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Holding the Taliban Accountable for Gender Persecution: The Search for New Accountability Paradigms under International Human Rights Law, International Criminal Law and Women, Peace, and Security

Rangita de Silva de Alwis 

University of Pennsylvania Carey Law School, Philadelphia, Pennsylvania, United States
Email: rdesilva@law.upenn.edu

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Abstract

In this paper, I will examine the legal standards of gender persecution and the evolving descriptor *gender apartheid* as a way to describe the status of women in Afghanistan. The paper also examines other complementary forms of legal accountability procedures to vindicate Afghan women's rights and hold perpetrators accountable under crimes against humanity. Although the current locus of the paper is focused on Afghan women, it has larger implications for all other crimes of gender persecution.

Keywords: Gender apartheid; gender persecution; Taliban; international human rights law; women, peace, and security

Introduction

“... unprecedented, systemic attacks on women's and girls' rights are creating gender-based apartheid.”

– UN Secretary-General Antonio Guterres on the Taliban attacks on women and girls in Afghanistan, January 2023.

“Women and girls in Afghanistan are experiencing severe discrimination that may amount to gender persecution[—]a crime against humanity[—]and be characterised as gender apartheid, as the de facto authorities appear to be governing by systemic discrimination with the intention to subject women and girls to total domination.”

– UN Special Rapporteur Richard Bennett on the Situation of Human Rights in Afghanistan.¹

¹Richard Bennett, UN Special Rapporteur on the situation of human rights in Afghanistan, in his report to the HRC. Off. of the UN High Comm'r for Hum. Rts., Taliban Edicts Suffocating Women and Girls in Afghanistan: UN Experts (June 19, 2023), <https://www.ohchr.org/en/press-releases/2023/06/taliban-edicts-suffocating-women-and-girls-afghanistan-un-experts>.

In June 2023, the UN Special Rapporteur (SR) reporting on the situation of human rights in Afghanistan, together with the Working Group on discrimination against women and girls, submitted a joint report to the Human Rights Council (HRC) on the situation of women and girls in Afghanistan.² The report was based on the SR and Working Group's visit to Afghanistan in May 2023 and their in-person and virtual interviews with over 2,000 Afghan women and men – the majority of them in Afghanistan.³

The UN report made history with its seminal articulation of the emerging concept of gender apartheid, the first in a formal UN report. In this Article, I examine the legal standards of gender persecution and the evolving descriptor *gender apartheid* as a way to describe the status of women in Afghanistan. This Article also examines other complementary forms of legal accountability procedures to vindicate Afghan women's rights and hold perpetrators accountable for crimes against humanity. Although the current locus of this Article is focused on Afghan women, it has implications for all other crimes of gender persecution.

Hillary Charlesworth and Christine Chinkin argue that the invisibility of women in the development of international law has led to unfinished jurisprudence that reinforces the boundaries and gendered binaries of international law.⁴ The analysis of gender justice in international law is complicated by systemic gender inequalities that bleed into the creation and interpretation of the law. However, gender remains at the heart of both real-world and culture wars in defining the status of women in war and peace. One of the reasons for the gender asymmetry is that participation in international lawmaking is marked by male hierarchies and the conspicuous absence of women. This Article hopes to create a new narrative for international accountability processes for gender persecution.

A. Gender Persecution: an Intersectional and Interconnected Approach

Lisa Davis, the Special Adviser on Gender Persecution to the Prosecutor of the International Criminal Court (ICC), argues that gender persecution under the Rome Statute is the only holistic charge available to uphold accountability for crimes against humanity.⁵ The SR's June 2023 report was deeply concerned that gender persecution was occurring in Afghanistan under the *de facto* rule of the Taliban authorities. The report echoes that, under the Rome Statute, "persecution" is the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectively.⁶

The Rome Statute, which established the ICC in 1999, represents a significant milestone in the field of international criminal law due to its inclusion of gender definition,⁷ a feature distinct from prior international criminal instruments such as those employed by the International Criminal Tribunal for Yugoslav (ICTY) and International Criminal Tribunal for Rwanda (ICTR).⁸

²Human Rights Council (HRC), Rep. on the Situation of Women and Girls in Afghanistan, UN Doc. A/HRC/53/21 (June 20, 2023).

³*Id.* at ¶ 2.

⁴HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* (2000).

⁵Lisa Davis, *Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTIQ Persons*, 24 WM. & MARY J. WOMEN & L. 513, 544–47 (2018).

⁶Rep. on the Situation of Women and Girls in Afghanistan, at § 92. ("While the scope of the present report does not extend to making final determinations of individual criminal responsibility, the information received, including substantial first-hand accounts, gives rise to a critical concern that women and girls are being targeted for gender persecution . . .")

⁷The ICC is the first international criminal tribunal to define the term "gender" in its founding statute. According to Article 7.3 of the Rome Statute, "the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above." Int'l Crim. Ct. ("ICC"), Rome Statute of the International Criminal Court, art. 7.3 (2021), <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁸In the landmark 1998 decision, *Prosecutor v. Akayesu*, the accused was convicted of genocide and crimes against humanity for acts of sexual violence due to his inaction and omissions in relation to mass rape, forced public nudity, and sexual mutilation of Tutsi women perpetrated by Hutu men. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sep. 2, 1998),

Although these Special Tribunals recognized sexual violence as a crime against humanity, they lacked a specific definition for gender-related offenses and limited their reach to political, racial, or religious grounds. The Rome Statute, on the other hand, surpasses its predecessors by encompassing a more comprehensive array of crimes pertaining to sexual and gender-based violence (SGBV), including gender persecution as a crime against humanity.⁹

An examination of the Rome Statute reveals multiple provisions aimed at addressing SGBV crimes. The statute identifies various acts including, but not limited to, “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity,” as prosecutable offenses when committed as part of a widespread or systematic attack on a civilian population with awareness of the assault.¹⁰ These acts can also constitute grounds for war crime charges when perpetrated within the context of international or national armed conflict.¹¹

The Rome Statute’s scope of SGBV crimes distinguishes it as an advancement in international criminal law, holding accountable those responsible for gender-related atrocity crimes. The Rome Statute, in its recognition of gender-based persecution, stands apart from previous international criminal tribunals, which, while not disregarding the crime of persecution entirely, typically confined its scope to political, racial, or religious grounds.¹² Within the Rome Statute, persecution is defined as the intentional and severe deprivation of fundamental rights contrary to international law perpetrated against an identifiable group or collectivity.¹³ For gender-based persecution to qualify as a crime against humanity, the perpetrator must specifically target any identifiable group based on gender grounds in conjunction with acts falling under the purview of the Rome Statute or any other crime within the jurisdiction of the Court. Moreover, gender persecution must be carried out as part of a widespread or systematic attack directed against a civilian population with the perpetrator possessing knowledge of the attack.

Scholars have observed that persecution, as delineated within the Rome Statute, diverges from other crimes against humanity by encompassing a broader spectrum of acts beyond specific offenses such as rape, murder, and extermination.¹⁴ This wider ambit includes severe deprivations of fundamental civil, political, social, and economic rights, regardless of whether the resulting harm is physical in nature. The incorporation of the crime against humanity of gender persecution

<http://www.unict.org/sites/unict.org/files/case-documents/ict-96-4/trialjudgements/en/980902.pdf>; 55 S.C. Res. 1960, ¶ 6, UN Doc. S/RES/1960 (Dec. 16, 2010); 56 S.C. Res. 2106, ¶ 18, UN Doc. S/RES/2106 (June 24, 2013). See generally Prosecutor v. Delalic, Case No. IT-96-21-A, Appeals Chamber Judgment, ¶ 416 (Feb. 20, 2001), available at <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf> (International Criminal Tribunal for the former Yugoslavia finding that “willfully [sic] causing great suffering or serious injury to body or health” constituted a grave breach of the Geneva Convention); Prosecutor v. Furundzija, Case No. T-95-17/1-T, Judgment, ¶ 171, 272 (Dec. 10, 1998) (finding the commanding officer who was present during acts of sexual violence and who facilitated the commission of the crimes guilty of the charges of “[v]iolation of the [l]aws or [c]ustoms of [w]ar”); Susana SáCouto, Director of the War Crimes Research Office, Remarks at American University Washington School of Law Conference: Addressing Sexual and Gender-Based Violence in Conflict and Post-Conflict Settings: National and International Strategies (Feb. 1, 2012) (transcript available at <http://www.genderjurisprudence.org/index.php/commentaries/78-investigation-and-prosecution-of-sexual-and-gender-based-violence-by-the-international-criminal-court-mandate-good-policy-or-both>) (highlighting the predominance of gender-based and sexual violence prosecutions in front of the ICC as a result of obligations arising from the Rome Statutes).

⁹ICC, Rome Statute, at art. 7.1, 7.1(h) (“... [P]ersecution on the basis of gender is specifically included as a crime against humanity. This means that the ICC has jurisdiction over crimes involving the intentional and severe deprivation of fundamental rights contrary to international law against a group targeted on the basis of gender.”)

¹⁰*Id.* at Art. 7(1)(g).

¹¹*Id.* at Art. 8(2)(e)(vi).

¹²*Id.* at Art. 7(1)(h).

¹³In order to meet the standard for gender persecution under the Rome Statute, the conduct (act or acts) committed must be prohibited. The enumerated crimes that may amount to Crimes Against Humanity include murder, extermination, enslavement, deportation or forcible transfer of population, and apartheid. ICC.

¹⁴Yvonne Dutton & Milena Sterio, *Prosecuting Gender Persecution at the ICC: Definitions, Policies, and Practice*, 46 FORDHAM INT’L L.J. 575, 577 (2023).

in the Rome Statute signifies a significant advancement in the evolution of international criminal law concerning the prosecution of systemic violence.¹⁵

The 2019 case of *Prosecutor vs. Al Hassan* marked the first instance in the ICC's history where a Pre-Trial Chamber recognized charges of gender persecution.¹⁶ Al Hassan, a Malian national, faced charges related to crimes of religious and gender-based persecution for his role as the de facto leader of the Ansar Eddine militia's Islamic police in the region of Timbuktu.¹⁷ In the unfolding of events, Ansar Eddine, alongside al-Qaeda in the Islamic Maghreb, gained control of Timbuktu and its neighboring areas in March 2012.¹⁸ During the period between April 2012 and January 2013, the armed groups exercised authority and imposed restrictions on women's agency by mandating male control over women's movements.¹⁹

The charging instrument presented by the Office of the Prosecutor (OTP) asserted that Al Hassan and other members of Ansar Eddine deliberately targeted women and young girls, driven by their discriminatory beliefs concerning gender roles.²⁰ This targeting led to the imposition of restrictions on women based on their gender. The charges levelled against Al Hassan were comprehensive, encompassing a range of crimes such as rape and other forms of sexual violence, torture, and murder, all perpetrated against civilians, with a particular focus on women, based on what the Chamber termed as "sexist grounds."²¹

The charges laid against Al Hassan bear a striking resemblance to the current situation in Afghanistan, by its mandates on women's attire and a restrictive dress code, limitations placed on women's movement without male accompaniment, and prohibitions against being alone with men other than their husbands.²² Moreover, educational institutions in the region separate boys and girls, further reinforcing gender-based disparities.²³ Under the Ansar Eddine (or Helpers of the Religion) regime, numerous women were coerced into marriages with members of the militia, signifying a grave violation of their rights and autonomy.²⁴ Moreover, with a striking similarity to the Taliban-led Afghanistan, the Ansar Dine banned music, mandated the burqa, prevented women from attending school, and carried out a series of acts bent on the destruction of cultural heritage. Any individuals found transgressing imposed regulations faced severe consequences, including physical abuse and incarceration.²⁵ These forms of systematic gender-based persecution mirrors the plight faced by women in present-day Afghanistan.²⁶

¹⁵Persecution is defined as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."

¹⁶The trial against Al Hassan commenced in July 2020, and substantial evidence, including evidence pertaining to the crime of gender persecution, has been submitted for consideration during the proceedings. Press Release, Office of the Prosecutor, Prosecutor of the International Criminal Court (ICC), Karim A.A. Khan KC, publishes Policy on the Crime of Gender Persecution (Dec. 7, 2022), <https://www.icc-cpi.int/news/prosecutor-international-criminal-court-icc-karim-aa-khan-kc-publishes-policy-crime-gender>.

¹⁷ICC, Situation in the Republic of Mali: The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (July 2020), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/200713-al-hassan-qa-trial-openingENG.pdf>.

¹⁸*Id.*

¹⁹*Id.*

²⁰Prosecutor v. Al Hassan, ICC-01/12-01/18-461-Corr-Red, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud [Corrigendum to Decision on Confirmation of Charges Against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud] (Nov. 13, 2019).

²¹Prosecutor v. Al Hassan, ICC-PIDS-CIS-MAL-02-012/23_Eng (Mar. 2023).

²²*Id.* at ¶ 691.

²³*Id.* at ¶ 664.

²⁴*Id.* at ¶ 652.

²⁵*Id.* at ¶ 960.

²⁶ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of the trial in the case against Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (July 14, 2020), <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-opening-trial-case-against-0> ("[I]t was the women and girls of Timbuktu and the region who were targeted and suffered the most."); ICC, Situation in Republic of Mali, UN Doc.

The ICC's evolving approach to human rights violations can be observed in the 2022 case of *Ongwen* of the Ugandan LRA, wherein the Court recognized crimes of forced marriage and forced pregnancy as distinct crimes against humanity for the first time.²⁷ The ICC delineated that the crime of forced pregnancy finds its basis in the violation of a woman's rights to personal and reproductive autonomy, as well as the right to family.²⁸ Notably, forced pregnancy is already recognized as a violation of victims' fundamental rights under the Rome Statute.²⁹ In considering forced marriage, the Court utilized the provision of "other inhuman acts" under Article 7(1) of the Rome Statute, interpreting it to encompass the right to choose one's spouse as a fundamental right.³⁰

This precedent exemplifies the Court's willingness to adapt and interpret relevant provisions to reflect evolving human rights norms. In a similar vein, violations of other human rights by the Taliban, such as the mass-scale denial of girls and women's education and employment, could be subject to interpretation under the "other inhuman acts" provision.³¹ This approach emphasizes the ICC's evolving commitment to addressing violations of fundamental human rights, including those borne out of gender persecution, and serves to establish accountability for such atrocity crimes.

I. Office of the ICC Prosecutor's Gender Persecution Policy 2014 and 2022

This section examines the Gender Persecution Policy introduced by the Office of the Prosecutor (OTP) and its potential applicability to the Taliban gender edicts since August 2021. Moreover, it also addresses the OTP's previous Policy Paper from 2014, and the subsequent Gender Persecution Policy unveiled in December 2022, elucidating the salient characteristics of these two policies.

The OTP's introduction of its Policy Paper on Sexual and Gender-Based Crimes in 2014 was preceded by extensive consultations with ICC States Parties, civil society, academia, and pertinent UN agencies. Its primary objective was to bolster the Office's investigative and prosecutorial capabilities concerning perpetrators of sexual and gender-based crimes within the Court's jurisdiction, adopting a systematic and comprehensive approach.³² Additionally, the policy sought to promote the integration of a gender perspective and expertise across all facets of the OTP's operations.³³

The 2014 Policy Paper on Sexual and Gender-Based Crimes introduced a nuanced perspective in its definition of "gender-based crimes," recognizing that such offenses need not solely pertain to sexual acts nor that they be restricted to women and girls. It explicitly asserted the Office's commitment to interpreting and applying the notion of gender in alignment with Article 21(3) of

ICC-01/12-01/18 (May 11, 2019) (explaining that the limitations imposed on the lives of women by Al Hassan constitute a violation of many of the fundamental rights accorded to women and girls in international law).

