to gender equality and human rights. It would also provide a basis for international cooperation in addressing and preventing gender-based violence and discrimination on the national level.

C. The Rome Statute and Gender Apartheid

The Rome Statute's passage serves as a valuable reference and precedent for codifying emerging gendered crimes, marking a pivotal moment in history. It introduced gender as a distinct ground for persecution.⁵⁴ This significant milestone was achieved through considerable advocacy from civil society and reflected a response to persistent pressures to underscore the recognition of gender-based persecution as a distinct form of injustice deserving of legal redress.⁵⁵ Moreover, the Rome Statute notably addressed the issue of forced pregnancy, marking the first instance of its enumeration within international criminal law.⁵⁶ This response was prompted by the harrowing atrocities witnessed in conflicts such as those in the former Yugoslavia and Rwanda.⁵⁷ Thus,

52. Letter from Glob. Just. Ctr. to Permanent Representatives of Member and Observer States of the U.N. (Oct. 5, 2023) [hereinafter Joint Call to Amend CAH], https://www.globaljusticecenter.net/wp-content/uploads/2023/10/Letter-to-UN-Member-States-Re_-Gender-Justice-Approach-to-Crimes-Against-Humanity-Treaty.pdf [https://perma.cc/2FZE-VN5Q].

53. *Id.*

54. Rome Statute, *supra* note 36, art. 7(1)(h).

55. Yvonne Dutton & Milena Sterio, *The ICC's 2022 Gender Persecution Policy in Context: An Important Next Step Forward*, JUST SEC. (June 1, 2023), <https://www.justsecurity.org/86760/the-iccs-2022-gender-persecution-policy-in-context-an-important-next-step-forward/> [https://perma.cc/2BKY-BDLY].

56. Rome Statute, *supra* note 36, art. 8(2)(b)(xxii).

57. Soh Sie Eng Jessie, *Forced Pregnancy: Codification in the Rome Statute and Its Prospect as Implicit Genocide*, 4 N.Z. J. PUB. & INT'L L. 311, 313 (2006).

the Rome Statute stands as a testament to the collaborative efforts of international civil society and legal institutions in codifying and confronting emerging gendered crimes; this offers invaluable guidance for ongoing endeavors to codify gender apartheid.

D. Gender Apartheid vs. Gender Persecution

While some may refer to “gender persecution” as a conceptualized term in the international legal frameworks of the Rome Statute, it is essential to realize that gender persecution stands apart from the distinct crime of gender apartheid.⁵⁸ The animating context (institutionalized regime) and intent (to maintain that regime) distinguish the crime of gender apartheid from the existing crime of gender persecution, which entails the “severe deprivation of fundamental rights” where victims are targeted because of their identity.⁵⁹ Similar to racial apartheid and racial persecution, terms that coexist in the Rome Statute and are seen as mutually reinforcing, the two crimes of gender persecution and gender apartheid can also coexist.⁶⁰ However, the term “apartheid” entails distinct and extreme entrenchment, pervasion, and scale which cannot be provided by gender persecution alone.⁶¹ The two crimes may involve overlapping facts and behaviors, and they can be charged cumulatively to capture the full extent of conduct, as is common practice in international criminal law, in order to capture the full criminality of an act.⁶²

The consequences of recognizing gender apartheid as opposed to gender persecution would open new doors for accountability and trigger new legal and political momentum that is not afforded by one term alone. By acknowledging their coexistence, legal mechanisms can better address the complexities and nuances of gender-based injustices, ultimately strengthening the efforts to combat systemic oppression and promote equality.

E. Consequences of Gender Apartheid Codification for State Parties

The ICC and International Court of Justice (“ICJ”) are complementary measures to CEDAW, and they highlight the urgency of using all the legal tools at their disposal to hold the Taliban accountable.

58. Joint Call to Amend CAH, *supra* note 52.

59. *Id.*; Rome Statute, *supra* note 36, art. 7(2)(g).

60. See Rome Statute, *supra* note 36, art. 7(1)(h). Racial prosecution is also included in the Draft CAH, *supra* note 21, art. 2(2)(h).

61. Joint Call to Amend CAH, *supra* note 52.

62. *Id.*

However, the draft articles on crimes against humanity proposed to the U.N. CEDAW Committee to conceptualize gender apartheid as a crime against humanity marks the first major U.N. treaty on core international crimes since the 1998 Rome Statute of the ICC.⁶³

Codifying the crime of gender apartheid raises queries regarding individual and state responsibility. Under the existing draft articles on crimes against humanity, if gender apartheid is included as a crime, state parties would be required to criminalize it in their domestic laws, thereby ensuring individual Taliban leaders' accountability for such offenses.⁶⁴ Additionally, states would be obliged to take preventive and punitive measures against gender apartheid regimes, including the Taliban, with violations potentially brought before the ICJ.⁶⁵ This inclusion in the treaty may also entail *erga omnes partes* obligations, which refer to international law's obligations towards all state parties and create standing before the ICJ even for non-injured states.⁶⁶ This may clarify state and international organization obligations in addressing situations of gender apartheid, in line with the *jus cogens* that exist to prohibit apartheid.⁶⁷

Furthermore, the impact of codification on third-state engagement with the Taliban is significant. With the crime of gender apartheid included in the treaty, state parties would be prohibited from engaging in acts of gender apartheid. It is essential to differentiate between diplomatic engagement and political recognition in this context. Notably, potential ICJ cases under treaties like CEDAW would likely seek to hold the Taliban accountable for their obligations under international

63. *Id.*

64. Draft CAH, *supra* note 21, art. 6(2)(a).

65. See generally *How the Court Works*, INT'L CT. JUST., <https://www.icj-cij.org/how-the-court-works> [<https://perma.cc/7SLM-5QX5>].

66. Obligations *erga omnes* in international law means that "all States can be held to have a legal interest in their protection" and it provides a legal avenue for states to pursue violations of obligations to human rights, even when the state is not directly injured so long as they are parties to the same treaty. *Barcelona Traction, Light and Power Company, Limited (Barcelona Traction) (Belg. v. Spain)*, Second Phase Judgment, 1970 I.C.J. 3, ¶ 33, 35 (Feb. 5); see also Pok Yin S. Chow, *On Obligations Erga Omnes Partes*, 52 *Geo. J. INT'L L.* 469, 470 (2021).

67. Rep. of Int'l L. Comm'n on the Work of Its Seventy-Third Session, U.N. Doc. A/77/10, at 16 (Aug. 12, 2022) (stating the non-exhaustive list of norms includes "prohibition of racial discrimination and apartheid"). *Jus cogens*, or peremptory norms, are the "highest-level norms in the field of international law which override contradictory norms and instruments" that establish universal human rights and, importantly, do not include prohibition of gender discrimination. Bennoune, *supra* note 15, at 23–24; see also Jonathan Wampler, *Jus Cogens and the Lack of a Universal Gender Equality Norm*, OXFORD HUM. RTS. HUB (June 15, 2023), <https://ohrh.law.ox.ac.uk/jus-cogens-and-the-lack-of-a-universal-gender-equality-norm/> [<https://perma.cc/65DN-ZA7Z>].

human rights law without recognizing them as Afghanistan's legitimate government, similar to the approach taken in cases involving entities like the Myanmar military junta.⁶⁸ This underscores the delicate balance between engagement and adherence to human rights standards in international relations.

II. The Comparison of Legal Frameworks and Violations of International Human Rights Law: Gender and Racial Apartheid

In 1948, the National Party government in South Africa named and enforced apartheid.⁶⁹ It led to widespread human rights abuses, social injustices, and economic disparities against the Black South African majority.⁷⁰ The system is defined as “inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.”⁷¹ Apartheid came to an end in a series of steps by the international community leading to the formation of a democratic government in South Africa in 1994.⁷² Apartheid is currently a crime against humanity punishable under the Rome Statute of the ICC.⁷³

Although gender apartheid and racial apartheid are not perfectly congruent, the comparison between both contextual and legal frameworks reveals that gender apartheid is “analogous” to racial apartheid.⁷⁴ Historically, the patriarchy, a series of systematic authoritarian domination and oppression by men over women, serves to suppress and impose feelings of powerlessness, inability, and hopelessness on women worldwide.⁷⁵ In the contemporary era, examples of the Taliban's institutionalized segregation and utilization of state efficiency

68. *Myanmar*, in HUM. RTS. WATCH, WORLD REPORT 2023: EVENTS OF 2022 432–39 (2023), https://data.opendevlopmentmyanmar.net/en/dataset/c24c6521-bf06-40fe-ad0c-bea68290d03d/resource/815735fa-680e-4380-a361-526ce704c4a3/download/world_report_2023_webspreads_0.pdf [<https://perma.cc/6TKK-PZ62>].

69. *National Party*, BRITANNICA, <https://www.britannica.com/topic/National-Party-political-party-South-Africa> [<https://perma.cc/662F-7268>].

70. Off. of U.N. High Comm'r for Hum. Rts., *30 Years On, South Africa Still Dismantling Racism and Apartheid's Legacy*, AFR. RENEWAL (Apr. 18, 2024), <https://www.un.org/africarenewal/magazine/april-2024/30-years-south-africa-still-dismantling-racism-and-apartheid%E2%80%99s-legacy> [<https://perma.cc/PH8G-WNDE>].