²⁷Marina Kumskova, *Invisible Crimes Against Humanity of Gender Persecution: Taking a Feminist Lens to the ICC's Ntaganda and Ongwen Cases*, 57 TEX. INT'L L.J. 239 (2022).

²⁸Prosecutor v. Ongwen, ICC-02/04-01/15-1762-Red, Public Redacted Trial Judgment, ¶ 2717 (Feb. 4, 2021). ("This is the first time forced pregnancy is to be considered by a trial chamber of this Court. The crime of forced pregnancy is grounded in the woman's right to personal and reproductive autonomy and the right to family.")

²⁹ICC, Rome Statute, *supra* note 8, at art. 7.1 (g).

³⁰Prosecutor v. Ongwen, ICC-02/04-01/15-1762-Red, ¶ 2819; *see* ICC, Rome Statute, *supra* note 8, at art 7.1(k). (including "other inhumane acts . . . intentionally causing great suffering, or serious injury to body or to mental or physical health" in its definition of crimes against humanity).

³¹Press Release, UN Hum. Rts. Off. of the High Comm'r, Afghanistan: Taliban attempting to steadily erase women and girls from public life – UN experts (Jan. 17, 2022), <https://www.ohchr.org/en/press-releases/2022/01/afghanistan-taliban-attempting-steadily-erase-women-and-girls-public-life-un>.

³²ICC, Policy Paper on Sexual and Gender-Based Crimes [2014 Policy Paper], 10 (June 2014), https://www.icc-cpi.int/sites/default/files/Policy_Paper_on_Sexual_and_Gender-Based_Crimes-20_June_2014-ENG.pdf.

³³*Id.*

the Rome Statute and universally acknowledged human rights principles. Consequently, the Office affirmed its intent to “consider not only acts of violence and discrimination rooted in sex but also those linked to socially constructed gender roles.”

Upon the policy’s launch in 2014, the then-prosecutor, Fatou Bensouda, highlighted its significance by underscoring that, as of December 2014, the OTP had specifically filed charges of sexual violence in approximately seventy percent of its cases.³⁴ Furthermore, she reiterated the Office’s commitment to persist in its endeavors to combat impunity for horrific crimes of sexual and gender-based violence pervasive in the crimes investigated by the OTP.³⁵

In December 2022, the OTP released its Policy on Gender Persecution, signalling its commitment to pursuing accountability for SGBV crimes, with particular focus on the offense of gender persecution.³⁶ The OTP introduced this policy under the leadership of ICC Prosecutor Karim Khan as a corrective to the fact that charging for gender-based crimes in both international and domestic courts often falls short of legal commitments.³⁷ In an effort to rectify this oversight, the Gender Persecution Policy built upon the foundation established by the 2014 Policy Paper, seeking to elevate the visibility and prosecution of such crimes.³⁸

Both the OTP’s 2014 Policy Paper and the 2022 Gender Persecution Policy demonstrate a shared dedication to interpreting the Rome Statute’s definition of “gender” more broadly while adhering to the principles enshrined in Article 21(3) of the Rome Statute.³⁹ The policies call for the statute’s provisions to be construed and applied in a manner consistent with internationally recognized human rights and must refrain from any discriminatory distinctions based on factors such as gender.⁴⁰

The OTP’s 2022 Policy Paper on Sexual and Gender-Based Crimes further reinforced the understanding that gender-based crimes can be committed against individuals, irrespective of their gender, due to the traditional construction of gender roles.⁴¹ This expanded interpretation of gender persecution assumes significance in prosecuting cases involving the Taliban’s perpetration of gender persecution, as it now encompasses discrimination and segregation based on gender roles and stereotypes. Given the systemic nature of gender role stereotyping and the segregation evident in the Taliban’s directives and edicts, this broadened understanding of the Rome Statute becomes critical in effectively addressing and prosecuting such offenses.

The Gender Persecution Policy recognizes SGBV crimes, including gender persecution, as some of the gravest offenses delineated in the Rome Statute.⁴² Consequently, the policy affirms that investigating and prosecuting these crimes remains a paramount priority for the OTP. Building upon the approach outlined in the 2014 Policy Paper, the OTP committed to devoting particular attention to cases involving the commission of gender persecution and other related crimes, ensuring a thorough examination and consideration of such matters at all stages of its operations, ranging from preliminary examination and investigation to trial, sentencing, appeal, and reparations.⁴³

³⁴Statement of Fatou Bensouda, Prosecutor-Elect of the ICC, Gender Justice and the ICC: Progress and Reflections (Feb. 14, 2012), <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/FED13DAF-3916-4E94-9028-123C4D9BB0C9/0/StatementgenderSydeny140212.pdf>.

³⁵ICC, 2014 Policy Paper at 10.

³⁶Press Release, The Office of the Prosecutor Launches Public Consultation on a Policy Initiative to Advance Accountability for Gender Persecution Under the Rome Statute, UN Press Release ICC-OTP-20221109-PR1683 (Nov. 9, 2022).

³⁷*Id.*

³⁸*Id.*

³⁹Critics had contested the ICC’s definition of “gender,” objecting to the inclusion of biologically determined “sex,” which they argue undermines the recognition that “gender” is fundamentally a social construct.

⁴⁰ICC, 2014 Policy Paper at 12; ICC, Policy on the Crime of Gender Persecution [2022 Gender Persecution Policy], 12 (Dec. 2022), <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf>.

⁴¹ICC, 2022 Gender Persecution Policy at 12.

⁴²*Id.* at 4.

⁴³*Id.* at 1–2.

II. An Intersectional Approach

In addition to providing a comprehensive definition of gender, both the 2014 and 2022 Gender Persecution Policies expressly embraced an intersectional approach that fully acknowledged the interplay between gender and other facets of an individual's identity or circumstances. As a concept, intersectionality examines how an individual's overlapping identities shape their lived experiences, including instances of discrimination. Within the context of the 2022 Gender Persecution Policy, the notion of intersectional persecution recognizes that victims may become targets, not solely due to their perceived gender but also because of other distinct factors, such as race, religion, pregnancy, or sexual orientation.⁴⁴

The inaugural Section of the 2022 Gender Persecution Policy encompasses a comprehensive list of definitions for pivotal terms, including "gender," "gender persecution," "intersex," and "LGBTQI+" (representing lesbian, gay, bisexual, transgender, queer, and intersex individuals).⁴⁵ With respect to the term "gender," the OTP provides a clear elucidation, characterizing it as a socially constructed concept that exhibits variation and the potential for evolution over time.⁴⁶ This definition is expressly grounded in Article 21 of the Rome Statute. Moreover, the policy expounds upon the notion of "gender persecution," outlining that this crime was perpetrated against individuals due to their sex characteristics and/or as a result of the social constructs and criteria employed to delineate gender.⁴⁷

In its 2014 Policy Paper, the OTP pledged to comprehensively "understand the intersection of various factors, such as gender, age, race, disability, religion or belief, political or other opinion, national, ethnic, or social origin, birth, sex, sexual orientation, and other status or identities which may give rise to multiple forms of discrimination and social inequalities."⁴⁸

The ICC also demonstrated its adoption of an intersectional view of persecution. In the *Al Hassan* case, for example, the ICC judges acknowledged the potential relevance of the victim's race, age, and pregnancy status in confirming the charges of persecution against the defendant.⁴⁹ This explicit recognition of intersectionality within the 2022 Gender Persecution Policy and the Court's ongoing jurisprudence in the *Al Hassan* case provides the right framing for the prosecution of the Taliban's multiple and compounded forms of discrimination against women and minorities in Afghanistan. Al Hasan was part of the local group Ansar Dine (or Helpers of the Religion), which took over Timbuktu in 2012.

The 2022 Gender Persecution Policy not only acknowledges the significance of intersectionality in principle but also provides explicit guidelines for its practical integration throughout all stages of ICC proceedings, encompassing charging decisions, investigations, and sentencing.⁵⁰ The policy underscores that individuals may become targets of gender persecution due to their sex, characteristics, and/or as a consequence of the social constructs and criteria that define gender roles, behaviors, activities, and attributes.⁵¹ The crimes based on stereotyped and masculinized gender roles have particular significance to Taliban-led edicts. This nuanced approach seeks to

⁴⁴Lisa Davis, *Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20 NORTHWESTERN J. OF HUM. RTS. 1, 6 (2021) ("By definition, gender-based crimes target women, men, children, LGBTIQ, non-binary and gender non-conforming persons, on the premise of gender discrimination. At its core, gender-based crimes are used as punishments against those who are perceived to transgress assigned gender narratives that regulate 'accepted' forms of gender expression manifest in, for example, roles, behaviors, activities, or attributes.")

⁴⁵ICC, 2022 Gender Persecution Policy at 3.

⁴⁶*Id.* ("As a social construct, gender varies within societies and from society to society and can change over time.")

⁴⁷ICC, 2022 Gender Persecution Policy at 3.

⁴⁸ICC, 2014 Policy Paper, *supra* note 34, at 16.

⁴⁹Prosecutor v. Al Hassan, ICC-01/12-01/18-767-Corr-Red, Rectificatif de la Décision Portant Modification des Charges Confirmées [Corrigendum to the Decision Amending the Confirmed Charges], ¶ 166 (May 8, 2020).

⁵⁰ICC, 2022 Gender Persecution Policy at 19, 22, 27, 28.

⁵¹*Id.* at 15. ("Persons may be targeted for gender persecution because of... the social constructs and criteria used to define gender roles, behaviors, activities and attributes.")

address and challenge the social constructs that contribute to the subordination of specific groups of women and minorities, presenting a valuable framework that is particularly relevant in the context of crimes perpetrated by the Taliban.

The emphasis on an intersectional lens in the policy is pertinent in cases involving crimes perpetrated by the Taliban in Afghanistan, which is home to over thirty ethnic groups where gender-based persecution and discrimination are often rooted in deeply entrenched paternalistic constructs of women. The policy's emphasis on challenging and countering these constructs offers a significant framework to systemically address these structural harms.

It is also significant that, under the new policy, not all targeted individuals need to be direct members of the particular targeted group; rather, being sympathizers or affiliates of the targeted members is sufficient to come under the ambit of gender persecution.⁵² In the Afghan context, for instance, if a perpetrator aims to prevent girls from attending a school, male teachers and staff at that institution may also be considered part of the targeted group if the grounds for targeting are based on gender. Likewise, journalists persecuted for reporting on discrimination against women may also be considered targets within the ambit of these policies.

The recognition of gender persecution as a distinct crime brings greater clarity and focus to gender-related offenses. As emphasized in the 2022 Gender Persecution Policy, such crimes reveal the “continuum of historical and longstanding structural discrimination and fundamental rights deprivations experienced by vulnerable gender groups such as women [and] girls . . .” in Afghanistan.⁵³ The concept of gender persecution unmask the structural forms of discrimination underlying these crimes. Such recognition plays a crucial role in unveiling the layers of overlapping institutionalized discrimination against Afghan women and girls, which is examined in later Sections of this Article.

The 2022 Gender Persecution Policy also articulates a commitment to actively engage with relevant stakeholders, including states, civil society organizations, and other key actors, to strengthen the punishment and prevention of gender persecution.⁵⁴ Another facet of this is its explicit recognition of the significance of engaging with victims and victim groups throughout the investigative and prosecutorial processes to effectively address the crime of gender persecution.⁵⁵ The ability of Taliban's victims to safely participate in proceedings stands as a central tenet in fulfilling the ICC's mandate of holding perpetrators accountable for gender persecution.

Another integral aspect of the new OTP strategy involves gender analysis, which entails a thorough examination of how crimes are linked to differences and inequalities between male and female individuals, as well as the power dynamics and intersections between gender and various other impermissible grounds, such as political, racial, national, ethnic, cultural, and religious factors.⁵⁶ This analysis extends to considering other dynamics that influence gender roles within a specific context, giving rise to assumptions and stereotypes. The policy emphasizes that crimes against humanity can manifest as a consequence of gendered power imbalances. Gender analysis applies to diverse women and individuals targeted for deviating from prescribed gender roles.⁵⁷

⁵²*Id.* (“[T]he ‘targeted group’ should be viewed broadly. Not all targeted persons are required to be directly part of the targeted group. It is sufficient if they are sympathisers or affiliates of targeted members” (footnotes omitted)).

⁵³*Id.* at 5.

⁵⁴*Id.* (declaring that the Office “actively engages with States, civil society organizations, and other key stakeholders in order to continue to improve the effectiveness of preventing and addressing gender persecution.”)

⁵⁵*Id.* at 9, 10.

⁵⁶*Id.* at 20.

⁵⁷UN International, Impartial, and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes Under International Law Committed in the Syrian Arab Republic since March 2011, IIIM Gender Strategy and Implementation Plan – Abridged Version, 6 (“The term ‘gender’ . . . entails: understanding the ways in which socially constructed gender roles can cause an imbalance of power against women and girls; being aware that gender-based discrimination also drives harms against people of diverse SOGI [sexual orientations and gender identities] and can make their experiences invisible or poorly understood; and ensuring that addressing gender constructions harming men

It necessitates consideration of whether the crimes, including SGBV, were intertwined with gender norms and inequalities. By adopting a gender analysis, the policy commits to addressing the complexities of structural gender-based crimes.

In essence, the successful investigation and establishment of charges related to gender persecution relies on the application of a human rights framework of gender analysis. This analytical tool can serve to illustrate the inequalities, social structures, and power dynamics that underlie crimes committed by the Taliban.

B. Is this Gender Apartheid?

The International Convention on the Suppression and Punishment of the Crime of Apartheid, commonly referred to as the Apartheid Convention, recognized apartheid as a “crime against humanity” in 1973.⁵⁸ However, the definition of apartheid outlined in Article II of the Apartheid Convention is confined to racial segregation and discrimination practiced in southern Africa.⁵⁹ The Convention defines apartheid as the implementation of policies and practices by one racial group to establish and maintain dominance over another.⁶⁰ Signatories to the Convention were required to undertake legislation or “other measures” to prevent apartheid, as well as adopt the necessary means to allow for the prosecution of those parties liable for apartheid.⁶¹ It is important to note that the Apartheid Convention does not include provisions for the individual prosecution of those responsible for perpetrating acts of apartheid. Instead, it urges state parties to enact legislation that facilitates the prosecution and prevention of apartheid within their respective jurisdictions.⁶²

Afghanistan became a state party to the Rome Statute on February 10, 2003, granting the ICC jurisdiction to investigate and prosecute crimes committed within its territory or by its nationals.⁶³ While apartheid is recognized as a crime against humanity under the Rome Statute, its definition remains confined to racial terms.⁶⁴ A revision of the Rome Statute would be necessary before going forward with a claim of gender apartheid.

While the call for gender apartheid and its recognition in the Rome Statute keeps rising, there needs to be a full understanding of its characteristics and its relationship to Afghanistan. This Section delves into the concept of apartheid, initially focusing on the segregationist policies that were implemented in South Africa that ultimately led to the international recognition of apartheid as a crime against humanity. It highlights the significance of apartheid as a historical phenomenon and examines its lasting legacy. Subsequently, the Section transitions to an analysis of gender apartheid, drawing parallels between the Taliban’s policies towards women in Afghanistan and the apartheid regime in South Africa. Despite being situated in different times and geographical contexts, the presence of striking similarities in the systematic and institutionalized oppression enforced by both regimes supports the characterization of the current situation faced by Afghan women as gender apartheid. Through this comparative analysis,

and boys does not undermine efforts to address the systemic inequality and discrimination experienced by women and girls in all societies.”)

⁵⁸G.A. Res. 3068 (XXVIII), Apartheid Convention (July 18, 1976).

⁵⁹*Id.* at art. II. (“For the purpose of the present Convention, the term ‘the crime of apartheid,’ which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa . . .”)

⁶⁰*Id.*

⁶¹*Id.* at art. IV(a).

⁶²*Id.* at art. IV(b).

⁶³ICC, Afghanistan: Situation in the Islamic Republic of Afghanistan, UN. Doc. ICC-02/17, ~<https://www.icc-cpi.int/afghanistan#:~:text=Jurisdiction%20E2%80%93%20General%20status,Statute%20on%2010%20February%202003>.

⁶⁴ICC, Rome Statute, *supra* note 8, at art. 7.2(h) (defining apartheid as inhumane acts “committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.”)

this part of the Article underscores the gravity of the challenges confronted by Afghan women today and the urgency to address their plight.

I. The Rome Statute as an Entry Point for Gender Apartheid

Article 7, paragraph 1 of the Rome Statute provides an introduction to crimes against humanity that apartheid falls under.⁶⁵ The text clarifies that crimes against humanity “are the most serious crimes of concern to the international community as a whole. .. and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.”⁶⁶ Already a constrained definition, this portion dictates that such crimes will be “strictly construed.”⁶⁷

The Rome Statute clarifies that apartheid is a crime against humanity over which the ICC has jurisdiction,⁶⁸ while the elements of crime standards clarify that apartheid must have been “committed in the context of an institutionalized regime of systematic oppression by one racial group over any other racial group or groups.”⁶⁹ While this definition appears in absolutist terms, the Elements of Crimes offers substantial textual support for a more expansive reading of apartheid crime when it states that an apartheid act is one “referred to in [A]rticle 7, paragraph 1, of the Statute, or was an act of character similar to any of those acts.”⁷⁰

Despite the seemingly stringent restrictions on the ICC’s definition of apartheid, the Rome Statute provides textual evidence for the inclusion of gender-based apartheid within the umbrella of crimes against humanity over which the tribunal has jurisdiction. First, crimes against humanity encompass a broader range of crimes than rape or murder, including those that deprive fundamental civil, political, social, and economic rights.⁷¹

Interpretive instructions within the Rome Statute suggest whether broader interpretations of persecution are appropriate – the Statute explains that crimes against humanity include those committed on “other grounds that are universally recognized as impermissible under international law.”⁷²

It is also useful at this juncture to understand the structures of crimes of persecution and genocide under Articles 6 and 7 of the Rome Statute. The crime of persecution under Article 7 of the Rome Statute refers to the intentional and severe deprivation of fundamental rights by reason of the group’s identity or collectivity and must be committed as part of a widespread or systematic attack against a civilian population. These acts must have been committed on discriminatory grounds such as political, racial, national, ethnic, cultural, religious, gender, religion, nationality, political affiliation, or other prohibited grounds.

While Article 6 of the Rome Statute, which describes “genocide” as acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, sets a high threshold of genocidal intent – that is, intent to destroy a people or group – Article 7, on the crime of persecution, requires evidence of intent to cause humanitarian suffering, which aligns with the Taliban’s acts of forcible deprivation of education and work opportunities for women as part of a systematic attack against women.⁷³

⁶⁵ICC, Rome Statute, *supra* note 8, at Art. 7.1.

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*Id.* at Art. 7.1(j). (“For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack . . . The crime of apartheid.”)

⁶⁹ICC, Elements of Crimes, at art. 7.1(j)(4), UN Doc. ICC-PIOS-LT-03-002/15_Eng, UN Sales No. E.03.V.2 (2013).

⁷⁰*Id.* at art. 7.1(j)(2).

⁷¹*Id.* at art. 7.2(g). (“Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”)

⁷²*Id.* at art. 7.1(h).

⁷³ The Special Rapporteur Richard Bennett has stated that over 60,000 women have been forced to leave their jobs because of Taliban decrees.

Textually speaking, the Rome Statute already classifies gender-based persecution and rape as crimes against humanity over which the ICC has jurisdiction.⁷⁴ This evidence suggests that the Rome Statute allows for other grounds, including an intersectional reading of crimes against humanity. As things stand, under the historic Rome Statute, apartheid is restricted to race, although, as discussed earlier, persecution is defined more broadly in terms of political, racial, national, ethnic, cultural, religious, gender, and other grounds.⁷⁵

Apartheid, by its nature, is based on a system of governance based on laws and/or policies that impose the systematic segregation of different categories of people and exclude certain persons from public spaces and spheres. While apartheid is recognized as the political, social, economic, and cultural subordination of a group, this group does not, as yet, recognize gender as a category of identity and is consistent with what Hillary Charlesworth called the “hidden gender of international law,” meaning that gender is subordinated or invisible international law.⁷⁶

Although “not a formally defined term under international human rights law,”⁷⁷ gender apartheid can be defined as “a system of governance, based on laws and/or policies, which imposes systematic segregation of women and men and may also systematically exclude women from public spaces and spheres.”⁷⁸ Furthermore, according to human rights scholar Karima Bennouna, gender apartheid solidifies “a hierarchical system that maintains the inferiority of women and the superiority of men, not simply their equal separation.”⁷⁹

II. Origins of Apartheid

The concept of apartheid traces its origins to the institutionalized segregationist policies implemented in South Africa from approximately 1948 to 1994.⁸⁰ Coined by the Nationalist Party in the lead-up to the 1948 election, the term “apartheid” is an Afrikaans word derived from the French term “mettre à part,” meaning “apartness” or “separateness.”⁸¹

Throughout its seventy-year history, the term “apartheid” has been predominantly associated with South Africa’s racial policies.⁸² However, in recent decades, the concept of “gender apartheid” has gained prominence in human rights discourse, especially in describing the rule of the Taliban in Afghanistan.⁸³ Karima Bennouna further elucidates that gender apartheid solidifies a hierarchical structure that perpetuates the subjugation of women and the elevation of men, not merely emphasizing their equal separation.⁸⁴

The genesis of the term “gender apartheid” can be traced back to the late 1990s when it was first used to describe the policies of the initial Taliban government in Afghanistan that severely curtailed the freedom and rights of Afghan women. In 1999, the then-UN SR on the Elimination

⁷⁴*Id.*

⁷⁵*Id.* at art. 7.2(g).

⁷⁶Hilary Charlesworth, *The Hidden Gender of International Law*, 16 TEMP. INT’L & COMP. L.J. 93, 93 (2002).

⁷⁷Naheed Farid & Rangita de Silva de Alwis, *Afghanistan Under the Taliban: A State of “Gender Apartheid”?*, PRINCETON SPIA, at 3 (2023), https://spia.princeton.edu/sites/default/files/2023-02/SPIA_NaheedRangita_PolicyBrief_07.pdf.

⁷⁸Karima Bennouna, *The International Obligation to Counter Gender Apartheid in Afghanistan*, 54 COLUMBIA HUM. RTS. REV. 1, 24 (2023).

⁷⁹*Id.* at 25.

⁸⁰*A History of Apartheid in South Africa*, S. AFR. HIST. ONLINE (last visited Aug. 3, 2023), <https://www.sahistory.org.za/article/history-apartheid-south-africa>.

⁸¹*Id.*; *Apartheid*, CORNELL L. SCH. LEGAL INFO. INSTITUTE (last visited Aug. 3, 2023), <https://www.law.cornell.edu/wex/apartheid>.

⁸²*Apartheid*, CORNELL L. SCH. LEGAL INFO. INSTITUTE.

⁸³*Experts: Taliban Treatment of Women May Be “Gender Apartheid”*, UN HUM. RTS. OFF. OF THE HIGH COMM’R (July 11, 2023), <https://www.ohchr.org/en/stories/2023/07/experts-taliban-treatment-women-may-be-gender-apartheid>.

⁸⁴Bennouna, *supra* note 78, at 24.

of Intolerance and All Forms of Discrimination Based on Religion or Belief, Abdelfattah Amor, characterized the Taliban's policies as a form of apartheid targeting women.⁸⁵

This is the first known articulation of gender apartheid in a soft law international normative arena. Approximately one year later, feminist and human rights advocates called for an international response to the treatment of women under the first Taliban government, leading to the emergence of the term "gender apartheid" in the discourse surrounding women's rights and gender-based discrimination. In order to address these violations, there have been growing calls to criminalize gender apartheid under international law to establish a framework for holding accountable those responsible within the Taliban regime.

III. Why Taliban Rule May Constitute Gender Apartheid

A joint report (June 2023) was presented to the Human Rights Council (HRC) by the UN SR on the Situation of Human Rights in Afghanistan and the Working Group on discrimination against women and girls. The experts, Richard Bennett and Dorothy Estrada-Tanck stated that the Taliban's "grave, systematic and institutionalized discrimination against women and girls . . . gives rise to concerns that they may be responsible for gender apartheid."⁸⁶

The stunning reversal of hard-won gains by women and girls' rights after the second Taliban takeover of Afghanistan in August 2021 saw increasingly restrictive directives set out by the Taliban on women's education, work, political participation, and freedom of movement.⁸⁷ Between September 2021 and May 2023, the Taliban issued more than fifty edicts, resulting in the rapid disappearance of women in public life and the slow erasure of women in public spaces.⁸⁸ The Taliban's de facto authority not only suspended the constitution – taking on the unremarkable role as the only country without a constitution – but also suspended the legal system.⁸⁹ While the claim is that laws are being reviewed regarding their compliance with the Shariah, the Ministry for Women's Affairs, established to advance women's rights, has now been replaced by the Ministry for the Propagation of Virtue and Prevention of Vice.⁹⁰

These edicts, decrees, declarations, and directives severely and systematically restrict women and girls' rights, including their freedom of movement, dress code, and behavior, and their access to education, work, health, and access to justice. One positive edict included the directive that forbade forced marriage but maintained discriminatory inheritance provisions regarding widows in accordance with Sharia law. The total erasure of women and their forced disappearance from public life has never been present in any other country and has been repeatedly described as the worst country in which to be a woman. In a rollback of prior pledges to reopen all schools in the

⁸⁵Press Release, HRC, Special Rapporteurs on Religious Intolerance and Judicial Independence, Independent Expert on Compensation Address Human Rights Commission, UN Press Release HR/CN/908 (Apr. 13, 1999).

⁸⁶Gender apartheid framing emphasizes that exclusion of and discrimination against women and girls is institutionalized and, as such, is a grave and systematic human rights violation that breaches the Charter of the United Nations, the principle of equality and non-discrimination, and the fundamental spirit and norms of international human rights law. The International Court of Justice has also made clear that claimed valid motives for apartheid – such as cultural or religious justifications for [gender] apartheid – are unacceptable and irrelevant under the purposes and principles of the Charter, and thus contrary to international law. Apartheid framing also highlights that other states and actors and the international community at large have a duty to take effective action to end the practice, as was done to end racial apartheid in South Africa. Richard Bennett, *supra* note 3.

⁸⁷*Taliban Restrictions on Women's Rights Deepen Afghanistan's Crisis*, INT'L CRISIS GROUP (Feb. 23, 2023), <https://www.crisisgroup.org/asia/south-asia/afghanistan/329-taliban-restrictions-womens-rights-deepen-afghanistans-crisis>.

⁸⁸*Id.*

⁸⁹Belquis Ahmadi & Scott Worden, *The Taliban Continue to Tighten Their Grip on Afghan Women and Girls*, U.S. Institute of Peace (Dec. 8, 2022), <https://www.usip.org/publications/2022/12/taliban-continue-tighten-their-grip-afghan-women-and-girls>.

⁹⁰*Women's Rights in Afghanistan One Year After the Taliban Takeover*, UN Women, 4 (Aug. 15, 2022), https://www.unwomen.org/sites/default/files/2022-08/Gender-alert-2-Womens-rights-in-Afghanistan-one-year-after-the-Taliban-take-over_en_0.pdf.

Spring of 2022, the Taliban directive of March 23, 2022, declared that girls' high schools would be closed, denying girls in sixth grade and above formal educational instruction.⁹¹ Following on the heels of Hibatullah Akhundzada, the Taliban's supreme leader's decree called upon Afghan women to cover their faces in public. In early May, the Taliban Ministry for the Promotion of Virtue and Vice decreed that "women, unless they are very young or very old, must cover their faces except for their eyes" when meeting a non-relative.⁹² The declaration announced that women "should wear a chadori [head-to-toe burqa], as it is traditional and respectful."⁹³ A particularly patriarchal form of male involvement in this decree was reinforced by proclaiming that male relatives would be punished in cases of non-compliance with these orders.⁹⁴ Furthermore, the decree advised women that "the best way to observe hijab is to not go out unless it's necessary."⁹⁵ These orders expand on directives issued on December 26, 2021, disallowing women from travelling beyond seventy-two kilometers from their homes without being chaperoned by a *mahram* or a close male relative.⁹⁶ Immediately following the March 23 decree on school closures for middle and high school girls, the UN Security Council, in a press statement on March 27, called on the Taliban to "respect the right to education and adhere to their commitments to reopen schools for all female students without further delay."⁹⁷

IV. Racial Apartheid and Gender Apartheid: A Comparison

Taliban rule is a kind of gender apartheid. The same vigor to fight apartheid should be used to fight Taliban rule.

– *Graca Machel, widow of Nelson Mandela*

The UN SR's report on the situation of human rights in Afghanistan of June 2023 marked what could be a historic recognition of gender apartheid. Although not currently a crime under the Rome Statute, there are proposals for the revision of the application of the definition of the crime against humanity to include gender apartheid in the Rome Statute. Adapting the definition of Article 7(2)(h), gender apartheid could be understood as inhumane acts committed in the context of an institutionalized regime of systematic oppression and domination by one gender group over any other gender group or groups dedicated to maintaining that regime.⁹⁸ This is an accurate description of the situation documented in the present report, in which systematic discrimination against women and girls is at the heart of Taliban ideology and rule.

The term "gender apartheid" entered the lexicon of the international community and gained significant attention in the late 1990s, primarily in reference to the policies enforced by the initial Taliban regime from 1996 to 2001, which imposed severe restrictions on the freedoms and rights of Afghan women.⁹⁹ A year after Abdelfattah Amor, the UN SR characterized the prevailing

⁹¹Monthly Forecast: Afghanistan, SEC. COUNCIL REP. (May 31, 2022), <https://www.securitycouncilreport.org/monthly-forecast/2022-06/afghanistan17.php>

⁹²Margerita Stancati & Esmatullah Kohsar, *Taliban Orders Women to Cover Their Faces*, WALL STREET J. (May 7, 2022, 10:42 am ET), <https://www.wsj.com/articles/taliban-orders-women-to-cover-their-faces-11651934565>.

⁹³*Id.*

⁹⁴*Id.*

⁹⁵*Id.*

⁹⁶Margherita Stancati & Ehsanullah Amiri, *New Taliban Rules Impose Chaperones on Afghan Women*, WALL STREET J. (Mar. 25, 2022), https://www.wsj.com/articles/new-taliban-rules-impose-chaperones-on-afghan-women-11648200600?mod=article_inline.