71. ICSPCA, *supra* note 20, art. II.

72. See generally Becky Little, *End of Apartheid: Key Stages*, HIST. (Nov. 20, 2020), <https://www.history.com/news/end-apartheid-steps> [<https://perma.cc/GZM8-PQK5>].

73. Rome Statute, *supra* note 36.

74. Bennoune, *supra* note 15, at 24.

75. See generally *Patriarchy*, BLACK'S LAW DICTIONARY (12th ed. 2024).

in discriminatory treatment against women in Afghanistan are found to be as inhumane and intolerable as apartheid laws in South Africa.⁷⁶

As the Taliban regime orders tens of edicts and decrees since their takeover, marking Afghanistan as the worst country for women, the urgency to address and criminalize gender apartheid has never been more crucial.⁷⁷ The following parallels between institutionalized and systematic discrimination imposed by the apartheid regime in South Africa and the Taliban in Afghanistan draw connections between these legal contexts in nine areas of life. The similarities shed light on the critical need to codify and criminalize gender apartheid and consequently to hold its perpetrators accountable.

A. Education Segregation

Segregation in the formal education system is a practice in which individuals are denied access to education or are subjected to unequal educational opportunities based on characteristics such as gender, ethnicity, or socio-economic status and violates fundamental principles of international human rights law.⁷⁸ The Universal Declaration of Human Rights (“UDHR”) explicitly addresses this violation and underscores the right to education for all, emphasizing its role in fostering respect for human rights and fundamental freedoms.⁷⁹ Similarly, the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) recognizes education as a fundamental human right essential for the full development of the human personality and promoting understanding among nations and groups.⁸⁰ The Convention on the Rights of the Child (“CRC”) also guarantees the right to education without discrimination for children.⁸¹ Additionally, the Convention against

76. See generally Sahar Halaimazi et al., *Inside Afghanistan’s Gender Apartheid: Listen as Women Reveal the Impact of the Taliban’s Oppressive Decrees*, ATL. COUNCIL (Mar. 7, 2024), <https://www.atlanticcouncil.org/in-depth-research-reports/report/inside-afghanistans-gender-apartheid-listen-as-women-reveal-the-impact-of-the-talibans-oppressive-decrees/> [<https://perma.cc/5WTK-ZNBA>].

77. *Id.*

78. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 2, 26 (Dec. 10, 1948) [hereinafter UDHR].

79. *Id.*

80. International Covenant on Economic, Social and Cultural Rights art. 13, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (entered into force Jan. 3, 1979), *adopted in* G.A. Res. 2200A (XXI).

81. G.A. Res. 44/25, Convention on the Rights of the Child, art. 28 (Nov. 20, 1989) [hereinafter CRC].

Discrimination in Education (“CDE”) works to combat discriminatory practices in education.⁸²

While education segregation contradicts universal principles and stands in stark contrast to international human rights standards, the apartheid regime of South Africa implemented laws to restrict and segregate education based on racial discrimination and classification.⁸³ The laws were implemented to systematically restrict and segregate education for Black South African individuals.⁸⁴ The Bantu Education Act of 1953 specifically targeted Black South African students, enforcing a policy of separate and notably inferior education.⁸⁵ This deliberate educational inequality contributed to systemic discrimination against Black individuals in South Africa. Furthermore, the apartheid government solidified its discriminatory policies through the Extension of University Education Act of 1959,⁸⁶ the Coloured Persons Education Act of 1963,⁸⁷ and the Indians Education Act of 1965 to further institutionalize racial segregation.⁸⁸ These laws perpetuated a system that severely limited educational opportunities for Black South Africans, reinforcing social and economic disparities along racial lines and shaping inequality in South Africa’s educational landscape.

The education segregation laws implemented by the South African apartheid regime mirror the Taliban’s decrees that imposed restrictions on the education of girls and women in Afghanistan, violating UDHR, ICESR, CRC, and CDE.⁸⁹ They emphasize the common thread of oppressive ideologies seeking to punish a group of people through education discrimination. Starting on August 30, 2021, with a declaration banning co-education and prohibiting men from teaching girls, the Taliban progressively intensified restrictions on women’s education.⁹⁰ On September 12, 2021, the Taliban implemented a decree

82. U.N. Educ., Sci. & Cultural Org. Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93 [hereinafter CDE].

83. *Apartheid*, BRITANNICA, <https://www.britannica.com/topic/apartheid> [<https://perma.cc/BC7Q-6MFE>].

84. *Id.*

85. Bantu Education Act 47 of 1953 § 7 (S. Afr.).

86. Extension of University Education Act 45 of 1959 (S. Afr.).

87. Coloured Persons Education Act 47 of 1963 (S. Afr.).

88. Indians Education Act 61 of 1965 (S. Afr.).

89. *See generally* UDHR, *supra* note 78; ICESCR, *supra* note 80; CRC, *supra* note 81; CDE, *supra* note 82.

90. Srishti Goel, *Taliban Declare Ban on Co-Education in Afghanistan, Prohibit Men from Teaching Girls*, REPUBLIC WORLD (Aug. 30, 2021, 6:53 AM), <https://www.republicworld.com/world-news/taliban-declare-ban-on-co-education-in-afghanistan-prohibit-men-from-teaching-girls> [<https://perma.cc/FR9S-G3E9>]; *see also* Belquis Ahmadi & Hodei Sultan, *Taking a Terrible Toll: The Taliban’s Education Ban*, U.S. INST. PEACE (Apr. 13, 2023), <https://www.usip.org>.

that banned girls from secondary education.⁹¹ These restrictions further escalated with the closure of blind girls' schools in Nangarhar and Kunar.⁹² Although a temporary reopening of girls' schools was announced on March 17, 2022, the Taliban maintained that schools for girls in grades seven and above closed as of March 24, 2022.⁹³ The situation worsened as the decree issued on December 22, 2022, banned girls beyond grade six from attending private courses, further restricting educational opportunities for young Afghan girls and women.⁹⁴ This series of decrees collectively imposed significant barriers to girls' education, reflecting a stark limitation on the academic pursuits of women and girls in Afghanistan under the Taliban gender apartheid regime.

B. Banning and Detention Without Trial

Banning and detention without trial are severe violations of international human rights law explicitly addressed in various treaties and conventions like the International Covenant on Civil and Political Rights ("ICCPR") that prohibits arbitrary detention⁹⁵ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") that prohibits the practice of torture and arbitrary detention and emphasizing the right to due process and fair treatment.⁹⁶

org/publications/2023/04/taking-terrible-toll-talibans-education-ban [https://perma.cc/7YJF-XDXJ].

91. Emma Graham-Harrison, *Taliban Ban Girls from Secondary Education in Afghanistan*, GUARDIAN (Sept. 17, 2021, 2:09 PM), <https://www.theguardian.com/world/2021/sep/17/taliban-ban-girls-from-secondary-education-in-afghanistan> [https://perma.cc/XE8Z-HMU2].

92. *Tracking the Taliban's (Mis)Treatment of Women*, U.S. INST. PEACE [hereinafter USIP Taliban Decree Tracker], <https://www.usip.org/tracking-talibans-mistreatment-women> [https://perma.cc/G2PS-RC59].

93. *Taliban Closes Secondary Schools for Girls in Afghanistan*, PEOPLES DISPATCH (Mar. 25, 2022), <https://peoplesdispatch.org/2022/03/25/taliban-closes-secondary-schools-for-girls-in-afghanistan/> [https://perma.cc/J5B8-G2G7].

94. Hikmat Noori, *Taliban Ban Afghan Women from University Education*, GUARDIAN (Dec. 20, 2022), <https://www.theguardian.com/world/2022/dec/20/taliban-ban-afghan-women-university-education> [https://perma.cc/BR6P-JNAV]; Breshna Nazari, *Taliban's New Ruling: Educational Courses for Girls Above the Sixth Grade Were Banned*, RADIOFREEEUROPE RADIOLIBERTY (Dec. 19, 2022), <https://da.azadiradio.com/a/32189313.html> [https://perma.cc/MEQ3-QHCU].

95. International Covenant on Civil and Political Rights art. 9, *opened for signature* Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171 [hereinafter ICCPR] (entered into force Mar. 23, 1976).

96. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 7, *opened for signature* Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85 [hereinafter CAT] (entered into force June 26, 1987).

The Suppression of Communism Act of 1950, reincorporated into the Internal Security Act in 1976, was the legislation of the apartheid regime that clearly violated ICCPR and CAT.⁹⁷ The law intended to further chaos and hostility by targeting Black South Africans subjected to being barred from public participation and restricted in movement.⁹⁸ The Act gave authority for the government to ban and detain Black South African people, and it was used as the basis to place individuals under banning orders and to isolate and silence voices of opposition.⁹⁹

The language of the Act suggests that anyone who opposed government policy could be deemed a communist.¹⁰⁰ The Act was frequently used to legally restrain critics of racial segregation and apartheid because it explicitly declared that communism sought to encourage racial disharmony.¹⁰¹

Similarly, in contradiction to international human rights norms of ICCPR and CAT, the Taliban regime has jailed many women without trial for what it considered moral crimes, such as traveling without a male relative or leaving their husbands.¹⁰² Women continued to resist and protest Taliban edicts, and in response, on September 8, 2021, the Taliban banned protests and slogans that did not have prior approval from the Taliban.¹⁰³ Many women protesters who participated in public demonstrations disappeared or were arrested, tortured, and raped; some of their fates continue to be unknown to their families.¹⁰⁴ On December 26, 2021, the Taliban banned women from traveling on long-distance road trips greater than forty-five miles without a male companion; otherwise, their male family members would be arrested.¹⁰⁵

97. Suppression of Communism Act 44 of 1950 (S. Afr.); see also Mich. State U., Afr. Stud. Ctr., *Banned People in Apartheid-Era South Africa*, S. AFR. OVERCOMING APARTHEID BLDG. DEMOCRACY, <https://overcomingapartheid.msu.edu/sidebar.php?kid=163-581-1&page=3> [<https://perma.cc/KV5U-XCP8>].

98. Suppression of Communism Act; see Mich. State U., Afr. Stud. Ctr., *supra* note 97.

99. Mich. State U., Afr. Stud. Ctr., *supra* note 97.

100. Internal Security Amendment Act 79 of 1976 § 7 (S. Afr.).

101. *Id.*

102. Frontline PBS, *Women Held for 'Immoral Behavior' at a Taliban Prison Speak Out*, YOUTUBE, at 02:42 (Aug. 9, 2022), <https://www.pbs.org/wgbh/frontline/article/women-in-afghanistan-taliban-prison-video/> [<https://perma.cc/D3PJ-T4CZ>]; USIP Taliban Decree Tracker, *supra* note 92.

103. Akhtar Mohammad Makoi et al., *Taliban Ban Protests and Slogans that Don't Have Their Approval*, GUARDIAN (Sept. 8, 2021), <https://www.theguardian.com/world/2021/sep/08/taliban-ban-protests-and-slogans-that-dont-have-their-approval> [<https://perma.cc/3UJJ-D6P6>].

104. James Gregory & Aalia Farzan, *Taliban: Women's Protest in Kabul Over Education Ban Dispersed*, BBC (Apr. 4, 2022), <https://www.bbc.com/news/world-asia-64065206> [<https://perma.cc/5LKG-XFK5>].

105. USIP Taliban Decree Tracker, *supra* note 92.

Additionally, on March 24, 2022, Taliban authorities forbid women from working in offices.¹⁰⁶ The order states women must not leave their homes.¹⁰⁷ The Taliban's escalation of movement restrictions on women to total confinement in their homes demonstrates a completely devastating deprivation of liberties and serves as a mechanism for the Taliban to detain women who leave their home without a fair trial.

C. Segregation in Public Spaces

Access to public spaces is a key human right codified in multiple international treaties. The International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") prohibits racial segregation and apartheid-like practices in public spaces.¹⁰⁸ The CEDAW emphasizes gender equality in all spheres of life, including access to and use of public spaces.¹⁰⁹ Additionally, regional human rights instruments such as the European Convention on Human Rights and the African Charter on Human and Peoples' Rights reinforce these protections against segregation in public spaces.¹¹⁰

In a denial of all international norms, South Africa's apartheid regime enacted the Reservation of Separate Amenities Act in 1953, allowing for segregation in public premises, vehicles, and almost all public services based on race.¹¹¹ This exclusion began in 1927 with the Native Administration Act, which gave the executive government wide-ranging authority to govern Black South Africans and define boundaries for any tribe by proclamation.¹¹² Later, the Riotous Assemblies Act further restricted gatherings in public places, and the Public Safety Act allowed authorities to detain people without trial during emergencies.¹¹³ These laws extended to personal relationships and public activities, including using public premises like pools, restaurants, shops, and medical facilities, reinforcing racial discrimination across different aspects of life in South Africa.¹¹⁴

106. *See id.*

107. *Id.*

108. International Convention on the Elimination of All Forms of Racial Discrimination art. 3, *opened for signature* Dec. 21, 1965, T.I.A.S. No. 94-1120, 660 U.N.T.S. 195 [hereinafter CERD] (entered into force Jan. 4, 1969).

109. *See* CEDAW, *supra* note 27.

110. *See generally* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; African Charter on Human and Peoples' Rights, *opened for signature* June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986).

111. Reservation of Separate Amenities Act 49 of 1953 (S. Afr.).

112. Native Administration Act 38 of 1927 ch. II(5)(1)(a) (S. Afr.).

113. Riotous Assemblies Act 17 of 1956 (S. Afr.); Public Safety Act 3 of 1953 (S. Afr.).

114. *See* Native Administration Act; Riotous Assemblies Act; Public Safety Act.

Similar to the apartheid regime of South Africa, the Taliban implemented a series of stringent decrees that significantly curtailed the daily lives of Afghan women and girls in public spaces.¹¹⁵ On November 6, 2022, the Taliban ordered the closure of public baths for women in specific regions as well and prohibited their participation in public gatherings and activities in parks and gyms.¹¹⁶ By January 7, 2022, coffee shops stopped serving women unless they were accompanied by a male family member.¹¹⁷ Starting March 2, 2022, women were required to have a male relative present to access public healthcare.¹¹⁸ The Taliban stopped issuing driver's licenses to women on May 5, 2022,¹¹⁹ and later that month, they restricted women's use of public transport without the accompaniment of a male family member.¹²⁰ Additionally, in May of 2022, the Taliban enforced new rules related to hijabs, emphasizing the wearing of a burqa or staying at home.¹²¹ The Taliban's ban on beauty salons run by women was declared on July 6, 2023, impacting both businesses and services tailored for women.¹²² These collective decrees tightly controlled the mobility, appearance, and engagement of women and girls within the public sphere in Afghanistan under the Taliban gender apartheid system of oppression.¹²³

115. USIP Taliban Decree Tracker, *supra* note 92.

116. *Banned from Public Parks and Bathhouses, Afghan Women Say Life Under Taliban Is Like a Prison*, RADIOFREEEUROPE RADIOLIBERTY (Nov. 10, 2022), www.rferl.org/a/afghanistan-taliban-women-banned-parks-bathhouses-prison/32124374.html [<https://perma.cc/8F3E-R74F>]; Belquis Ahmadi & Scott Worden, *Taliban Continue to Tighten Their Grip on Afghan Women and Girls*, U.S. INST. PEACE (Dec. 8, 2022), www.usip.org/publications/2022/12/taliban-continue-tighten-their-grip-afghan-women-and-girls [<https://perma.cc/XSW4-RYG3>].

117. See USIP Taliban Decree Tracker, *supra* note 92.

118. *Taliban Edicts Against Afghan Women and Girls*, FEMINIST MAJORITY FOUND., <https://feminist.org/our-work/afghan-women-and-girls/taliban-edicts/> [<https://perma.cc/QYW7-GU6K>].

119. See USIP Taliban Decree Tracker, *supra* note 92.

120. *Afghanistan: Taliban Orders Women to Stay Home; Cover Up in Public*, U.N. NEWS (May 7, 2021), <https://news.un.org/en/story/2022/05/1117762> [<https://perma.cc/CZ49-6PQD>] (describing a Taliban decree on May 7th that women should only leave their houses in cases of necessity). Later in 2023, women were even banned from riding in the front of taxi cars and instructed to ride in the trunk of the vehicle so they are not seen by men. Sana Atef & Mahtab Safi, *Taliban Directive: Women Belong in a Taxi's Trunk, Not Its Passenger Seats*, ZAN TIMES (Aug. 14, 2023), <https://zantimes.com/2023/08/14/taliban-directive-women-belong-in-a-taxis-trunk-not-its-passenger-seats/> [<https://perma.cc/QK5Y-39DE>].

121. See Belquis Ahmadi & Mohammad Osman Tariq, *How the Taliban's Hijab Decree Defies Islam*, U.S. INST. PEACE (May 12, 2022), <https://www.usip.org/publications/2022/05/how-talibans-hijab-decree-defies-islam> [<https://perma.cc/V2JQ-4EQV>].

122. Christina Goldbaum, *Taliban Close Beauty Salons in Afghanistan*, N.Y. TIMES (July 25, 2023), <https://www.nytimes.com/2023/07/25/world/asia/taliban-beauty-salons-afghanistan.html> (last visited Nov. 1, 2024).

123. Sahar Halaimazi et al., *Inside Afghanistan's Gender Apartheid: Listen as Women Reveal the Impact of the Taliban's Oppressive Decrees*, ATL. COUNCIL, <https://www.atlanticcouncil.org/>

The decrees constitute a form of gender apartheid because they severely restrict women's mobility, appearance, and engagement in society. These measures undermine women's rights and freedoms by confining their movements, dictating their physical appearance, and limiting their public participation. Such controls not only reinforce dependency and invisibility but also strip women of their autonomy and voice, deepening systemic gender-based segregation and discrimination.