⁹⁷See Rangita de Silva de Alwis, *Expanding the Women Peace and Security Agenda to Protect Women's Education in Afghanistan and Other Geographies of Conflict*, 43 U. PA. J. INT'L L. 991 (2022); Farid & de Silva de Alwis, *supra* note 77.

⁹⁸ICC, Rome Statute, *supra* note 8, at Art. 7.1(h).

⁹⁹Fact Sheet No. 1: What is Gender Apartheid?, END GENDER APARTHEID (last visited Aug. 3, 2023), <https://endgenderapartheid.today/download/FactSheet1.pdf>.

situation at that time as “a system of apartheid in respect of women”;¹⁰⁰ in 1999, approximately a year later, Nancy Gallagher credited the emergence of the term “gender apartheid” to the collective appeals of feminist and human rights advocates who sought an international response to address the oppressive treatment of women under the initial Taliban government.¹⁰¹

Comparing the state of racial apartheid in South Africa to the state of gender apartheid in Afghanistan reveals striking similarities, most apparent in terms of political engagement, access to education, employment opportunities, and freedom of movement – all of which perpetuate systems of subjugation.¹⁰²

1. Education

The South African Bantu Education Act of 1953 enforced racial separation in schools and significantly reduced government funding for non-white educational institutions that were compelled to undergo registration with the state.¹⁰³ This discriminatory approach extended to higher education, where non-whites were effectively barred from accessing most universities.¹⁰⁴

Similar to South Africa’s apartheid policies, the Taliban initially enforced segregation in schools by banning coeducation and prohibiting male teachers from instructing girls.¹⁰⁵ However, the Taliban’s education policies extend beyond the measures implemented during South African apartheid. While South African laws, including the Bantu Education Act, imposed segregation, control, and inadequate funding for non-white schools, the Taliban has taken more extreme measures by effectively prohibiting the education of girls and women in Afghanistan.¹⁰⁶ The Taliban has “effectively institute[ed] a total ban on the education of girls and women” in the country. Girls are no longer permitted to attend school beyond the sixth grade, thereby banning female students from pursuing higher education at universities. Consequently, the dreams of young women aspiring for advanced education and future careers have been abruptly shattered, leaving them feeling emotionally devastated and bereft of hope.¹⁰⁷ The impact of these

¹⁰⁰*Id.*

¹⁰¹Nancy Gallagher, *The International Campaign Against Gender Apartheid in Afghanistan*, 5 UCLA J. INT’L L. & FOR. AFF. 367, 378 (2000). Others similarly characterized the rollback of women’s rights in Iran as gender apartheid. See Bennoune, *supra* note 78, at 28.

¹⁰²The following discussion is not an exhaustive list. Rather it highlights three of the most prominent policies that subjugate women in Afghanistan and how they closely compare with laws in apartheid South Africa. Other examples include controls on access to public spaces. *Compare Apartheid Legislation II*, 452 (describing South Africa’s apartheid restrictions on non-whites entering “libraries, zoos, recreational facilities, [and theaters]”) with *Taliban Ban Restaurant Gardens for Families, Women in Herat*, AP News (Apr. 10, 2023), <https://apnews.com/article/afghanistan-taliban-ban-women-outdoor-dining-7c6fc23f8b199e117935d902f7c4dbe2> (noting Taliban banning women in certain regions from restaurants); *Banned from Public Parks and Bathhouses, Afghan Women Say Life Under Taliban is Like a ‘Prison’*, RFERL (Nov. 10, 2022), <https://www.rferl.org/a/afghanistan-taliban-women-banned-parks-bathhouses-prison/32124374.html> (“Afghan women have been barred from entering public bathhouses and parks in Kabul.”)

¹⁰³Elizabeth S. Landis, *South African Apartheid Legislation II: Extension, Enforcement and Perpetuation*, 71 YALE L.J. 437, 491–92 (1962).

¹⁰⁴*Id.*

¹⁰⁵UN Women, *supra* note 90, at 5.

¹⁰⁶Sune Engel Rasmussen & Margherita Stancati, *Taliban Crack Down on Social Freedoms with Even Stricter Policing*, WALL STREET J. (Apr. 5, 2022), https://www.wsj.com/articles/taliban-crack-down-on-social-freedoms-with-even-stricter-policing-11649156657?mod=article_inline; Margherita Stancati & Ehsanullah Amiri, *Taliban Abruptly Decide to Keep Secondary Schools Closed to Girls*, WALL STREET J. (Mar. 23, 2022, 7:15 am ET), https://www.wsj.com/articles/taliban-crack-down-on-social-freedoms-with-even-stricter-policing-11649156657?mod=article_inline.

¹⁰⁷Ahmad Mukhtar & Tucker Reals, “I Felt Like I was Dead”: *The Taliban’s Ban on Women at College Has Hit Afghanistan’s Brightest Prospects* (Jan. 6, 2023, 11:18 AM), <https://www.cbsnews.com/news/taliban-ban-women-university-afghanistan-college-girls-education/>.

restrictions has left many with a profound sense of emptiness and despair. Young women reported feeling “dead inside” and like “an empty corpse.”¹⁰⁸

2. Employment and Political Enfranchisement

The discriminatory policies that segregated and undermined non-white education in South Africa were closely intertwined with employment restrictions that systematically excluded non-white individuals from higher-skilled job opportunities.¹⁰⁹ The intentional limitation of educational opportunities for non-white South Africans effectively prevented them from acquiring the knowledge and skills necessary for professional development.¹¹⁰

The Taliban’s restrictions on women’s employment parallel the limitations imposed on education. The opportunities for women to work as teachers have been severely curtailed, and female healthcare workers are restricted to providing services exclusively to female patients. Moreover, a significant number of female civil servants have been instructed to remain at home indefinitely. These policies bear a resemblance to South Africa’s Job Reservation Act, which effectively excluded non-white individuals from skilled and semi-skilled jobs.¹¹¹

In addition to systemic marginalization in education and employment, non-whites in South Africa were deliberately excluded from participating in the political sphere.¹¹² Leadership positions within the government were exclusively reserved for whites, while the non-white franchise was severely restricted, effectively denying them meaningful political representation.¹¹³

The two regimes’ exclusion of women from government leadership is a striking parallel. Just as South Africa’s apartheid government reserved political power exclusively for whites, the Taliban formed a government absent of women. An illustrative instance of the curtailment of women’s rights in Afghanistan can be observed through the decree issued by the Ministry of Economy on December 24, 2022, which effectively prohibited women from engaging in employment within national and international non-governmental organizations (NGOs).¹¹⁴ This measure had significant repercussions; hitherto, women constituted a substantial proportion of the workforce in NGOs, amounting to thirty percent.¹¹⁵ Consequently, the ban on women’s participation in the labor force hindered the ability of these organizations to deliver vital assistance to vulnerable populations across the nation effectively. By impeding women’s involvement in humanitarian efforts, the decree undermined the comprehensive reach and impact of NGOs striving to address the pressing needs of at-risk individuals throughout Afghanistan.¹¹⁶

The advent of Taliban rule in Afghanistan has resulted in substantial challenges for women working in the education sector. A powerful illustration of these hardships can be observed through the accounts of teachers in the Princeton Policy Brief, co-authored by de Silva de Alwis

¹⁰⁸*Id.*

¹⁰⁹Penelope Andrews, *Apartheid – the Legal Death of the Black Worker*, 14 HUMAN RTS. 33, 34 (1987).

¹¹⁰*Id.*

¹¹¹Marvine Howe, *Apartheid Attacked on Economic Grounds*, N.Y. TIMES 39 (Aug. 4, 1970).

¹¹²*The National Party and Apartheid*, BRITANNICA (last visited July 24, 2023), <https://www.britannica.com/place/South-Africa/The-National-Party-and-apartheid>.

¹¹³*South Africa: Revolution at the Ballot Box*, TEACH DEMOCRACY (last visited July 24, 2023), <https://www.crf-usa.org/bill-of-rights-in-action/bria-12-2-a-south-africa-revolution-at-the-ballot-box>.

¹¹⁴Steve Inskip & Jan Egeland, *Taliban Rulers Ban Women from Working at Non-Governmental Organizations*, NPR (Dec. 26, 2022 5:13 AM ET), <https://www.npr.org/2022/12/26/1145509279/taliban-rulers-ban-women-from-working-at-non-governmental-organizations>.

¹¹⁵Ruchi Kumar, *The Taliban Again Bans Afghan Women Aid Workers. Here’s How the UN Responded*, NPR (Apr. 14, 2023 3:27 PM ET), <https://www.npr.org/sections/goatsandsoda/2023/04/14/1169682995/the-taliban-again-bans-afghan-women-aid-workers-heres-how-the-u-n-responded>.

¹¹⁶*Id.*

and Naheed Farid.¹¹⁷ This situation exemplifies the circumstances female educators face, grappling with the significant burden of supporting their households and encountering a sense of hopelessness.¹¹⁸ The pervasive absence of timely and fair compensation serves as a grim testament to the adverse impact of the Taliban's control on the economic well-being and livelihoods of female educators in Afghanistan.

3. Right to Free Movement

The movement of women in Afghanistan is heavily regulated and controlled by the Taliban. Women must now be accompanied by a male chaperone, known as a *mahram*, for long-distance travel and air transportation.¹¹⁹ The *mahram* requirement is enforced by religious-police forces for taxi drivers and those entering government buildings such as the Passport Office.¹²⁰ In certain regions, the Taliban have prohibited women from accessing healthcare centers without a male companion.¹²¹ The morality police enforce these regulations through threats and acts of violence. Female doctors who treat unaccompanied female patients face threats, and there have been documented instances of unaccompanied female patients being subjected to physical assaults.¹²²

The measures implemented by the Taliban, although seemingly distinct from the practices of apartheid South Africa, share similarities with the pass system employed to restrict the free movement of people of color. While Africans were required to carry registration books to be legally permitted outside their homes,¹²³ Afghan women were obliged to be accompanied by a male relative in public. This requirement has harmful consequences for women in abusive relationships, who may be effectively confined to their homes, and widowed women without capable sons or relatives who find themselves without anyone to accompany them.

C. Complementary Strategies

So far, this Article has discussed two possibilities: the possibility of applying the crime of gender persecution to Taliban rule and a far lengthier process involving the revision of the definition of gender apartheid in the Rome Statute. Two fresh approaches, discussed below, include universal jurisdiction to hold the Taliban accountable and how the WPS Agenda and Environmental, Social, and Corporate Governance (ESG) models might provide other avenues for accountability.

I. Universal Jurisdiction: The Case of Germany

[B]ased on the notion that certain crimes are so harmful to international interests that states are entitled—and even obliged—to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or victim.

– Mary Robinson, former High Commissioner for Human Rights in Foreword to the Princeton Principles on Universal Jurisdiction.

¹¹⁷Farid & de Silva de Alwis, *supra* note 77.

¹¹⁸*Id.*

¹¹⁹Ahmadi & Worden, *supra* note 89.

¹²⁰Margherita Stancati & Ehsanullah Amiri, *Women in Afghanistan Struggle with New Taliban Rules*, Wall St. J. (Apr. 5, 2022), <https://www.wsj.com/story/women-in-afghanistan-struggle-with-new-taliban-rules-a46738be>.

¹²¹UN Women, *supra* note 90, at 5–6.

¹²²*Id.*

¹²³*Pass Laws in South Africa 1800-1994*, S. AFR. HIST. ONLINE (last visited July 24, 2023), <https://www.sahistory.org.za/article/pass-laws-south-africa-1800-1994>.

Under universal jurisdiction in international law, certain offenses are deemed common enemies of all humankind, allowing any state to punish the perpetrators due to the shared interest of all nations in apprehending and punishing such offenders.¹²⁴ This concept of universal jurisdiction is established based on the international condemnation of these acts and the general interest in collaborating to suppress them, as evidenced by widely accepted international agreements and resolutions of international organizations.¹²⁵

Several countries, including Germany, incorporated universal jurisdiction into their national legal frameworks, granting their national courts the authority to investigate and prosecute international crimes committed on foreign territory by foreign nationals.¹²⁶ Universal jurisdiction primarily focuses on addressing heinous international crimes, including genocide, war crimes, crimes against humanity, torture, and enforced disappearance.¹²⁷

The Princeton Project on Universal Jurisdiction emphasized the concept of universal jurisdiction. In 2000, Princeton University and the International Commission of Jurists conceptualized a set of principles to understand prosecutions for serious crimes under international law in national courts, even in the absence of traditional jurisdictional links to the victims or the perpetrators of crimes.¹²⁸ The Project adopted the Princeton Principles on Universal Jurisdiction in 2001.¹²⁹ These fourteen principles aim to advance the continued evolution of international law and the application of international law in national legal systems.¹³⁰ The first and second principles define the concept of universal jurisdiction as follows:

... universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.¹³¹

Initially intended to combat piracy on the high seas, universal jurisdiction has significantly evolved to encompass the punishment of slavery, war crimes, crimes of aggression, crimes against humanity, genocide, and torture.

Mary Robinson, the then-High Commissioner for Human Rights, in her foreword to the Principles, emphasized the values behind universal jurisdiction as “based on the notion that certain crimes are so harmful to international interests that states are entitled—and even obliged—to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or victim.”¹³²

¹²⁴What is Universal Jurisdiction?, CTR. FOR JUST. & ACCOUNTABILITY (last visited Aug 4, 2023), <https://cja.org/what-we-do/litigation/legal-strategy/universal-jurisdiction/>.

¹²⁵*Id.*

¹²⁶Jenny Gesley, *FALQS: The Exercise of Universal Jurisdiction in Germany*, LIBR. OF CONG. BLOGS (June 30, 2022), <https://blogs.loc.gov/law/2022/06/falqs-the-exercise-of-universal-jurisdiction-in-germany/>.

¹²⁷What is Universal Jurisdiction?, CTR. FOR JUST. & ACCOUNTABILITY.

¹²⁸Participants in the Princeton Project included: Lloyd Axworthy, former foreign minister of Canada and director of the Liu Centre for the Study of Global Issues at the University of British Columbia; M. Cherif Bassiouni, president of the International Human Rights Law Institute at DePaul College and chairman of the drafting committee for the diplomatic conference establishing the International Criminal Court; William J. Butler, president of the American Association for the International Commission of Jurists; Hans Corell, Undersecretary General for Legal Affairs at the United Nations; Diane F. Orentlicher, Director of the War Crimes Research Office at American University; and Stephen M. Schwebel, former president of the International Court of Justice.

¹²⁹Princeton Principles on Universal Jurisdiction, Int’l Commission of Jurists (Jan. 5, 2001), <https://www.icj.org/princeton-principles-on-universal-jurisdiction/>.

¹³⁰*Id.*

¹³¹PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28–29 (2001).

¹³²*Id.* at 16.

Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), provided the person is present before such judicial body.¹³³ Principle 11 affirms that a state should, where necessary, “enact national legislation to enable the exercise of universal jurisdiction and the enforcement of these Principles.”¹³⁴ This Principle builds on Principle 3, which called upon “national judicial organs [to] rely on universal jurisdiction even if their national legislation does not specifically provide for it.”¹³⁵

This Section uses universal jurisdiction in Germany to illustrate the range of options available under universal jurisdiction to focus on gender persecution under the Rome Statute. The Article delves into the approach of the Office of the German Federal Prosecutor General of the Federal Court of Justice concerning gender-related considerations. Additionally, the Article acknowledges the obstacles that impede the investigation and adjudication of crimes under international law, with particular emphasis on the challenges associated with investigating and prosecuting sexual and gender-based offenses.