D. Employment Discrimination

Employment discrimination violates fundamental principles of international human rights law.¹²⁴ The UDHR emphasizes the right to work and prohibits discrimination in employment based on race, color, and sex.¹²⁵ Additionally, the ICESCR guarantees the right to work under just and favorable conditions without discrimination of any kind.¹²⁶ Moreover, the International Labour Organization ("ILO") conventions, such as the Discrimination (Employment and Occupation) Convention, provide specific measures to eliminate discrimination in employment and occupation.¹²⁷

The apartheid regime of South Africa systematically ignored human rights standards and implemented laws, enforcing job reservations and economic apartheid.¹²⁸ The government designed these legislative measures to restrict and segregate employment opportunities based on racial classifications.¹²⁹ The Mines and Works Act of 1911, for instance, limited specific jobs to white workers, creating a racially exclusive job market.¹³⁰ The Native Building Workers Act of 1951 extended these restrictions, further limiting employment prospects for Black South African individuals.¹³¹ Additionally, the Native Labour (Settlement of Disputes) Act of 1953 and the Industrial Conciliation

in-depth-research-reports/report/inside-afghanistans-gender-apartheid-listen-as-women-reveal-the-impact-of-the-talibans-oppressive-decrees/ [https://perma.cc/FS56-L45R].

124. UDHR, *supra* note 78, art. 23.

125. *Id.*

126. ICESCR, *supra* note 80, art. 7.

127. Int'l Lab. Org. [ILO], Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation art. 3, *opened for signature* June 25, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960).

128. *See* Bantu/Native Building Workers Act 27 of 1951 (S. Afr.); Reservation of Separate Amenities Act 49 of 1953 (S. Afr.).

129. *See* Bantu/Native Building Workers Act; Factories, Machinery and Building Works Act 22 of 1941 (S. Afr.).

130. Mines and Works Act 12 of 1911 (S. Afr.).

131. Bantu/Native Building Workers Act.

Act of 1956 institutionalized racial divisions in the workplace, preventing equitable resolution of labor disputes and reinforcing economic disparities.¹³² Together, these laws formed a comprehensive system that perpetuated job reservations, ensuring that certain occupations were exclusive to specific racial groups, thereby deepening economic segregation during the apartheid era in South Africa.

In contrast with South Africa's apartheid laws, which only segregated the workforce based on race, the Taliban issued a series of restrictive edicts on women's employment across diverse sectors, creating substantial barriers to their participation in the workforce and effectively prohibiting employment altogether based on gender.¹³³ In violation of UHRD and ICESCR, these measures included explicit bans on women pursuing specific professions, closing doors to numerous career paths in education, economic, and political spheres.¹³⁴ Later, the Taliban issued directives explicitly instructing all female employees of all sectors to stay at home, depriving them of the opportunity to contribute to the workforce, limiting their economic independence, and seriously impacting their families.¹³⁵ These restrictions not only curtailed the rights of women to choose their professions but also reinforced traditional gender roles by confining them to domestic spheres.¹³⁶ The Taliban's gender apartheid policies resulted in a severe setback to women's empowerment and economic autonomy, highlighting a concerning departure from the time before the Taliban takeover, when principles of gender equality and inclusivity that was creating a groundswell of change in Afghanistan.¹³⁷

132. Native Labour (Settlement of Disputes) Act 48 of 1953 (S. Afr.); Industrial Conciliation Act 28 of 1956 (S. Afr.).

133. Press Release, Off. of U.N. High Comm'r for Hum. Rts., Taliban Edicts Suffocating Women and Girls in Afghanistan: UN experts, U.N. Press Release (Jun. 19, 2023), <https://www.ohchr.org/en/press-releases/2023/06/taliban-edicts-suffocating-women-and-girls-afghanistan-un-experts> [<https://perma.cc/SZ4Q-7AS7>].

134. USIP Taliban Decree Tracker, *supra* note 92 (stating the Taliban decrees prohibiting women from employment in government and businesses); *see also* Ahmad Mukhtar, *Taliban Blocks Women from College Entrance Exams in Subjects Deemed "Too Difficult,"* CBS NEWS (Oct. 14, 2022, 9:07 AM), <https://www.cbsnews.com/news/taliban-blocks-women-college-entrance-exams-subjects-too-difficult/> [<https://perma.cc/Q3MQ-DKQ4>] (describing Taliban decree that blocks women from majoring in engineering, economics, veterinary medicine, agriculture, geology, and journalism).

135. Ahmadi & Worden, *supra* note 116; *see also* Bennoune, *supra* note 15, at 45 ("When women suffer, such as by being denied employment during an economic catastrophe, their families suffer too. The spillover effects of gender apartheid on families and the population at large are far-reaching, as in the case of racial apartheid.")

136. Ahmadi & Worden, *supra* note 116.

137. *Id.*

E. Access to Justice

In international human rights law, legal discrimination is strictly prohibited.¹³⁸ Various treaties and conventions, including the ICCPR and CERD, explicitly forbid discrimination in the enactment or application of laws.¹³⁹

In addition to institutionalizing racial segregation through discriminatory laws, the apartheid regime in South Africa prohibited certain legal rights and services for the Black majority, further violating universal international values and entrenching legal discrimination by.¹⁴⁰ The Suppression of Communism Act not only facilitated the suppression of political opposition but also curtailed legal services for individuals labeled as communist or anti-apartheid activists.¹⁴¹ This law restricted Black South Africans' ability to access legal representation and defend their rights, exemplifying how the legal system itself can be weaponized to marginalize and discriminate against targeted groups.¹⁴² The apartheid regime's systematic denial of legal services to those opposing its policies underscores the extent to which legal mechanisms were employed to perpetuate injustice and suppress dissenting voices, contributing to the broader framework of legal discrimination during that period.

After their takeover, the Taliban implemented a series of orders, in contradiction of ICCPR and CERD, impacting the legal landscape in Afghanistan that directly denies the legal rights of women.¹⁴³ These decrees, which exemplify a true form of gender apartheid, deny women equal access to the legal system and remove them from the legal profession altogether.¹⁴⁴ This impediment to legal access and legal practice

138. G.A. Res. 67/187, U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (Mar. 28, 2013).

139. ICCPR, *supra* note 95, art. 26; CERD, *supra* note 108.

140. See Population Registration Act 30 of 1950 § 1 (iii), (x), (xv) (S. Afr.) (providing the basic framework for apartheid by classifying all South Africans based on race).

141. Suppression of Communism Act 44 of 1950 (S. Afr.).

142. *Id.*

143. Rep. of the Special Rapporteur on the Situation of Human Rights in Afghanistan and the Working Group on Discrimination Against Women and Girls, ¶ 80, U.N. Doc A/HRC/53/21 (June 15, 2023) [hereinafter 2023 Report on Women and Girls in Afghanistan]; see also *Taliban Leader Orders Re-Evaluation of Court Cases Under New Regulations*, HASHT-E SUBH (Mar. 30, 2023), <https://8am.media/eng/taliban-leader-orders-re-evaluation-of-court-cases-under-new-regulations/> [<https://perma.cc/F769-Q6MT>] (stating that the re-evaluation of court cases could place any cases concerning women in jeopardy, especially if they were beneficial).

144. Ron Synovitz, *Judge, Jury, AND Executioner: Taliban Brings Afghanistan's Justice System Under Its Thumb*, RADIOFREEEUROPE RADIOLIBERTY (Dec. 1, 2021), <https://www.rferl.org/a/taliban-afghanistan-justice-system/31588972.html> [<https://perma.cc/TDM5-Y6CZ>]

exacerbates existing gender inequalities, limiting women's opportunities to appeal and seek justice if their basic right to education, employment, political participation, and overall autonomy has been violated.¹⁴⁵ These decrees manifested in several ways, including the invalidation of divorce cases decided during the previous Afghan republic era.¹⁴⁶ By doing so, the Taliban undermined all legal decisions made to protect women under the previous governance system and replaced them with their harsh interpretation of Sharia law that significantly affected women's lives.¹⁴⁷ This move not only disrupted the legal continuity but also imposed a strict domestic layer on women's suffering under Taliban gender apartheid policies.

While the majority of decrees ordered by the Taliban are against women, the Taliban re-tasked legal institutions and utilized state efficiency to target and suppress women.¹⁴⁸ They notably transformed the Attorney General's Office into the General Directorate for Monitoring and Follow-up of Decrees and Directives in order to maintain reinforcement of decrees against women.¹⁴⁹ This restructuring was a true element of gender apartheid execution and marked a significant shift in the legal system of Afghanistan, reflecting the Taliban's vision of misogynic governance under Sharia law.¹⁵⁰

F. Political Representation Discrimination

In international human rights law, political representation is considered a fundamental right essential for the functioning of democratic societies.¹⁵¹ Discrimination in political representation violates principles outlined in treaties like the ICCPR, which guarantees the right to participate in government, and the CEDAW, which specifically addresses gender-based discrimination in political life.¹⁵²

The South African apartheid regime actively preserved electoral arrangements to perpetuate an unequal political system against Black

(detailing that the Taliban has suspended all legal licenses and required renewal, while only opening the process to men meaning all legal credentials all removed from women).

145. See 2023 Report on Women and Girls in Afghanistan, *supra* note 143.

146. Susannah George, *Afghan Women Who Were Divorced Under Prior Government Fear for Their Status*, WASH. POST (Mar. 7, 2023, 9:00 AM), <https://www.washingtonpost.com/world/2023/03/04/afghanistan-taliban-women-marriage-divorce> [https://perma.cc/QKM4-36YN].

147. *Id.*

148. 2023 Report on Women and Girls in Afghanistan, *supra* note 143, ¶ 19.

149. *Id.*

150. Synovitz, *supra* note 144.

151. UDHR, *supra* note 78.

152. ICCPR, *supra* note 95; CEDAW, *supra* note 27.

individuals, starting from the creation of the union of South Africa.¹⁵³ The South Africa Act of 1909, which consolidated the four South African colonies into a unitary state, enshrined electoral arrangements that restricted political representation for Black people.¹⁵⁴ This legislation upheld a discriminatory political structure¹⁵⁵ that continued during the apartheid era, where a series of acts were enacted that further maintained the disenfranchisement of Black voters and solidified the regime's discriminatory political agenda.¹⁵⁶ These acts include separating out European and non-European voters,¹⁵⁷ establishing independence of the native homelands to strip Black people of their South African citizenship,¹⁵⁸ and prohibiting racially mixed political parties.¹⁵⁹ The preservation of such electoral arrangements became a cornerstone of the apartheid system, reflecting the regime's commitment to sustaining racial inequality in the political arena.

Consecutively, the Taliban enacted policies that severely curtailed women's political participation and influence in Afghanistan.¹⁶⁰ In a move reminiscent of the apartheid regime's discriminatory practices, the Taliban formed an all-men cabinet of old guard members, effectively excluding women from key decision-making positions within the government and public offices.¹⁶¹ This deliberate exclusion extended as the Taliban dismantled the Ministry of Women Affairs, eliminating a dedicated governmental body focused on addressing women's political decision-making.¹⁶² This systematic removal of women from political participation demonstrated the Taliban's intent to consolidate power within a male-centric framework.¹⁶³ Their policies mirrored the discriminatory tactics employed by the apartheid regime in South Africa,

153. See South Africa Act 1909, 9 Edw. 7 c. 9. pt. IV ¶ 24 (Eng.).

154. *Id.*

155. *Id.* ¶ (26) (d) (stating that senators must be a "British subject of European descent").

156. See Separate Representation of Voters Act 46 of 1951 (S. Afr.); Promotion of Bantu Self-Government Act 46 of 1959 (S. Afr.); Separate Representation of Voters Amendment Act 46 of 1968 (S. Afr.); Prohibition of Political Interference Act 51 of 1968 (S. Afr.).

157. Separate Representation of Voters Act.

158. Promotion of Bantu Self-Government Act.

159. Prohibition of Political Interference Act.

160. 2023 Report on Women and Girls in Afghanistan, *supra* note 143, ¶¶ 24, 28.

161. Kathy Gannon, *Taliban Form All-Male Afghan Government of Old Guard Members*, ASSOC. PRESS (Sept. 7, 2021, 11:03 PM), <https://apnews.com/article/middle-east-pakistan-afghanistan-arrests-islamabad-d50b1b490d27d32eb20cc11b77c12c87> [<https://perma.cc/8LPQ-8VFS>].

162. *Taliban Replace Ministry for Women with Guidance Ministry*, AL JAZEERA (Sept. 18, 2021), <https://www.aljazeera.com/news/2021/9/18/taliban-replace-ministry-for-women-with-guidance-ministry> [<https://perma.cc/NDK6-6YGH>].

163. Bennoune, *supra* note 15, at 38.

emphasizing the commonality in the suppression of specific groups in the pursuit of their political agenda.

G. Restrictions on Movement

Freedom of movement is also guaranteed by international law and enshrined in documents like the UDHR and ICCPR.¹⁶⁴ The South African apartheid regime violated these universal standards by enforcing laws that restricted the movement of people based on race, including limitations on where Black South African individuals could live and travel.¹⁶⁵ The Group Areas Act of 1950 designated legal residential zones based on race, leading to the forceful displacement of entire communities.¹⁶⁶ The Population Registration Act of 1950 allowed the government to bureaucratically determine the racial classification of its citizens, and together with the Pass Laws, it controlled the internal movement of Black individuals.¹⁶⁷ The Reservation of Separate Amenities Act of 1953 permitted the segregation of public spaces, vehicles, and services by race without the requirement to provide equal facilities to all racial groups.¹⁶⁸ These Acts essentially institutionalized discrimination, allowing for the creation of separate and unequal spaces for different races and perpetuating a deeply entrenched system of racial hierarchy.

Similar to the oppressive movement practices of the South African apartheid regime, the Taliban implemented restrictive measures that severely curtailed women's ability to travel.¹⁶⁹ The Taliban's gendered hierarchy resulted in restrictions on women's mobility, including imposing bans on long-distance travel without a male relative.¹⁷⁰ Their order dictates that women must be accompanied by close male relatives if traveling for more than seventy-two kilometers, drawing punishment for any disobedience.¹⁷¹ Eventually, the Taliban banned women from

164. UDHR, *supra* note 78, art. 13; ICCPR, *supra* note 95, art. 12.

165. See Group Areas Act 41 of 1950 (S. Afr.) (restricting residence in urban areas on the grounds of race).

166. *Id.*

167. Population Registration Act 30 of 1950 (S. Afr.); Natives (Abolition of Passes and Co-Ordination of Documents) Act 67 of 1952 (S. Afr.) (requiring all "non-white" people to fingerprint and carry "reference books" with them everywhere).

168. Reservation of Separate Amenities Act 49 of 1953 (S. Afr.).

169. USIP Taliban Decree Tracker, *supra* note 92.

170. *Id.*

171. *No Long-Distance Travel for Women Without Male Relative: Taliban*, AL JAZEERA (Dec. 26, 2021), <https://www.aljazeera.com/news/2021/12/26/afghanistan-long-distance-travel-women-without-male-escort-taliban> [<https://perma.cc/7Y7S-CTF8>].

leaving their homes altogether unless in case of an emergency.¹⁷² These measures are in contradiction with international human rights law and enforce a patriarchal system that seeks to control and restrict women's independence on a daily basis.¹⁷³

Additionally, the Taliban enforced limitations on the use of public transport, further curtailing their freedom of movement within society.¹⁷⁴ These restrictions mirrored the apartheid-era laws that dictated where certain racial groups could not live and travel.¹⁷⁵ The comprehensive and systemic nature of these mobility restrictions exemplified the Taliban's intent to assert dominance and control over women's lives and curb their autonomy.

H. Legalized Discrimination in Marriages

Legalized discrimination in marriages refers to laws or practices that permit unequal treatment based on gender, religion, ethnicity, or other factors within the institution of marriage. International human rights law, including treaties like the CEDAW, CRC, and ICCPR, prohibits such discrimination and affirms the right to marry and find a family without any distinction.¹⁷⁶

The apartheid regime of South Africa enacted marriage restriction laws forbidding extramarital relationships and marriages between people of different races.¹⁷⁷ By criminalizing unions that crossed racial boundaries, the apartheid laws aimed to enforce racial segregation rigidly, maintaining a strict social hierarchy that denied people the fundamental right to choose their life partners freely.¹⁷⁸

The Immorality Act of 1927 marked the initial step in criminalizing interracial relationships, and subsequent legislation further entrenched these discriminatory practices.¹⁷⁹ The Prohibition of Mixed Marriages Act of 1949 specifically targeted marriages between

172. *Afghanistan: Taliban Orders Women to Stay Home; Cover Up in Public*, U.N. NEWS (May 7, 2021), <https://news.un.org/en/story/2022/05/1117762> [<https://perma.cc/CZ49-6PQD>].

173. 2023 Report on Women and Girls in Afghanistan, *supra* note 143, ¶¶ 51–53.

174. *Taliban Resurrects Gender Segregation in Public Offices, Transport in Afghanistan*, RADIOFREEEUROPE RADIOLIBERTY (Mar. 16, 2022), <https://www.rferl.org/a/taliban-gender-segregation-afghanistan/31756292.html> [<https://perma.cc/7GWZ-S66W>].

175. *See generally* Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952 (S. Afr.).

176. CEDAW, *supra* note 27, art. 16; UDHR, *supra* note 78, art. 16; ICCPR, *supra* note 95, art. 23.

177. *See, e.g.*, Prohibition of Mixed Marriages Act 55 of 1949 (S. Afr.).

178. *A History of Apartheid in South Africa*, S. AFR. HIST. ONLINE, <https://www.sahistory.org.za/article/history-apartheid-south-africa> [<https://perma.cc/L885-PW3N>].