In recent times, the Office of the German Federal Prosecutor General of the Federal Court of Justice (GBA) has emerged as a prominent actor in investigating international crimes committed abroad, guided by the principle of universal jurisdiction as enshrined in the Code of Crimes against International Law (CCAIL).¹³⁶ This legal framework serves as the domestic implementation of the Rome Statute within Germany. Notably, Germany’s universal jurisdiction legislation is relatively unrestrictive, allowing for a broad scope of application, and its civil law system ensures substantial participatory rights for victims as parties in criminal proceedings. This unique combination of factors makes Germany an important case study for exploring the potential of universal jurisdiction in advancing accountability for gender persecution, in this case, in Afghanistan. Within the context of this investigation, I look at two cases involving SGBV incorporated into an indictment since the establishment of the German CCAIL in 2002.

The proceedings involving two high-ranking representatives of the armed rebel group Forces Démocratiques de libération du Rwanda (FDLR) highlight the persistent inadequacies in investigating and prosecuting SGBV.¹³⁷ These deficiencies perpetuate the invisibility of such crimes and the related harm endured by survivors.¹³⁸ The trial marked a significant milestone as the inaugural trial under the CCAIL to incorporate charges related to conflict-related sexualized violence – their indictment represented a significant step in addressing crimes of a sexualized and gender-based nature under the framework of universal jurisdiction in Germany.¹³⁹ However, an analysis of the trial proceedings and its final outcome reveals various deficiencies on the part of both the prosecution and the court, which ultimately led to the dismissal of all conflict-related sexualized violence charges.¹⁴⁰

The second case pertains to former officials of Syria’s President Bashar al-Assad’s General Intelligence Directorate, with one of them facing indictment for sexual crimes and violence, particularly sexualized slavery perpetrated against Yazidi women and girls.¹⁴¹ Sexual violence

¹³³*Id.* at 29.

¹³⁴*Id.* at 34.

¹³⁵*Id.* at 30.

¹³⁶Code of Crimes Against International Law [CCAIL], Federal Law Gazette I, at Art. 1 (Ger.).

¹³⁷*Groundbreaking Trial in Germany: Rwandan FDLR Rebel Leaders Sentenced*, EUR. CTR. FOR CONS. & HUM. RTS. [ECCHR] (last visited Aug. 4, 2023), <https://www.ecchr.eu/en/case/groundbreaking-trial-in-germany/>.

¹³⁸The first case targeted Ignace Murwanashyaka and Straton Musoni, respectively the President and Vice-President of the Democratic Forces for the Liberation of Rwanda (FDLR).

¹³⁹*Germany: Q&A on Trial of Two Rwandan Rebel Leaders*, HUM. RTS. WATCH (May 2, 2022, 10:00 AM EDT), <https://www.hrw.org/news/2011/05/02/germany-qa-trial-two-rwandan-rebel-leaders>; Gesley, *supra* note 127.

¹⁴⁰*German Court Partially Overturns War Crimes Verdict for Rwandan*, REUTERS (Dec. 20, 2018, 6:53 AM), <https://www.reuters.com/article/us-germany-congo-court/german-court-partially-overturns-war-crimes-verdict-for-rwandan-idUSKCN1OJ1YA>.

¹⁴¹Gesley, *supra* note 127.

constituted a significant aspect of the international crimes committed by ISIS against this religious and ethnic minority.¹⁴² However, the initial trials addressing international crimes against the Yazidi community revealed a conspicuous absence of any sexualized violence charges being levied against the defendants.¹⁴³

The allegations of sexualized violence in this case were predicated on the testimonies of the affected victims. During the main trial, three victims provided their testimonies via video conference. Surprisingly, the Trial Chamber decided to drop two-thirds of the charges after these testimonies, with the Presiding Judge citing concerns that the proceedings would become protracted if all charges were pursued.¹⁴⁴ Nonetheless, as a fundamental tenet, criminal courts bear the responsibility of thoroughly examining charges brought before them. In this case, the Trial Chamber failed to fulfill its obligation to conduct a comprehensive investigation into the charges, resulting in a reduction of charges through dismissal.

Despite certain advancements, German investigations into gender-based crimes still display persistent shortcomings, especially concerning the incorporation of a gender perspective as a foundational element for effectively prosecuting conflict-related sexualized violence. This highlights the need for further improvements in addressing and prosecuting such crimes in a manner that appropriately acknowledges their gendered nature and impact. The OTP's 2014 Policy Paper and 2022 Gender Persecution Policy lay out methods, from preliminary examination through to prosecution, to strengthen the Rome Statute.¹⁴⁵ The question remains, however: how can these steps, such as specialized training, help Judges, the Office of the Federal Prosecutor, and the Federal Criminal Police Office recognize a gender analysis in crimes of persecution?¹⁴⁶

II. A New Security Council Resolution under the Women Peace and Security Agenda

A new UN Security Council Resolution (UNSCR) under Resolution 1325's Women Peace and Security (WPS) Agenda could recognize the elements of gender persecution and gender apartheid.¹⁴⁷ Given that gender apartheid addresses institutional forms of segregation and subordination through laws, policies, and executive orders, gender persecution and gender apartheid provide an inflection point to the WPS agenda, which is a shift from interpersonal to structural violence. It will also provide a new category of violence that grew out of the Taliban's control over women's autonomy and empowerment.

New challenges – including the Taliban's exclusion of women and girls from education and certain forms of employment – push us to reimagine the UNSCR 1325's paradigmatic focus on women's bodies toward a more holistic understanding of violence against women.¹⁴⁸ The term, "conflict-related sexual violence," as defined by UNSCR 1820, must be redefined in light of the current structural forms of violence against women, such as denial of women and girls' education in Afghanistan.¹⁴⁹

¹⁴²Syria Torture: German Court Convicts Ex-Intelligence Officer, BBC (Feb. 24, 2021), <https://www.bbc.com/news/world-europe-56160486>.

¹⁴³Deborah Amos, *In a Landmark Case, a German Court Convicts an Ex-Syrian Officer of Torture*, NPR (Jan. 13, 2022, 5:13 AM ET), <https://www.npr.org/2022/01/13/1072416672/germany-syria-torture-trial-crimes-against-humanity-verdict>.

¹⁴⁴Susann Aboueldahab & Fin-Jasper Langmack, *The End of the Al-Khatib Trial: A Historic Verdict and a Trial of Missed Opportunities*, VÖLKERRECHTSBLOG (July 2, 2022), <https://voelkerrechtsblog.org/the-end-of-the-al-khatib-trial/>.

¹⁴⁵ICC, 2014 Policy Paper, *supra* note 33; ICC, 2022 Gender Persecution Paper, *supra* note 41.

¹⁴⁶ICC, 2022 Gender Persecution Policy, *supra* note 41.

¹⁴⁷See Rangita de Silva de Alwis, *Reflecting on the 10th Anniversary of the CEDAW's General Recommendation 30 on Women Peace and Security*, GEO. INSTITUTE FOR WOMEN, PEACE & SEC. (June 8, 2023), <https://giwps.georgetown.edu/reflecting-on-the-10th-anniversary-of-the-cedaws-general-recommendation-30-on-women-peace-and-security/>.

¹⁴⁸S.C. Res. 1325 (Oct. 31, 2000).

¹⁴⁹S.C. Res. 1820, ¶ 3 (June 19, 2008).

Seven of the ten WPS resolutions specifically addressed sexual violence in conflicts: conflict-related sexual violence was noted 174 times across four resolutions.¹⁵⁰ By comparison, education was mentioned nine times across the same number of resolutions.¹⁵¹ Women and girls' education as a security issue needs to be a focus, especially with the ban on women and girls' education in Afghanistan. Although a few of the UNSCRs invoke education, none go far enough to address the attacks against girls' education as part of the WPS oeuvre.

The Taliban's ban on girls' education reinforces the urgency for the adoption of a standalone WPS resolution that recognizes the disproportionate impact of conflict on girls' education in places such as Afghanistan. This new WPS resolution must address girls and women's education as key to sustaining peace and security and threats to girls and women's education as a form of gender persecution. The WPS agenda is critical to peace and security and recognizes and advances women's participation in peace and security. As they stand, the ten WPS UNSCR resolutions with an emphasis on conflict-related sexual abuse are more focused on protecting women's bodies than on advancing their minds as important tools for strengthening peace and security and empowering women and girls in communities such as Afghanistan. More must be done to redefine the WPS agenda and to develop a new standalone resolution that reframes bans on education as a threat to global and national security and a form of gender persecution.

The Taliban's limits on education for girls provide a warning cry for a WPS resolution that looks specifically at women's education as a casualty of conflict and violent extremism. Thus, denial of girls and women's education must be seen as a form of conflict-related intellectual violence that is interconnected with conflict-related sexual and other forms of physical violence. Despite profound threats, girls' education is a potent vaccine to stem the tide of fundamentalism. A new UNSCR that acknowledges the primacy of educating girls, not only as a fundamental human right but also as a security imperative to prevent conflict and sustain peace, is critical to a new understanding of what constitutes gender persecution. As devastating attacks on schools and schoolgirls escalate in Afghanistan and other communities, the Security Council should adopt a WPS resolution protecting women's education during and after conflicts.

Even before the ban on women's education and the partial denial of girls' education by edict, the Taliban waged a war against girls and women's education. In Afghanistan, school wells had been poisoned, and girls travelling to school were subject to acid attacks.¹⁵² In May 2021, a bomb attack killed scores of schoolgirls at the Sayed Ul-Shuhada High School in Kabul.¹⁵³ Schoolteachers at schools for girls had to grapple with the reality that the Taliban may have poisoned their drinking water.¹⁵⁴ Even before the August 2021 takeover of Afghanistan, "night letters" were a tool of Taliban communication in rural communities in Afghanistan, often threatening teachers and students.¹⁵⁵

In my co-authored Princeton Policy Brief, we interviewed ten Afghan women teachers from different ethnic groups; one teacher's dire portrayal of the hopelessness suffered by the denial of women's and girls' education captures the loss to all of Afghanistan and the world:

¹⁵⁰Sexual violence was mentioned thirty-four times in UNSCR 1820; forty-eight times in UNSCR 1888; forty-five times in UNSCR 1960; and forty-seven times in UNSCR 2106. *Id.*; S.C. Res. 1888 (Sept. 30, 2009); S.C. Res. 1960 (Dec. 16, 2010); S.C. Res. 2106 (June 24, 2013).

¹⁵¹Education was mentioned five times in UNSCR 1889, twice in UNSCR 2242, and once in 2467 and 2494, respectively. S.C. Res. (Oct. 5, 2009); S.C. Res. 2242 (Oct. 13, 2015); S.C. Res. 2467 (Apr. 23, 2019); S.C. Res. 2106 (June 24, 2013).

¹⁵²Masoud Popalzai et al., *Nearly Eighty Students, Mostly Girls, are Poisoned in Afghanistan, Say Officials*, CNN (June 5, 2023, 3:51 PM EDT), <https://www.cnn.com/2023/06/05/asia/afghan-schoolgirls-poisoning-intl/index.html>.

¹⁵³Thomas Gibbons-Neff & Najim Rahim, *Bombing Outside Afghan School Kills at Least Ninety, With Girls as Targets*, N.Y. TIMES (May 8, 2021), <https://www.nytimes.com/2021/05/08/world/asia/bombing-school-afghanistan.html>.

¹⁵⁴Noël James, *Women This Week; Afghan Schoolgirls Targeted in Poison Attack*, COUNCIL ON FOREIGN REL. (June 9, 2023, 4:56 PM EST), <https://www.cfr.org/blog/women-week-afghan-schoolgirls-targeted-poison-attack>.

¹⁵⁵*Taliban Use Traditional Afghan Method of 'Night Letters' to Intimidate*, ECON. TIMES (Aug. 31, 2021, 4:01 PM IST), <https://economictimes.indiatimes.com/news/international/world-news/taliban-use-traditional-afghan-method-of-night-letters-to-intimidate/articleshow/85795913.cms?from=mdr>.

In my province, we had girls who could be singers, professors, athletes, and politicians. Now we have nothing left. All of those talents were arrested. .. Families rush to marry their daughters because they are afraid the Taliban may take them for marriage. Most girls are forced to marry. This is a nightmare I never imagined [would] happen.¹⁵⁶

The primary focus on sexual violence limits the focus on WPS to women's bodies as the only battleground of violence. The fetishization of women's bodies creates a hierarchy of violence that prioritizes the protection of women over their empowerment. The dichotomization of violence must give way to an understanding of the overlapping forms of physical and intellectual violence. A new UNSCR, under the WPS corpus, will provide an understanding that women's minds are battlegrounds as well, especially in the context of the Taliban's control over women's educational and intellectual advancement.¹⁵⁷

III. How ESG Can Help: Human Rights and Supply Chain Management

The corporate social responsibility movement, a forebear of environmental, social and corporate governance (ESG), spurred the United States to enact the Comprehensive Anti-Apartheid Act, a 1986 federal law that imposed sanctions and prohibited US nationals from making any new investments in South Africa during the apartheid regime.¹⁵⁸ This Section analyzes how investment based on ESG can help to dismantle human rights abuses. Although less applicable to Afghanistan, the often underexamined "S" in the ESG can help support Afghan human rights defenders both inside and outside Afghanistan.

The recent momentum on the "S" has been spurred by the spotlight on diversity, equity, and inclusion in corporate America following the 2018 #MeToo anti-sexual harassment movement, the 2020 Black Lives Matter movement, and the 2021 Stop Asian Hate movement.¹⁵⁹ The confluence of the public reckoning with the COVID-19 pandemic has increased renewed awareness and attention to the role of business in human rights. This momentum should be used as a strategy to hold perpetrators of gender persecution accountable.

1. Legislative Reform

The Dodd-Frank Act of 2010, drafted to address the economic downturn, addressed reporting requirements on trade in conflict minerals in the Democratic Republic of Congo (DRC) and other aligned countries.¹⁶⁰ The provision imposed on businesses additional reporting on trade in conflict minerals that help to finance conflict, particularly sexual and gender-based violence, in the DRC and adjoining countries.¹⁶¹

¹⁵⁶Farid & de Silva de Alwis, *supra* note 77.

¹⁵⁷See further Rangita de Silva de Alwis, *Expanding the Women Peace and Security Agenda to Protect Women's Education in Afghanistan and Other Geographies of Conflict*, Faculty Scholarship at Penn Carey Law (2022) (https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3869&context=faculty_scholarship); Farid & de Silva de Alwis, *supra* note 77.

¹⁵⁸In 2011, the Special Representative on the Issue of Human Rights, John Ruggie issued the Guiding Principles on Business and Human Rights. The Guiding Principles on Business and Human Rights. The Guiding Principles are important, because they create a norm of corporate governance that would prevent business activities that contribute to human rights abuses. If businesses acknowledge or continue to adhere to the goals set forth in The Guiding Principles, many conflicts such as those in the DRC would not be so heavily financed.