179. Immorality Act 5 of 1927 (S. Afr.).

people of different races, making such unions illegal and subject to legal penalties.¹⁸⁰ The Immorality Amendment Act of 1950 reinforced these restrictions by further criminalizing interracial relationships and strengthening the apartheid regime's control over the personal lives of individuals.¹⁸¹

In line with the CRC, child marriage is considered to be a form of forced marriage if one or both parties have not expressed full, free, and informed consent.¹⁸² The Taliban, in a manner parallel to the oppressive marriage restriction laws enacted during South Africa's apartheid era, imposed severe constraints on women's marital choices.¹⁸³ Under the new rule, girls as young as twelve years old can be given in marriage to a man of any age against their will. As a result, many families are marrying their daughters voluntarily to avoid a forced marriage to Taliban fighters.¹⁸⁴

Under the Taliban's restrictive policies, the age at which women and girls could legally marry became uncertain with the removal of protective measures that previously guaranteed the maturity and well-being of those women and girls entering into marriage.¹⁸⁵ This removal of legal safeguards has left women and girls vulnerable to forced marriages, undermining their autonomy and basic rights.¹⁸⁶ Furthermore, the Taliban officially opposed extramarital relationships and defined it as adultery, subjecting individuals involved to draconian punishments, including the possibility of death.¹⁸⁷

180. Prohibition of Mixed Marriages Act.

181. Immorality Amendment Act 21 of 1950 (S. Afr.).

182. *Child and Forced Marriage, Including in Humanitarian Settings*, U.N. OFF. OF HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/en/women/child-and-forced-marriage-including-humanitarian-settings> [<https://perma.cc/8U4T-T2JE>]. See generally CRC, *supra* note 81.

183. METRA MEHRAN, RECOGNITION OF GENDER APARTHEID IN AFGHANISTAN JUSTIFIED 1 (Afg. Rsch. Network, June 2023), https://peacerep.org/wp-content/uploads/2023/06/PeaceRep-Afghanistan-Research-Network-Reflection_06.pdf [<https://perma.cc/7LJR-JYGN>].

184. See Abubakar Siddique, *Afghans Increasingly Marrying Off Young Daughters to Avoid Forced Unions with Taliban*, RADIOFREEEUROPE RADIOLIBERTY (Dec. 1, 2022), <https://www.rferl.org/a/afghanistan-early-marriage-avoid-taliban/32157525.html> [<https://perma.cc/DZA2-HZGP>]. In an interview with a twelve-year-old she revealed that she married an older man despite not wanting to marry; she explained: "[M]y father warned me that if I refused to marry, the Taliban would force him to marry me to one of their fighters." *Id.*

185. Cristina María Zamora Gómez, *Forced Marriage of Afghan Girls and the Bifurcated Approach for Defining Persecution*, VÖLKERRECHTSBLOG (Sept. 3, 2023), <https://voelkerrechtsblog.org/forced-marriage-of-afghan-girls-and-the-bifurcated-approach-for-defining-persecution/> [<https://perma.cc/B3DU-7S6K>].

186. Siddique, *supra* note 184.

187. See, e.g., Ruchi Kumar, *Taliban Affirms that Stoning Will Be Punishment for Adulterers — Especially Women*, NPR (May 8, 2024, 8:45 AM), <https://www.npr.org/sections/goatsandsoda/2024/05/08/1242306960/taliban-affirms-that-stoning-will-be-punishment-for-adulterers-especially-women> [<https://perma.cc/VY77-64QW>].

Taliban's strict enforcement of moral and marital codes further restricts the personal freedoms of women, symbolizing gender apartheid and echoing the discriminatory practices employed during the apartheid regime in South Africa.¹⁸⁸ The parallels between these historical and contemporary instances underscore the recurrence of oppressive measures aimed at controlling individuals' marriage choices.

I. Land Ownership and Property Rights

Land ownership and property rights are fundamental aspects of individual autonomy and economic security. International human rights law, including the UDHR and subsequent treaties like the ICESCR, recognizes the right to property as a fundamental human right.¹⁸⁹ Denying women equal rights to own or inherit property contravenes the right to non-discrimination and equality before the law as outlined in CEDAW.¹⁹⁰

In violation of international norms, South Africa's apartheid regime enacted laws that limited land ownership by Black people to a small percentage of the total land area. The Natives Land Act of 1913 limited land ownership by Black people to eight percent of the land area of South Africa.¹⁹¹ The Natives Land Act of 1913 and the Native Trust and Land Act of 1936, further entrenched systemic inequality and set the stage for long-lasting socio-economic disparities because the acts imposed strict racial segregation in land ownership.¹⁹² The deliberate allocation of a disproportionately small portion of land to the Black population was a strategic move by the apartheid government to consolidate power and resources within the white minority.

Subsequently, the Taliban, through their fundamentalist interpretation of Sharia law, imposed severe restrictions on women's property rights.¹⁹³ Under the Taliban's rule, widows and female-headed households face significant challenges in exercising their property

188. *The Taliban's Oppression of Women Is Gender Apartheid*, GEO. INST. WOMEN, PEACE, & SEC. (Dec. 5, 2023), <https://giwps.georgetown.edu/the-talibans-oppression-of-women-is-gender-apartheid/> [https://perma.cc/NR7P-AM3Y].

189. UDHR, *supra* note 78, art. 17; ICESCR, *supra* note 80, art. 11(1).

190. CEDAW, *supra* note 27, art. 16(1)(h).

191. *1913 Natives Land Act Centenary*, S. AFR. GOV. (June 2013), <https://www.gov.za/news/events/commemorative-events/1913-natives-land-act-centenary> [https://perma.cc/SYT7-37UP]; *see also* Natives Land Act 27 of 1913 (S. Afr.).

192. *1913 Natives Land Act Centenary*, *supra* note 191; Native Trust and Land Act 18 of 1936 (S. Afr.).

193. Rina Chandran, *Afghan Women's Hard-Won Land Rights Seen at Risk Under Taliban*, REUTERS (Aug. 25, 2021, 12:05 AM), <https://www.reuters.com/article/afghanistan-landrights-heritage-idUSL8N2PP0EN/> [https://perma.cc/JD5X-BUWS] (explaining that

rights.¹⁹⁴ The requirement of a male companion for even basic activities, such as stepping outside the home or into a court, renders it practically impossible for these women to assert their rights to property.¹⁹⁵ In Afghanistan, there are an estimated two million widows, in addition to millions of women living independently, who have no access to their legal rights to do even basic tasks due to a lack of a male chaperone to accompany them, as required by the Taliban.¹⁹⁶ The Taliban's rigid adherence to their interpretation of Sharia law exacerbates the situation, leaving women destitute and, in some cases, coercing women into marriage solely to access their rights.¹⁹⁷ According to the Taliban interpretation, the inheritance of assets for a married couple is unequal depending on who is the surviving spouse, and a daughter is granted less than what her brother's inheritance is from their father.¹⁹⁸ Women cannot safeguard even their narrow property rights under Taliban restrictions on women's mobility, employment, and public service.

Overall, the comparisons drawn above, ranging from the prohibition and segregation of education and employment to limitations on marriage and access to public spaces, ownership, and political participation, underscore the similarity and persistent consequences of discriminatory policies that aim to relegate certain groups of individuals to subordinate level of the society in both contexts of South African apartheid and Taliban gender apartheid.¹⁹⁹ Whether examining the historical backdrop of South Africa or the present-day struggles of women of Afghanistan living under Taliban rule, these parallels illuminate the enduring impact of legal, political, and systematic discrimination on these groups due to their identity.²⁰⁰ Therefore, the Taliban's implementation of institutionalized discriminatory orders by utilizing state power and efficiency qualifies it to be labeled as gender apartheid.²⁰¹

any widows, divorced women, or female-led households that owned property titles would likely lose their rights).

194. *Id.*

195. *Id.*

196. Naquiba Barekzai et al., 'All Doors Are Closed' for Single and Unaccompanied Afghan Women Under the Taliban, RADIOFREEEUROPE RADIOLIBERTY (Jan. 31, 2024), <https://www.rferl.org/a/afghanistan-taliban-restrictions-single-women-widows/32799903.html> [<https://perma.cc/AJJ2-TFCD>].

197. Heather Barr, *Afghanistan: Taliban Deprive Women of Livelihoods, Identity*, HUM. RTS. WATCH (Jan. 18, 2022, 12:01 AM), <https://www.hrw.org/node/380954/printable/print> [<https://perma.cc/Z2KH-UDN5>].

198. Afghanistan 2022 Human Rights Report, *supra* note 8, at 32.

199. *The Taliban's Oppression of Women Is Gender Apartheid*, *supra* note 188.

200. *Id.*; Bennoune, *supra* note 15, at 24.

201. *See* Bennoune, *supra* note 15, at 25.

III. The Uphill Battle Toward Criminalization of Gender Apartheid

South Africa during apartheid and the current situation today in Afghanistan demonstrate similarities with the regimes' approach to edicts, parallel institutionalized mechanisms, and akin violations of universal values. These parallels are substantial and justify the rationale behind the codification of gender apartheid. Equivalently, the contexts of South African apartheid and Taliban rule employ comparable legal measures and state efficiency to suppress distinct groups of people through education segregation, banning and detention without trial, segregation in public spaces, employment, legal and political representation discrimination, restrictions on movement, legalized discrimination in marriages, and property rights. The comparison also reveals that both regimes similarly violated the universal human rights conventions of UDHR, ICCPR, CEDAW, CAT, CDE, ICERD, and CRC.²⁰² Nonetheless, a marked disparity underscores that gender discrimination and gender apartheid lack the same degree of condemnation as their racial counterpart and requires a comprehensive dynamism behind its codification and criminalization.²⁰³

Many scholars and government leaders resist the codification because the term "apartheid" carries a powerful negative connotation.²⁰⁴ Their resistance perpetuates the rationalization of the systematic subjugation of women involving arguments of cultural relativism, patriarchal perspectives, existing frameworks, and practical challenges. These issues contribute to the uphill battle toward the criminalization of gender apartheid.²⁰⁵

A. Gender Apartheid and Cultural Relativism

Cultural relativism is often invoked in discussions surrounding human rights and international law. The concept of cultural relativism

202. See generally CEDAW, *supra* note 27; UDHR, *supra* note 78; CRC, *supra* note 81; CDE, *supra* note 82; ICCPR, *supra* note 95; CAT, *supra* note 96; CERD, *supra* note 139; see also Bennoune, *supra* note 15, at 60.

203. See *The Taliban's Oppression of Women Is Gender Apartheid*, *supra* note 108.

204. U.N. Hum. Rts. Council, Human Rights Council Hears that the Severity of Violations Against Women and Girls in Afghanistan Might Amount to Crimes Against Humanity, and that Nearly 18 Million Individuals Face Acute Hunger in Sudan Amidst Looming Famine, U.N. Doc HRC24.012E (June 18, 2024), <https://www.un Geneva.org/en/news-media/meeting-summary/2024/06/le-conseil-des-droits-de-lhomme-est-alerte-sur-le-systeme#:~:text=The%20report%20found%20that%20the,amounting%20to%20crimes%20against%20humanity> [https://perma.cc/TMX9-WP2N].

205. See generally Bennoune, *supra* note 15, at 54–56, 71–81.

suggests that ethical standards are culturally determined and, therefore, must be valued over international standards.²⁰⁶ The same patterns of oppression and domination against women that are recognized as international crimes governments have justified as spurred by cultural or religious preservations.²⁰⁷ The Taliban argues that their actions are acceptable under Pashtun culture and Islamic fundamentalism;²⁰⁸ through this lens, women are not victims of the Taliban rule but violators of cultural norms.²⁰⁹

Some nations may view the imposition of gender apartheid laws as a violation of their cultural sovereignty as a form of “cultural imperialism.”²¹⁰ Critics believe that codifying gender apartheid could undermine national sovereignty by imposing a “Western” or internationalist understanding of gender equality, which may conflict with local traditions and customs.²¹¹ This perspective suggests that efforts to codify gender apartheid could face resistance from states that perceive such measures as infringing on cultural or religious norms.

However, the argument of cultural relativism overlooks the fundamental rights of women and girls, which are non-negotiable under international human rights law.²¹² Although not explicitly stated in the UDHR,²¹³ cultural practices cannot justify gross human rights violations, including those targeting women based solely on gender.²¹⁴

206. See *Cultural Relativism*, CARNEGIE COUNCIL FOR ETHICS IN INT’L AFFS., <https://www.carnegiecouncil.org/explore-engage/key-terms/cultural-relativism> [https://perma.cc/4SZL-3G7V].

207. Bennoune, *supra* note 15, at 71–72.

208. Omar Sadr, *Gender Apartheid and Cultural Relativism Under the Taliban and Iranian Regimes*, JADALIYYA (Sept. 11, 2023), <https://www.jadaliyya.com/Details/45300> [https://perma.cc/YH5M-HP8K].

209. 2023 Report on Women and Girls in Afghanistan, *supra* note 143, at ¶ 68.

210. Lan Cao, *Weaponizing Culture to Undermine International Women’s Rights*, 73 HASTINGS L.J. 233, 236 (2022). Cultural traditionalists deem challenging such oppressive norms wrong and illegitimate and insulate changes in the name of cultural diversity, even if these norms are practices that curtail women’s autonomy, mobility, freedom, or equality. Despite claims to the contrary, it is the cultural traditionalists who are in fact in favor of cultural homogeneity (one authentic culture), ironically defending homogeneity and so-called purity using the language of cultural diversity. *Id.* at 292–93.

211. *Id.*; see also ABDULLAHI AHMED AN-NA’IM, HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 4 (1992).

212. See Cao, *supra* note 210, at 233; Press Release, General Assembly, Relativist Claims on Culture Do Not Absolve States from Human Rights Obligations, Third Committee Expert Says as Delegates Denounce Country-Specific Mandates, U.N. Press Release GA/SHC/4241 (Oct. 23, 2018).

213. See UDHR, *supra* note 78.

214. Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *Rep. on Cultural Rights*, ¶ 56, U.N. Doc. A/67/287 (Aug. 10, 2012).

Cultural diversity must be acknowledged and respected, but it should not upend universal standards of human rights and humanitarian law. The notion of cultural relativism does not provide a legitimate defense for actions that violate universally recognized human rights.²¹⁵ These rights are inherent to all individuals, and they must be protected and upheld regardless of cultural or religious boundaries.

B. Patriarchal Justifications

Other critics argue that gender-based discrimination is insignificant or potentially justified.²¹⁶ As a result, they may object to applying the term “apartheid” to situations where women are the victims of such discrimination.²¹⁷ Moreover, due to the consecutive predominance of male control in political arenas both nationally and internationally, issues concerning women are inherently undervalued and excused.²¹⁸ The reasoning behind this perspective is that since men typically do not experience sex discrimination, domestic violence, or sexual degradation and related violence, these concerns are often relegated to a distinct sphere and tend to be overlooked.²¹⁹ This stands in stark contrast to the vigorous international condemnations of racial discrimination, which is experienced by both men and women and potentially increased the political attention to the Apartheid in South Africa.²²⁰

Additionally, the South African regime stood alone in its explicit justification for its draconian actions during the apartheid era.²²¹ In contrast, some elements of the Taliban ideology are practiced to some extent in many neighboring Middle East and North African countries such as Iran, Pakistan, Saudi Arabia, and the United Arab Emirates.²²² This trend indicates that, unlike the South African regime, the Taliban’s ideological interpretation has found some sympathizers beyond the

215. See Bennoune, *supra* note 15, at 72.

216. See *supra* Section III.A. See generally U.N. ESCOR, 68th Sess., 2d mtg., U.N. Doc WOM/2231 (Mar. 11, 2024).

217. Mayer, *supra* note 23, at 247.

218. See Razan Masad, *The Struggle for Women in Politics Continues*, U.N. DEV. PROGRAMME (Mar. 13, 2020), <https://www.undp.org/blog/struggle-women-politics-continues> [<https://perma.cc/2FQE-EZ9N>].

219. Mayer, *supra* note 23, at 247.

220. *Id.*; see Verveer et al., *supra* note 9.

221. Catherine Barnes, *International Isolation and Pressure for Change in South Africa*, CONCILIATION RES., Feb. 2008, at 1, 36–38.

222. See, e.g., Heather Barr, *The Taliban and the Global Backlash Against Women’s Rights*, GEO. J. INT’L. AFFS. (Feb. 6, 2024), <https://gjia.georgetown.edu/2024/02/06/the-taliban-and-the-global-backlash-against-womens-rights/> [<https://perma.cc/56GT-28DC>].

borders of Afghanistan.²²³ Therefore, the long-standing perspective of the international community to treat racial discrimination as particularly heinous while downgrading the seriousness of gender apartheid complicates the efforts to codify gender apartheid.²²⁴ However, as scholar Professor Karima Bennoune acknowledges, “[T]he failure to employ a heightened concept and an enhanced response to a regime whose well-known policies are this relentlessly misogynistic sends a terrible message to women everywhere that their rights do not matter.”²²⁵ Action is critical because “patriarchy cannot be justified or defended by referencing the very patriarchal culture that has supported patriarchy itself.”²²⁶

C. Sufficiency of Existing Frameworks

Another key counterargument to codifying gender apartheid is that the current international legal framework already addresses gender discrimination sufficiently.²²⁷ For instance, instruments like the CEDAW provide mechanisms for addressing gender-based injustices.²²⁸ Critics argue that adding gender apartheid as a distinct crime is redundant and potentially unnecessary, as existing conventions already aim to protect women’s rights on a global scale.²²⁹ The issue, they assert, lies more in the lack of enforcement of these frameworks rather than the need for additional legal instruments, and additional efforts may further dilute pre-existing efforts.²³⁰

However, while CEDAW and other frameworks provide protections for individuals, they are often fragmented and lack the enforcement mechanisms needed to address systemic issues like gender apartheid. The creation of a specific crime for gender apartheid would bring

223. Verveer et al., *supra* note 9.

224. Barr, *supra* note 222.

225. Bennoune, *supra* note 15, at 59.

226. Cao, *supra* note 210, at 276.

227. See, e.g., Off. of the U.N. High Comm’r for Hum. Rts., Using the International and Regional Legal Framework to Stop All Forms of Violence Against Women and Girls (Mar. 8, 2022), <https://www.ohchr.org/en/statements/2022/03/using-international-and-regional-legal-framework-stop-all-forms-violence-against> [<https://perma.cc/FP27-GHYK>].

228. *Id.*; Elsa Shalina Abdullah, Abstract, *Examining Both Sides: Perspectives on Codification of Gender Apartheid*, CAMBRIDGE INT’L L. BLOG (Jul. 17, 2024), <https://cilj.co.uk/2024/07/17/examining-both-sides-perspectives-on-codification-of-gender-apartheid/> [<https://perma.cc/FMU5-AB4F>].

229. *Id.*; see also Gender Apartheid and Gender Persecution, *supra* Section II.D.