¹⁵⁹Ellen Holloman & Hyunjoo Han, *ESG, MeToo, and Black Lives Matter: Key Corporate Governance and Workplace Issues*, LexisNexis Practical Guidance (2021), 1. https://www.cadwalader.com/uploads/media/ESG,_MeToo,_and_Black_Lives_Matter_Key_Corporate.pdf.

¹⁶⁰H.R. 4173, 111th Cong. ¶ 1502 (2010).

¹⁶¹*Id.*

In October 2010, the European Parliament passed a resolution urging the EU to develop legislation akin to Dodd-Frank's Section 1502.¹⁶² By April 2017, the EU Council adopted regulations to curb the financing of armed groups through the trade of conflict minerals.¹⁶³ Throughout this process, the EU actively engaged with the Organization for Economic Cooperation and Development (OECD) Due Diligence Guidelines, aligning its approach with the international framework for disclosing the use of conflict minerals, which the United States similarly recognized.¹⁶⁴

Moreover, in response to concerns about forced labor in China's Xinjiang region, particularly affecting the Uyghur, a Turkish ethnic group, and other Muslim minority populations, President Biden recently enacted the Uyghur Forced Labor Prevention Act.¹⁶⁵ This new legislation, which came into effect on June 21, 2022, imposes stringent requirements on companies.¹⁶⁶ It mandates that companies must provide robust documentation to U.S. Customs and Border Protection, affirming that none of their products contained components sourced or manufactured using forced labor.¹⁶⁷

These legislative actions reflect the growing global concern regarding the adverse impact of conflict minerals and forced labor on human rights and international security. Both the EU and the United States have taken steps to address these issues through regulatory controls, thereby contributing to the efforts to combat the financing of armed groups and the use of forced labor in regions of concern.¹⁶⁸ These initiatives signify responsible business practices and safeguard human rights across the global supply chain.

2. Corporate Accountability in the Courts

Instances related to human rights violations have emerged in the corporate domain. As shareholders and consumers increasingly demand transparency and ethical behavior from companies, such legal actions prompt businesses to assess and improve their supply chain practices, thereby promoting a more socially responsible and sustainable business landscape.

In a lawsuit against Starbucks, the plaintiff made allegations concerning the company's hot chocolate, which was marketed as being "made with ethically sourced cocoa."¹⁶⁹ Furthermore, Starbucks administered an internal certification program known as "COCOA."¹⁷⁰ However, the plaintiff contended that the company was fully aware of the use of child and slave labor on the cocoa farms from which it sourced its cocoa, despite the purported ethical sourcing claims.¹⁷¹

Another significant legal development occurred in January 2019 when the National Consumer League announced a settlement in a lawsuit against defendant retailers Wal-Mart, The Children's Place, and J.C. Penney.¹⁷² The basis for the lawsuit was the failure of these companies to fulfill their promises to conduct supplier audits to ensure safe and healthy working conditions for their workers and refrain from employing child labor.¹⁷³

¹⁶²*Conflict Minerals Regulation: The Regulation Explained*, EUR. COMM'N (last visited Aug. 5, 2023), https://policy.trade.ec.europa.eu/development-and-sustainability/conflict-minerals-regulation/regulation-explained_en.

¹⁶³*Id.*

¹⁶⁴*Id.*

¹⁶⁵H.R. 1155, 117th Cong. (2022).

¹⁶⁶*Id.*

¹⁶⁷*Id.* at ¶ 5.

¹⁶⁸H.R. 4173, *supra* note 161; EUR. COMM'N, *supra* note 163.

¹⁶⁹*Myers v. Starbucks Corp*, 536 F. Supp. 3d 657, 662 (C.D. Cal. 2021).

¹⁷⁰*Id.*

¹⁷¹*Id.* ("Myers would like to consume cocoa that is *not* produced by child slaves.")

¹⁷²*Statement on Resolution of Lawsuit Against Walmart, JC Penney, and The Children's Place*, Nat'l Consumers League (Jan. 25, 2019), https://nclnet.org/archive-pages/resolution_walmart/.

¹⁷³Ramona L. Lampley, *Mitigating Risk, Eradicating Slavery*, 68 AM. U.L. REV. 1707, 1719 (2019).

Additionally, shareholder activists also directed their focus on Monster Beverage Corporation, alleging that the company utilizes sugar cane sourced from regions where modern slavery remains a pressing concern.¹⁷⁴ The activists argued that Monster had neglected to conduct adequate audits and disclose sufficient information about its supply chain practices.¹⁷⁵

These instances underscore the mounting emphasis on corporate accountability and human rights considerations, particularly concerning supply chains. Given the power of corporations and their reach and influence, they must do more to not only “do no harm” but to actively do good by supporting human rights defenders, including Afghan human rights defenders.

Some corporations have publicly announced commitments to uphold human rights in their supply chains. In March 2021, BlackRock Investment Stewardship, the world’s largest asset manager, publicly communicated its commitment to engaging companies in human rights and asked that companies report on how they integrate human rights considerations into their operations and risk management processes and demonstrate the steps they have taken to address these issues.¹⁷⁶ In recognition of International Human Rights Day on December 10, 2018, Citibank issued the following update to its statement concerning human rights: “[f]or project finance and project related corporate loans, any human rights mitigation requirements are included as a condition of financing.”¹⁷⁷

Human rights in the supply chain could track how entities continue to tacitly support the Taliban, whether through travel or technology. For example, Facebook banned Taliban-related accounts as part of its tiered policy for dangerous organizations.¹⁷⁸ After the second Taliban takeover on August 15, 2021, Facebook announced that it would continue to remove Taliban accounts and posts that supported them.¹⁷⁹ Similarly, YouTube said it would remove accounts it believed were operated by them.¹⁸⁰ Nevertheless, despite these bans, the reporting of pro-Taliban social media accounts continues.¹⁸¹ Similarly, the Taliban de facto authority continues to travel for personal and political purposes, thereby normalizing its authority.¹⁸² There is a shameful history of corporate entities directly or indirectly aiding and abetting oppression and violence in different parts of the world.¹⁸³ ESG governance must pierce the veil that obscures the legitimization of oppressive rule through business interest.

¹⁷⁴ *Monster Beverage Shareholders Vote to Fix Slavery Problem*, AS YOU SOW (June 8, 2018), <https://www.asyousow.org/press-releases/2018/6/8/monster-beverage-shareholders-vote-to-fix-slavery-problem>.

¹⁷⁵ *Monster Beverage Shareholder Resolution: Report on Slavery and Human Trafficking*, MONSTER BEVERAGE CORP. INV. (last visited Aug. 4, 2023), <https://investors.monsterbevcorp.com/static-files/71b00757-9878-4d4b-9114-35c6aaf023da>.

¹⁷⁶ Saijel Kishan & Annie Massa, *BlackRock to Press Companies About Their Policies Related to Human Rights, Biodiversity, Deforestation & Water*, BUS. & HUM. RTS. RES. CTR. (Mar. 18, 2021), <https://www.business-humanrights.org/en/latest-news/blackrock-to-press-companies-about-their-policies-related-to-human-rights-biodiversity-deforestation-water/>.

¹⁷⁷ *Statement on Human Rights*, Citibank (Nov. 2018), https://www.citigroup.com/rcs/citigpa/akpublic/storage/public/citi_statement_on_human_rights.pdf.

¹⁷⁸ Bhaskar Chakravorti, *Facebook’s Taliban Ban Will Prove Costly for Afghans*, FOREIGN POL’Y (Aug. 26, 2021 1:55 PM), <https://foreignpolicy.com/2021/08/26/taliban-facebook-ban-social-media-afghanistan/>.

¹⁷⁹ *Afghanistan: Facebook Continues Ban of Taliban-Related Content*, BBC (Aug. 7, 2021), <https://www.bbc.com/news/business-58239786>.

¹⁸⁰ Elizabeth Culliford, *YouTube Says It Does Not Allow Taliban-Affiliated Accounts*, REUTERS (Aug. 17, 2021 12:46 PM PDT), <https://www.reuters.com/technology/youtube-says-it-bans-accounts-believed-be-owned-by-taliban-2021-08-17/>.

¹⁸¹ Sheera Frenkel & Ben Decker, *Taliban Ramp Up on Social Media, Defying Bans by the Platforms*, N.Y. TIMES (Aug. 18, 2021), <https://www.nytimes.com/2021/08/18/technology/taliban-social-media-bans.html>.

¹⁸² Lynne O’Donnell, *The United Nations Can Hold the Taliban Accountable*, FOREIGN POL’Y (Aug. 28, 2022 2:31 PM), <https://foreignpolicy.com/2022/08/18/taliban-afghanistan-united-nations-travel-ban-terrorism/>.

¹⁸³ Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses (A Report Prepared for the Office of the UN High Commissioner for Human Rights)*, OHCHR (last visited Aug. 5, 2023), <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

D. Conclusion

The policies of the Taliban clearly target women and severely deprive them of their fundamental human rights, including freedom of movement, access to education, employment opportunities, and the right to political participation. Thus, a persuasive argument can be made for prosecuting Taliban officials for the crime of gender persecution, given the specific gender-based nature of their actions and their violation of fundamental rights. The 2022 Gender Policy released by the OTP will also be influential. Moreover, the OTP announced in July 2023 that it would prioritize crimes against women and children in the ongoing inquiry into Darfur.¹⁸⁴

A comparative analysis between the racial apartheid of the twentieth century and the gender apartheid of the twenty-first century exposes striking similarities in the implementation of systemic discriminatory governance. While it remains imperative for the international community to work towards the eventual criminalization of gender apartheid, interim solutions must be sought to ensure accountability for Taliban officials and to incentivize reforms aimed at securing full and equal rights for Afghan women. At the same time, there is a new urgency in naming a new category of gender violence under international law. Apartheid's horrific history of racial abuse was laid bare by naming the National Party as apartheid rule.¹⁸⁵ Women's rights advocates, especially those victimized by Taliban rule, are calling for the policies of the Taliban de facto regime to be recognized as gender apartheid.¹⁸⁶

Upon his release from imprisonment, Nelson Mandela declared that "apartheid has no future."¹⁸⁷ The same could be said about Afghanistan's own brand of apartheid. Not only does the concept of gender apartheid honor Nelson Mandela's legacy, but the history of apartheid shows us that naming crimes changes history.

The previous discussion on universal jurisdiction under the German legal system drives the examination of how it can use universal jurisdiction to initiate the prosecution of crimes against humanity by the Taliban.

Since the conviction of Nikola Jorgic for his involvement in the Bosnian genocide, Germany has implemented the principle of universal jurisdiction for genocide, crimes against humanity, and war crimes into its criminal law through the *Völkerstrafgesetzbuch* or *VStGB*, which implemented the Rome Statute, creating the International Criminal Code in 2002.¹⁸⁸ Germany could use its international criminal code to bring justice to the women of Afghanistan.

Moreover, as we approach the 25th anniversary of the WPS agenda, a state could put forward a resolution, the 10th in the corpus of WPS resolutions since the first landmark resolution 1325 in 2000. While Taliban rule rolls back the protection of Afghan women's human rights, it threatens women's rights everywhere by denying them meaningful participation with their Afghan colleagues.

A new WPS Resolution that clarifies gender persecution and defines gender apartheid could send a clear message to the international community that the denial of women and girls' human rights is a crime against humanity when committed as part of a widespread or systematic attack directed against a civilian population.¹⁸⁹ Recently, Richard Bennett, the UN SR on the situation of

¹⁸⁴Darfur International Criminal Court Launches Investigation into Surging Violence, UN News (July 13, 2023), <https://news.un.org/en/story/2023/07/1138692>. ("[The Prosecutor] informed ambassadors that he has given 'clear instructions' to his office to prioritize crimes against children, and crimes of sexual and gender[-]based violence.")

¹⁸⁵End of Apartheid, U.S. DEP'T OF STATE ARCHIVE (last visited Aug. 6, 2023), <https://2001-2009.state.gov/r/pa/ho/time/pcw/98678.htm#:~:text=Apartheid%2C%20the%20Afrikaans%20name%20given,a%20democratic%20government%20in%201994>.

¹⁸⁶Patrick Wintour, *Campaign Calls for Gender Apartheid to be Crime Under International Law*, Guardian (Mar. 8, 2023, 3:00 EST), <https://www.theguardian.com/society/2023/mar/08/campaign-calls-for-gender-apartheid-to-be-under-international-law>.

¹⁸⁷Nelson Mandela, Speech on His Release from Prison (Feb. 11, 1990).

¹⁸⁸*Tadic Case: The Verdict*, UN INT'L CRIM. TRIBUNAL FOR THE FMR. YUGOSLAVIA (May 7, 1997) <https://www.icty.org/en/press/tadic-case-verdict>.

¹⁸⁹*Ethnic Cleansing*, UN OFF. ON GENOCIDE PREV. AND THE RESPONSIBILITY TO PROTECT, <https://www.icty.org/en/press/tadic-case-verdict> (last visited Oct. 5, 2023).

human rights in Afghanistan, speaking on the sidelines of the 78th session of the UN General Assembly, accused the international community of betraying Afghan women. He called for practical actions, not just condemnations and expressions of sympathy, in the follow-up to his June 2023 Report to the Human Rights Council. “The pattern of large-scale systematic violations of women’s and girls’ fundamental rights in Afghanistan, abetted by the Taliban’s discriminatory and misogynistic policies and harsh enforcement methods, constitutes gender persecution and an institutionalized framework of gender apartheid.”¹⁹⁰

The WPS agenda is coming of age after a quarter century and is a critical tool for Afghan women. Last year, Zarqa Yaftali, an Afghan women’s rights activist, spoke on behalf of the NGO Working Group on WP when she said: “Twenty years of commitments and resolutions by this Council have not changed the reality for women in Afghanistan.” Yaftali said, “. . . we have fought back for decades for our rights, and we will not sit by and watch our achievements be thrown away. It is your responsibility as the international community to ensure that you do not either.” To borrow from Justice Jackson, this is a “grave responsibility of justice” given that in the SR’s findings: “[N]owhere else in the world has there been an attack as widespread, systematic and all-encompassing on the rights of women and girls as in Afghanistan.”¹⁹¹

There are examples of policies yet to be recognized as crimes under international law that are already being condemned by judicial bodies in their resolutions. One such example was the verdict in the International Criminal Tribunal of Yugoslavia (ICTY) in the “Tajic case,” which was the first-ever judicial condemnation of the policy of “ethnic cleansing.”

In addressing the armed conflict in the former Yugoslavia, the verdict, the first determination of individual guilt or innocence in connection with serious violations of international humanitarian law by an international tribunal, also represented the first-ever judicial condemnation of the “ethnic cleansing” policy.

Apart from being acknowledged in the judgments of the ICTY, the expression “ethnic cleansing” has also been used in resolutions of the Security Council and the General Assembly. Thus, a condemnation of “gender apartheid” by a judicial body and by a UN Security Council Resolution within the WPS agenda would help in its condemnation, even though it is yet to be codified explicitly as a crime in international law.

E. Coda: CEDAW General Recommendation 40

Since finalizing this Article, the CEDAW Committee is considering including language on gender apartheid and gender persecution in General Recommendation 40 of the CEDAW. CEDAW’s General Recommendations (GR) are considered authoritative statements that are interpretive tools to clarify further and expand the CEDAW Convention’s statutory provisions concerning women’s human rights and state accountability.¹⁹² General Recommendations, such as the newly developing General Recommendation 40, are part of “an impressive framework to address intersectional discrimination,” where a GR almost always informs the state’s statutory language.¹⁹³ Toward this end, the author, a CEDAW Committee expert, has proposed this language and included the draft language below for consideration by the Committee.¹⁹⁴

¹⁹⁰*Situation of Women and Girls in Afghanistan*, HUMAN RIGHTS COUNCIL (June 20, 2023), <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session53/advance-versions/A-HRC-53-21-AdvanceEditedVersion.docx>.