230. See Paulina Montez, Abstract, *Women’s Rights Are Human Rights: CEDAW’s Limits and Opportunities*, BERKELEY J. INT’L L. BLOG (Apr. 4, 2021), <https://www.berkeleyjournalofinternationallaw.com/post/women-s-rights-are-human-rights-cedaw-s-limits-and-opportunities> [<https://perma.cc/8PB6-8JD8>].

greater attention to these issues and compel states to act instead of relying on preexisting instruments that have not hindered the egregious actions.²³¹ Additionally, the crime of race-based apartheid was codified and existed alongside the crime of persecution on the grounds of race in the Rome Statute, demonstrating that additional definitions fighting similar injustices are appropriate and have already existed.²³²

D. Practical Challenges and Diplomatic Consensus

One of the other barriers to codification is based on the practicality of codifying gender apartheid.²³³ Critics argue that creating a new international legal category would require a lengthy diplomatic process and advocates might struggle to gain global consensus.²³⁴ They contend that rather than focusing on codification, efforts should be directed toward reinforcing existing legal tools and improving the enforcement of current international law.²³⁵

Diplomatic negotiations are undoubtedly complex, but codifying gender apartheid will create a clearer legal standard, offering stronger avenues for accountability. Securing international cooperation is necessary to deter and prevent gender-based oppression, even in states resistant to change.

While all of these counterarguments raise valid concerns, they ultimately highlight why it is crucial to codify gender apartheid. Women around the world suffer from severe systematic discrimination, particularly in countries like Afghanistan, where they are denied their basic rights despite comprising half of the population.²³⁶

International human rights law also lacks effective mechanisms to hold perpetrators of women's rights violations accountable.²³⁷ CEDAW, as the only crucial international measure to protect women's rights, does not impose criminal sanctions for gender discrimination.²³⁸ Instead, it provides guidance for member states to address discrimination through policy measures.²³⁹ International law does not explicitly

231. Joint Call to Amend CAH, *supra* note 52.

232. *Id.*

233. Abdullah, *supra* note 228.

234. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 199 (2005).

235. *Id.* at 195.

236. U.N. GA, 78th Sess., 9th & 10th mtg., U.N. Doc. GA/SHC/4376 (Oct. 4, 2023).

237. See, e.g., Navanethem Pillay, *Establishing Effective Accountability Mechanisms for Human Rights Violations*, 49 U.N. CHRON. 8, 11 (2012).

238. CEDAW, *supra* note 27, art. 2; see Sally Engle Merry, *Constructing a Global Law-Violence Against Women and the Human Rights System*, 28 L. & SOC. INQUIRY 941, 942–43 (2003).

239. CEDAW, *supra* note 27, arts. 2, 3.

denounce gender apartheid and pre-existing instruments of human rights law and non-discrimination norms are useless in the face of gender apartheid.²⁴⁰ The term gender apartheid, which commonly applies to the Taliban's policies, should be formally codified in international human rights law to rectify the imbalance and lack of accountability in addressing the gender counterpart of racial apartheid.²⁴¹

Gender apartheid codification in the draft articles on crimes against humanity would fill the existing accountability gap in international law, equipping the international community with a stronger accountability tool to tackle the totality of ongoing gender-based systematic oppression and domination, including in Afghanistan.

Conclusion

Broadening the definition of the crime of apartheid in international legal frameworks to include gender would address and highlight the lived experiences of women and girls under institutionalized regimes of systematic domination and oppression.

The international response thus far has been disjointed and incoherent, reflecting a disturbing lack of purpose.²⁴² This failure is not only perpetuating the suffering of Afghan women but also rewarding terrorism by diluting women's rights into "basic" and "non-basic" categories and undermining the rule of law by using women as bargaining chips.

For instance, despite the U.N. sanctions against the Taliban, there has been no material impact: Taliban leaders have been able to travel freely outside of Afghanistan while restricting women's movements at home.²⁴³ While no country formally recognizes the Taliban, it is concerning that two permanent members of the U.N. Security Council, Russia and China, have accepted Taliban-appointed diplomats at their

240. Press Release, Off. of U.N. High Comm'r for Hum. Rts., Gender Apartheid Must Be Recognised as a Crime Against Humanity, UN Experts Say, U.N. Press Release (Feb. 20, 2024), <https://www.ohchr.org/en/press-releases/2024/02/gender-apartheid-must-be-recognised-crime-against-humanity-un-experts-say> [<https://perma.cc/L497-X8L7>]; Bennoune, *supra* note 15, at 26.

241. Verveer et al., *supra* note 9. "Gender apartheid' can have symbolic as well as legal value, both shaming countries that enable it and eventually facilitating international legal accountability for its perpetrators." *Id.*

242. See Bennoune, *supra* note 15, at 4–5; *Afghanistan: Three Years of Taliban Rule and International Inaction Have Left Afghan Community with Little Hope*, *supra* note 24.

243. *Sanctions Are a Key Tool to Support Afghan Women and Girls*, GEO. INST. WOMEN, PEACE & SEC. BLOG (Sept. 10, 2024), <https://giwps.georgetown.edu/sanctions-are-a-key-tool-to-support-afghan-women-and-girls/> [<https://perma.cc/K59C-LVNU>].

embassies.²⁴⁴ This recognition weakens the resolve of the international community and sends a dangerous message: that women's rights are negotiable and that the fight against terrorism can be sidestepped when it serves political purposes.

Moreover, the international discourse surrounding Afghan women's rights has become dangerously functionalist, focusing on basic rights rather than the full spectrum of rights to which women are entitled as equal human beings.²⁴⁵ This flawed approach devalues women's rights, making them conditional and vulnerable to downgrades if they do not serve a perceived functional need. As a result, many discussions of the Taliban's violations have been relegated to footnotes, sidelining the enforcement of women's rights.

Words, legal instruments, and commitments mean nothing without decisive action. The international community, particularly the U.N., must take a firm and principled stance and codify gender apartheid in the CAH. Anything less than unequivocal action will be a de facto endorsement of the Taliban's regime of gender apartheid. Therefore, the call to codify gender apartheid as a crime against humanity has never been more urgent.

It is crucial to incorporate the definition of gender apartheid into international criminal law and enforce it through the ICC. The criminalization of gender apartheid is not only crucial for Afghanistan but as expressed by human rights activist Zubaida Akbar to the U.N., "[I]f you do not defend women's rights here [in the CAH], you have no credibility to do so anywhere else."²⁴⁶ Akbar's comments refer not only to the entire U.N. system's dependability but the dependability of all international mechanisms built to protect women.²⁴⁷ If the U.N. and other relevant international mechanisms fail to address women's rights in Afghanistan at the greatest time of Afghan women's need, their credibility to do so anywhere else will be impaired.²⁴⁸

Each moment the world hesitates, the Taliban solidifies their position, moving from de facto rulers to potentially gaining de jure

244. See Bennoune, *supra* note 15, at 46, 48.

245. *The Taliban's Oppression of Women Is Gender Apartheid*, *supra* note 188.

246. Vrinda Narain, *The Taliban's War on Women in Afghanistan Must Be Formally Recognized as Gender Apartheid*, CONVERSATION (Aug. 8, 2023), <https://theconversation.com/the-talibans-war-on-women-in-afghanistan-must-be-formally-recognized-as-gender-apartheid-210688> [<https://perma.cc/VHX3-8TS7>].

247. *Id.*

248. See, e.g., Edith M. Lederer, *UN Envoy Defends Failure to Include Afghan Women in Upcoming Meeting with the Taliban in Qatar*, ASSOC. PRESS (June 21, 2024), <https://apnews.com/article/un-afghanistan-taliban-women-girls-education-rights-88e7f5aadb25439b-328c90283ae6ab5a> [<https://perma.cc/2NC4-A66L>].

status. The recent statement by U.N. Deputy Secretary-General Amina Mohammed, which suggested “baby steps” towards recognizing the Taliban, is deeply concerning.²⁴⁹ Such rhetoric undermines the U.N.’s authority and signals to the Taliban that their gender apartheid will go unchallenged. The stakes could not be higher: As a woman interviewed by the U.N. noted, “[W]e have come to the realization it was their intention to slowly erase women.”²⁵⁰

The legal dilemmas posed by the situation in Afghanistan require legal solutions. The international community needs clear and specific enforcement procedures integrated into its legal frameworks. The Apartheid Convention of 1973 is a possible template for this effort, offering lessons that can be adapted to confront the Taliban’s systematic oppression of women.²⁵¹

Now is the time for the international community to match rhetoric with action and mobilize the full spectrum of global governance to recognize and end gender apartheid in Afghanistan. Regardless of the international legal community’s response to the Taliban’s ongoing subjugation of women, history has inevitably exposed that the next chapter of apartheid is gender apartheid.

249. Patricia Gossman, *Afghanistan Special Envoys Should Hold Firm Line on Rights*, HUM. RTS. WATCH (Apr. 26, 2023), <https://www.hrw.org/news/2023/04/26/afghanistan-special-envoys-should-hold-firm-line-rights> [<https://perma.cc/QS2N-XY4W>].

250. 2023 Report on Women and Girls in Afghanistan, *supra* note 143, ¶ 22.

251. ICSPCA, *supra* note 20.