¹⁹¹*Id.*

¹⁹²So far, the CEDAW Committee has developed 39 General Recommendations. The last GR 39 developed in 2022 was General recommendation No.39 (2022) on the rights of Indigenous women and Girls | OHCHR

¹⁹³Rangita de Silva de Alwis & Melanne Verveer, “*Time Is A-Wasting*”: *Making the Case for CEDAW Ratification by the United States*, 60 COLUM. J. OF TRANSNATIONAL L. 1, 14 (2021).

¹⁹⁴The author also thanks Catherine Amirfar for her guidance. See *Catherine Amirfar*, DEBEVOISE & PLIMPTON <https://www.debevoise.com/catherineamirfar> (last visited Oct. 25, 2023).

According to the concept note of General Recommendation 40, this specific GR complements GR 23 and is intended “to give a decisive impetus to women’s equal and inclusive representation in decision-making systems, based on a global and inclusive dimension.”¹⁹⁵ Ratification and implementation of GR 40 will require “moral leadership” of the kind that Harold Koh bemoaned – a form of leadership that was, in part, embodied by U.S. Secretary of State Condoleezza Rice’s 2008 introduction of the eventual Security Council Resolution 1820, in which she acknowledged sexual violence as a security concern.¹⁹⁶

What follows is a conceptualization of the inextricably interrelated nature of the moral leadership of women and holding states accountable for crimes against humanity, such as gender apartheid and gender persecution. This is followed by proposed language for CEDAW’s seminal engagement with gender apartheid and gender persecution as a provision of GR 40’s broader leadership mandate.¹⁹⁷

Proposed Language for CEDAW General Recommendation 40: Gender Persecution and Gender Apartheid and linkages with women in leadership and decision-making¹⁹⁸

Recognizing the severity of the impact of gender persecution and gender apartheid on the human rights of women and girls, especially in the context of their education, participation, and decision-making in public life, and that extreme forms of gender segregation, subordination, and the denial of women’s public participation and public decision-making, are known to be part of the strategic objective and ideology of extremist groups, which they use as a tactic to increase their power.

At its core, General Recommendation 40 calls for gender equality in women’s decision-making in all public areas, including the increased representation of women in decision-making in national, regional, and international institutions and mechanisms for preventing and resolving conflicts.

On October 25, 2023, the UN marked the 23rd anniversary of the adoption of UN Security Council Resolution 1325, the first resolution in the WPS agenda. In 2022, globally, just one was signed or witnessed by a woman. As conflict and war escalated, women’s decision-making became more central. According to the Council of Foreign Relations, during a twenty-seven-year period between 1992 and 2019, on average, women represented 13 percent of negotiators, 6 percent of mediators, and 6 percent of signatories to peace processes.¹⁹⁹

Bringing women’s participation and leadership to the forefront of peace and security efforts relies upon General Recommendation 40 to address the ways in which severe forms of gender segregation, women’s exclusion, and absence from meaningful participation in public affairs have a high correlation to sustainable peace, the prevention of conflict, and the security of nations.

The pattern of large-scale systematic violations of women and girls’ fundamental rights in different parts of the world, which, abetted by discriminatory and misogynistic policies and harsh enforcement methods, constitute mass-scale impediments to women’s leadership and decision-making. Moreover, institutionalized gender persecution and extreme segregation create a deliberate erasure of women in public life and decision-making and an institutionalized framework of gender cleansing in public leadership that amounts to gender expungement, leading to gender apartheid. At its core, General Recommendation 40’s goal of full and equal gender parity in leadership and decision-making is about standing up for what is unjust and unequal

¹⁹⁵Concept Note on the Future General Recommendation on Equal and Inclusive Representation of Women in Decision-Making Systems.

¹⁹⁶See de Silva de Alwis & Verveer, *supra* note 194, at 1–3, 25–26.

¹⁹⁷This language is derived from the arguments made in this Article about the new and evolving approaches to gender persecution.

¹⁹⁸This language is proposed by the author who is an independent expert the CEDAW Committee.

¹⁹⁹Women’s Contributions to Peace and Security Processes | Council on Foreign Relations (cfr.org)

worldwide. A fundamental goal of General Recommendation 40 is to condemn severe, widespread, systematic, and all-encompassing violations of the rights of women and girls in every corner of the world. General Recommendation 40's aim is to move toward a new ideal and theory of leadership built on a foundation of a common purpose that makes us collectively stand up against injustice on behalf of the rights of women and girls. These shared values of leadership are universal and inalienable. These truths are self-evident: we cannot achieve sustained peace in the world unless women obtain the same opportunities as men to influence decision-making at all levels of society.

Gender Apartheid

- *Proposed Definition:* The crime of “gender apartheid” refers to inhumane acts committed in the context of an institutionalized regime of systematic oppression and domination by one gender group over other gender group or groups to maintain that regime. Gender apartheid impacting women and girls is best understood as a form of governance based on laws or policies designed to systematically segregate men and women while depriving women of political, economic, social, civil, educational, and other human rights, systematically excluding women from public spaces and spheres and subordinating them, sometimes into systems of sexual slavery. Gender apartheid codifies the subordination of women in violation of fundamental principles of international law. Such systematic exclusion and subordination are compounded by intersectionality, where the interrelated nature of identity, which includes but is not limited to race, religion, ethnicity, sexual identity, and age, negatively impacts the most marginalized and vulnerable women.
- *Commentary:* The first sentence draws from the definition of apartheid in Article 7(2)(h) of the Rome Statute (also the definition in Article 2 of the Draft Convention on Crimes Against Humanity), which, along with Article 2 of the Apartheid Convention, is generally the starting point for conceptualizing gender apartheid. Following this legal definition, we have aimed to provide a more qualitative description, drawing from relevant literature to highlight elements of gender apartheid in practice, including the segregation and subordination of women, deprivation of fundamental rights, and exclusion from the public sphere. The definition highlights “laws and policies” to reflect that gender apartheid may be imposed by both *de jure* and *de facto* authorities. The key element in defining gender apartheid, which sets it apart from gender persecution (see below), is the existence of an institutionalized regime of systematic oppression and domination of one group over another, which the perpetrators seek to maintain by their actions.
- Gender as a social construct would align with the practice of other international bodies, including the International Criminal Court. The Rome Statute’s definition of “gender” under Article 7 refers to “the two sexes, male and female, within the context of society.” The ICC Office of the Prosecutor’s Policy on Gender Persecution explicitly frames gender as a social construct, stating that “[g]ender refers to sex characteristics and social constructs and criteria used to define maleness and femaleness, including roles, behaviors, activities, and attributes. As a social construct, gender varies within societies and from society to society and can change over time.” The Rome Statute thus appears to recognize gender as a social construct and does not limit its definitions to biological sex alone. It is for this reason that the crimes of gender persecution and gender apartheid should be understood to include the targeting of victims based on their actual or perceived sex characteristics and/or social constructs that define gender roles, behaviors, activities, and attributes associated with one gender. An intersectional approach to both crimes includes an understanding that gender persecution and gender apartheid may be based on multiple actual or perceived characterizations of individuals (for instance, based on actual or perceived sexual orientation). This further acknowledges gender as a social construct.

Gender Persecution

- *Proposed Definition:* “Gender persecution” refers to the intentional and severe deprivation of the fundamental rights of a group contrary to international law because of their gender. Gender persecution against women and girls targets even those sympathetic to or affiliated with them, based on their actual or perceived sex characteristics and/or social constructs that define the gender roles, behaviors, activities, and attributes associated with women and can be carried out through a variety of means, including physical or psychological violence or even the passage of regulations that impact women and girls in every aspect of life. Gender persecution targeting women is often based on multiple and intersecting grounds of persecution, including racial, national, ethnic, cultural, religious, pregnancy, sexual orientation, or other grounds.
- *Commentary:* The first sentence draws from the definition of “persecution” in Article 7.2(g) of the Rome Statute, which includes gender persecution as a crime against humanity pursuant to Article 7.1. Following this definition, we have focused on drawing out three key elements highlighted in the literature, namely (1) the fact that gender persecution can target groups (or affiliates/sympathizers of such groups) based on their *actual or perceived gender*; (2) the wide range of means through which gender persecution may be carried out; and (3) the fact that gender persecution must be understood through an intersectional approach in which victims may become targets, not *solely* due to their perceived gender but also as a result of other distinct factors. The crime of gender persecution can constitute a crime against humanity when committed as part of a widespread or systematic attack against a civilian population, with knowledge of the attack, and when carried out in connection with acts falling under Art. 7, paragraph 1 of the Rome Statute or any other crime within the jurisdiction of the International Criminal Court.

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Appendix I. Taliban Policies Restricting Women's Rights Since August 2021²⁰⁰

1. Instruction ordering imams to compile lists of unmarried women between ages twelve to forty-five for Taliban fighters to marry (Aug. 13, 2021)

Source	Daily Mail , “Advancing Taliban Go Door-to-Door and Forcibly Take Girls as Young as Twelve to be Sex Slave ‘Wives’ for Their Fighters as They Sweep Across Country Following NATO Withdrawal”
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 16 (b), “The same right to freely choose a spouse and to enter into a marriage only with their free and full consent.” International Covenant on Economic, Social, and Cultural Rights – Article 10, Section 1, “Marriage must be entered into with the free consent of the intending spouses.”
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003. Not signed but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	CRC State Report 2019 – Section 33, “The marriage age for girls . . . is 16 . . . The marriage of a girl under 15 is not permitted.”
Afghan National Action Plan on Women, Peace, and Security	“The laws of Afghanistan guarantee the protection of women’s rights and freedom . . . [against] offenses including forced marriage.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	N/A*

2. Temporary advisory for working women to stay at home “for their safety” (Aug. 25, 2021)

Source	CNN , “Taliban Tell Afghan Women to Stay Home From Work Because Soldiers Are ‘Not Trained’ to Respect Them”
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 11 (a), “The right to work as an inalienable right of all human beings.” International Covenant on Economic, Social, and Cultural Rights – Article 6, Section 1, “. . . the right of everyone to the opportunity to gain his living by work which he freely chooses.”
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003. Not signed but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – “The Committee notes with concern that the principle of equal remuneration for men and women workers for work of equal value is not guaranteed in the State party.”
Afghan National Action Plan on Women, Peace, and Security	“There are increased numbers of women in the police, military, [and] civil service but still not enough to respond to emerging needs of women. Women in the security sector is an encouraging force for more women to join the security forces.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Reaffirms its unwavering commitment to the full and equal enjoyment of all human rights by all women, girls, and children . . . including . . . the right to work.”

²⁰⁰Farid & de Silva de Alwis, *supra* note 77, at 8.

3. Ban on co-education, men prohibited from teaching girls (Aug. 30, 2021)

Source	Republic World , “Taliban Declare Ban On Co-Education in Afghanistan, Prohibit Men From Teaching Girls”
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 10 (a), “The same conditions for . . . access to studies,” (b), “Access to the same . . . teaching staff,” and (c), “elimination of any stereotyped concept of the roles of men and women at all levels.” Safe Schools Declaration – “Education is fundamental to development.”
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003. Endorsed in May 2015.
Afghan Reports to CEDAW, CRC, ICESCR	CRC State Report 2019 – Section 116, “. . . all children are entitled to enjoy free education . . . the Government is obliged to provide compulsory primary education for all children.”
Afghan National Action Plan on Women, Peace, and Security	“[the Government of Afghanistan] has developed this National Action Plan to achieve . . . increase[d] access to education and higher education for girls and women.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“. . . bilateral and regional efforts to promote the rights of women . . . in particular the right to education,” and “. . . the right to education for all is an essential condition for achieving sustainable development.”

4. Announcement of caretaker government without women (Sept. 8, 2021)

Source	CNN , “Taliban Name Ex-Guantanamo Detainees and Wanted Man to New Caretaker Government”
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 7 (b), “[ensure to women, on equal terms with men] To participate in the formulation of government policy . . . and to hold public office . . . at all levels of government.”
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – “The Committee . . . remains concerned at the low level of women’s representation in decision-making position[s] in Afghanistan.”
Afghan National Action Plan on Women, Peace, and Security	“[the Government of Afghanistan] has developed this National Action Plan to achieve . . . participation of women in the decision making and executive levels of the Civil Service.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Recognizing that the full, equal, effective and meaningful participation, inclusion and empowerment of all women and girls . . . is essential for sustainable peace.”

5. Ban on girls' secondary education (secondary schools to reopen only for male teachers and students) (Sept. 17, 2021)

Source	The Guardian , "Taliban Ban Girls From Secondary Education in Afghanistan"
Treaty Violated	Convention on the Rights of the Child – Article 28, Section 1 (b), "Encourage the development of different forms of secondary education . . . make them available . . . to every child"; Convention on the Elimination of All Forms of Discrimination Against Women – Article 10 (a), "The same conditions for . . . access to studies," (b), "Access to the same . . . teaching staff," and (c), "elimination of any stereotyped concept of the roles of men and women at all levels." Safe Schools Declaration – "Education is fundamental to development."
Treaty Ratification Status	Signed on Sept. 27, 1990, and ratified on March 28, 1994. Signed on Aug. 14, 1980, and ratified on March 5, 2003. Endorsed in May 2015.
Afghan Reports to CEDAW, CRC, ICESCR	CRC State Report 2019 – Section 116, ". . . all children are entitled to enjoy free education up to the undergraduate leve . . . the Government is obliged to provide compulsory primary education for all children," and Section 122, "To promote the right of girls to education."
Afghan National Action Plan on Women, Peace, and Security	"[the Government of Afghanistan] has developed this National Action Plan to achieve . . . increase[d] access to education and higher education for girls and women."
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	". . . bilateral and regional efforts to promote the rights of women . . . in particular the right to education," and ". . . the right to education for all is an essential condition for achieving sustainable development."

6. Removal of Ministry of Women's Affairs (Sept. 17, 2021)

Source	Reuters , "Taliban Replaces Women's Ministry With Ministry of Virtue and Vice"
Treaty Violated	International Covenant on Civil and Political Rights – Article 3, ". . . ensure the equal right of men and women to the enjoyment of all civil and political rights."
Treaty Ratification Status	Not signed but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – "The Committee . . . remains concerned at the low level of women's representation in decision-making position[s] in Afghanistan."
Afghan National Action Plan on Women, Peace, and Security	"[the Government of Afghanistan] has developed this National Action Plan to achieve . . . participation of women in the decision making and executive levels of the Civil Service."
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	"Calls for measures to ensure that local women's rights organizations and local organizations led by women can continue to carry out their work all over Afghanistan."

7. Effective ban on women in the workplace (Sept. 20, 2021)

Source	CBS News , “Taliban Tells Women and Girls to Stay Home From Work and School”
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 11 (a), “The right to work as an inalienable right of all human beings.” International Covenant on Economic, Social, and Cultural Rights – Article 6, Section 1, “. . . the right of everyone to the opportunity to gain his living by work which he freely chooses.”
Treaty Ratification Status	Not signed but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	Signed on Aug. 14, 1980, and ratified on March 5, 2003. Not signed but ratified on Jan. 24, 1983.
Afghan National Action Plan on Women, Peace, and Security	CEDAW Third State Report – Section 146, “Various government institutions . . . have launched public awareness raising programs on women’s rights including their right to work.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Create [an] enabling environment for women’s participation in the civil service through [the] development of [the] policy of mutual respect in the workplace.”

8. Ban on women teaching or studying at public universities until they can be segregated from men (Sept. 29, 2021)

Source	The Washington Post , “Kabul University Shuts Down as Taliban Government Bans Women From Campus, For Now”
Treaty Violated	International Covenant on Economic, Social, and Cultural Rights – Article 6, Section 1, “. . . the right of everyone to the opportunity to gain his living by work which he freely chooses.” Convention on the Elimination of All Forms of Discrimination Against Women – Article 10 (a), “The same conditions for . . . access to studies,” (b), “Access to the same . . . teaching staff,” and (c), “elimination of any stereotyped concept of the roles of men and women at all levels.” Safe Schools Declaration – “Education is fundamental to development,” and “. . . places of education are places of safety.”
Treaty Ratification Status	Not signed but ratified on Jan. 24, 1983. Signed on Aug. 14, 1980, and ratified on March 5, 2003. Endorsed in May 2015.
Afghan Reports to CEDAW, CRC, ICESCR	CRC State Report 2019 – Section 116, “The Government is obliged to provide compulsory primary education for all children,” and Section 122, “To promote the right of girls to education.” CEDAW Third State Report – Section 146, “Various government institutions . . . have launched public awareness raising programs on women’s rights including their right to work.”
Afghan National Action Plan on Women, Peace, and Security	“Create [an] enabling environment for women’s participation in the civil service through [the] development of [the] policy of mutual respect in the workplace.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Reaffirms its unwavering commitment to the full and equal enjoyment of all human rights by all women, girls and children . . . including . . . the right to work,” and “. . . the right to . . . meaningfully participate in the . . . transformative potential of education.”

9. Ban on dramas, soap operas, and entertainment shows broadcasting women; Women news presenters required to wear headscarves (Nov. 22, 2021)

Source	CNN , “Women Banned From Afghan Television Dramas Under New Taliban Media Rules”
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 11 (b), “The right to the same employment opportunities,” and (c), “The right to free choice of profession and employment.” International Covenant on Economic, Social, and Cultural Rights – Article 2, Section 2, “. . . the rights . . . in the present Covenant will be exercised without discrimination of any kind as to . . . religion.”
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003. Not signed but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	CEDAW Third State Report – Section 146, “Various government institutions . . . have launched public awareness raising programs on women’s rights including their right to work.”
Afghan National Action Plan on Women, Peace, and Security	“Create [an] enabling environment for women’s participation in the civil service through [the] development of [the] policy of mutual respect in the workplace.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Stressing the importance of regarding Afghan women as active agents over their own lives,” and “Deeply concerned at the situation of women journalists and media workers . . . underlining [their] important role . . . to carry out essential work.”

10. Decree on women’s rights exclusively on marriage, with no mention of access to education or work (Dec. 3, 2021)

Source	Reuters , “Taliban Release Decree Saying Women Must Consent to Marriage”
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 16 (b), “The same right to freely choose a spouse and to enter into a marriage only with their free and full consent.” International Covenant on Economic, Social, and Cultural Rights – Article 10, Section 1, “Marriage must be entered into with the free consent of the intending spouses.”
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003. Not signed but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	CEDAW Concluding Observations of Third State Report – “The practices of child and forced marriage . . . continue and that perpetrators enjoy impunity for such crimes,” and “Women . . . who try to escape from child or forced marriage . . . are revictimized.”
Afghan National Action Plan on Women, Peace, and Security	“The laws of Afghanistan guarantee the protection of women’s rights and freedom . . . [against] offenses including forced marriage.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	N/A

11. Ban on cab drivers from accepting women passengers without hijab (Dec. 26, 2021)

Source	Republic World , “Taliban Ban Drivers From Playing Music in Cars, Having Women Passengers Without a Hijab”
Treaty Violated	International Covenant on Economic, Social, and Cultural Rights – Article 2, Section 2, “. . . the rights . . . in the present Covenant will be exercised without discrimination of any kind as to . . . religion.” International Covenant on Civil and Political Rights – Article 18, Section 2, “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”
Treaty Ratification Status	Not signed but ratified on Jan. 24, 1983. Not signed but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – “It is particularly concerned at the fact that some provisions of the Shia Personal Status Law remain discriminatory against women, including . . . limitation on movements outside the home.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Recognizing that limiting women’s freedom of movement has a negative impact on their lives,” and “Reaffirms its unwavering commitment to the full and equal enjoyment of all human rights by all women, girls and children . . . including the right to freedom of movement.”

12. Ban on women taking long-distance road trips alone (male relative required to accompany them for distances beyond forty-five miles) (Dec. 29, 2021)

Source	CNN , “Taliban Bans Women From Solo, Long-Distance Road Trips in Afghanistan”
Treaty Violated	International Covenant on Civil and Political Rights – Article 12, Section 1, “. . . the right to liberty of movement,” and Section 2, “Everyone shall be free to leave any country.”
Treaty Ratification Status	Not signed, but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – “It is particularly concerned at the fact that some provisions of the Shia Personal Status Law remain discriminatory against women, including . . . limitation on movements outside the home.”
Afghan National Action Plan on Women, Peace, and Security	N/A
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Recognizing that limiting women’s freedom of movement has a negative impact on their lives,” and “Reaffirms its unwavering commitment to the full and equal enjoyment of all human rights by all women, girls and children . . . including the right to freedom of movement.”

13. Closure of public baths for women (Dec. 29, 2021)

Source	Etilaatroz , “The Taliban Shut Down Women’s Baths in Mazar-e-Sharif”
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 13 e, “The right to participate in recreational activities, sports and all aspects of cultural life.”
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – “The Committee regrets the discrepancy between the legal framework and the inequality in practice in sectors such as work, public life, education, and health.”
Afghan National Action Plan on Women, Peace, and Security	N/A
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Deeply concerned about the increasing erosion of respect for the human rights of women and girls in Afghanistan by the Taliban, including . . . women’s full, equal, effective and meaningful participation in public life.”

14. Ban on women entering cafes without a *mahram* in Herat (Jan. 5, 2022)

Source	Rukhshana Media , “Taliban Bans Women Without Mahram From Entering Cafes in Herat”
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 13 (c), “The right to participate in recreational activities, sports and all aspects of cultural life.” International Covenant on Civil and Political Rights – Article 12, Section 1, “. . . the right to liberty of movement.”
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003; Not signed but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – “It is particularly concerned at the fact that some provisions of the Shia Personal Status Law remain discriminatory against women, including . . . limitation on movements outside the home.”
Afghan National Action Plan on Women, Peace, and Security	N/A
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Stressing the importance of regarding Afghan women as active agents over their own lives.”

15. Ban on women government employees from entering government offices without hijab (Feb. 2, 2022)

Source	Rukshana Media , “Taliban: Female Government Employees Aren’t Allowed to Go to Work Without Hijab”
Treaty Violated	International Covenant on Economic, Social, and Cultural Rights – Article 2, Section 2, “. . . the rights . . . in the present Covenant will be exercised without discrimination of any kind as to . . . religion,” and Article 3, “. . . ensure the equal right of men and women to the enjoyment of all civil and political rights.” International Covenant on Civil and Political Rights – Article 18, Section 2, “no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”
Treaty Ratification Status	Not signed but ratified on Jan. 24, 1983. Not signed but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	CEDAW Concluding Observations of Third State Report – Section 26 (h), “[the Committee urges the State party] to address cultural norms and discriminatory stereotypes that lead to social stigma associated with gender-based violence against women and girls through . . . information and communication campaigns.”
Afghan National Action Plan on Women, Peace, and Security	“Men and women must possess equal access to opportunities and resources to achieve [increased women’s] participation in peace processes.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Stressing the importance of regarding Afghan women as active agents over their own lives,” and “Recognizing that limiting women’s freedom of movement has a negative impact on their . . . ability to generate income.”

16. Ban on women’s access to health centers without a *mahram* (Mar. 2, 2022)

Source	Foreign Policy , “The Taliban Are Harming Afghan Women’s Health”
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 12, Section 1, “. . . equality of men and women, access to healthcare services.”
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – “The Committee regrets the discrepancy between the legal framework and the inequality in practice in sectors such as work, public life, education, and health.” CEDAW Concluding Observations of Third State Report – Section 45 (a), “[it also notes with concern] the limited access that women with disabilities have to healthcare.”
Afghan National Action Plan on Women, Peace, and Security	“Women’s human right[s] deteriorated to unprecedented levels during the conflicts and war as they were denied their basic rights, including access to . . . healthcare.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Recognizing that limiting women’s freedom of movement has a negative impact on their lives, including the access of women and their children to healthcare services.”

17. Segregation of women and men's offices in the Ministry of Public Health (Mar. 13, 2022)

Source	Azadi Radio
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 12, Section 1, “... equality of men and women, access to healthcare services.”
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – “The Committee... remains concerned at the low level of women’s representation in decision[-]making position[s] in Afghanistan.” CEDAW Third State Report – Section 146, “Various government institutions... have launched public awareness raising programs on women’s rights including their right to work.”
Afghan National Action Plan on Women, Peace, and Security	“... some of the major areas that require focused attention... women lack proper access to healthcare services, education, and employment opportunities.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Recognizing that limiting women’s freedom of movement has a negative impact on their lives, including the access of women and their children to healthcare services... as well as women’s ability to generate income for their families.”

18. Closure of schools for girls above the sixth grade (Mar. 24, 2022)

Source	CNN , “Taliban Postpones Return to School for Afghan Girls Above 6th Grade”
Treaty Violated	Convention on the Rights of the Child – Article 28, Section 1(b), “Encourage the development of different forms of secondary education... make them available... to every child,” and (c), “Make higher education accessible to all on the basis of capacity by every appropriate means.” Convention on the Elimination of All Forms of Discrimination Against Women – Article 10 (a), “The same conditions for... access to studies,” and (c), “elimination of any stereotyped concept of the roles of men and women at all levels.” Safe Schools Declaration – “Education is fundamental to development,” “... places of education are places of safety,” and “Education that is ‘conflict sensitive’... pursues a contribution to peace.”
Treaty Ratification Status	Signed on Sept. 27, 1990, and ratified on March 28, 1994; Signed on Aug. 14, 1980, and ratified on March 5, 2003; Endorsed in May 2015
Afghan Reports to CEDAW, CRC, ICESCR	CRC State Report 2019 – Section 116, “The Government is obliged to provide compulsory primary education for all children,” and Section 122, “To promote the right of girls to education.”
Afghan National Action Plan on Women, Peace, and Security	“[the Government of Afghanistan] has developed this National Action Plan to achieve... increase access to education and higher education for girls and women.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“... bilateral and regional efforts to promote the rights of women... in particular the right to education,” “... the right to education for all is an essential condition for achieving sustainable development,” and “Reaffirming the equal right of every child to education without discrimination of any kind.”

19. Ban on women's air travel without a *mahram* (Mar. 27, 2022)

Source	Reuters , "Taliban Ban Women in Afghanistan From Flying Without Male Chaperone"
Treaty Violated	International Covenant on Civil and Political Rights – Article 12, Section 1, "... the right to liberty of movement," and Section 2, "Everyone shall be free to leave any country."
Treaty Ratification Status	Not signed but ratified on Jan. 24, 1983
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – "It is particularly concerned at the fact that some provisions of the Shia Personal Status Law remain discriminatory against women, including ... limitation on movements outside the home."
Afghan National Action Plan on Women, Peace, and Security	N/A
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	"Recognizing that limiting women's freedom of movement has a negative impact on their lives," and "Reaffirms its unwavering commitment to the full and equal enjoyment of all human rights by all women, girls and children ... including the right to freedom of movement."

20. Gender segregation in public parks – Women are only allowed to visit on Sunday through Tuesday (Apr. 6, 2022)

Source	Al Jazeera , "Shrinking Public Space for Afghan Women as Taliban Expands Curbs"; Republic World , "Taliban Issues Segregation Rule for Amusement Parks, Specifies Open Days for Each Gender"
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 13 (c), "The right to participate in recreational activities, sports and all aspects of cultural life"
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – "The Committee regrets the discrepancy between the legal framework and the inequality in practice in sectors such as work, public life, education, and health."
Afghan National Action Plan on Women, Peace, and Security	N/A
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	"Deeply concerned about the increasing erosion of respect for the human rights of women and girls in Afghanistan by the Taliban, including ... women's full, equal, effective and meaningful participation in public life."

21. Gender segregation in academic institutions—working week divided into shifts for only female or only male students (Apr. 29, 2022)

Source	University World News , “Taliban Splits University Week for Gender Separation”
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 10 (a), “The same conditions for . . . access to studies,” and (b), “access to the same curricula.”
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR State Report 2009 – “The Government of Afghanistan is making efforts to eliminate gender disparities in all levels of education no later than 2020.”
Afghan National Action Plan on Women, Peace, and Security	“[the Government of Afghanistan] has developed this National Action Plan to achieve. . . increase[d] access to education and higher education for girls and women.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“. . . bilateral and regional efforts to promote the rights of women . . . in particular the right to education,” and “. . . the right to education for all is an essential condition for achieving sustainable development.”

22. Ban on issuing of driving licenses for women (May 5, 2022)

Source	Independent , “Taliban Regime Stops Issuing Driving Licenses to Women, Reports Say”
Treaty Violated	International Covenant on Civil and Political Rights – Article 12, Section 1, “. . . the right to liberty of movement,” and Section 2, “Everyone shall be free to leave any country.”
Treaty Ratification Status	Not signed but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – “It is particularly concerned at the fact that some provisions of the Shia Personal Status Law remain discriminatory against women, including. . . limitation on movements outside the home.”
Afghan National Action Plan on Women, Peace, and Security	N/A
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Recognizing that limiting women’s freedom of movement has a negative impact on their lives,” and “Reaffirms its unwavering commitment to the full and equal enjoyment of all human rights by all women, girls and children . . . including the right to freedom of movement.”

23. Forced face covering in public for women (May 7, 2022)

Source	CNN , “Taliban Decree Orders Women in Afghanistan to Cover Their Faces”
Treaty Violated	International Covenant on Economic, Social, and Cultural Rights – Article 2, Section 2, “. . . the rights . . . in the present Covenant will be exercised without discrimination of any kind as to . . . religion.” International Covenant on Civil and Political Rights – Article 18, Section 2, “no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”
Treaty Ratification Status	Not signed but ratified on Jan. 24, 1983. Not signed but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – “The Committee regrets the discrepancy between the legal framework and the inequality in practice in sectors such as work, public life, education, and health.”
Afghan National Action Plan on Women, Peace, and Security	“[the Government of Afghanistan] has developed this National Action Plan to achieve . . . protection of women from all types of . . . discrimination.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Deeply concerned about the increasing erosion of respect for the human rights of women and girls in Afghanistan by the Taliban, including. . . women’s full, equal, effective and meaningful participation in public life.”

24. Ban on women’s access to parks in Herat; gender segregation in restaurants (May 12, 2022)

Source	Independent , “Taliban Bans Men and Women Eating Together in Restaurants in Afghan City of Herat”
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 13 (c), “The right to participate in recreational activities, sports and all aspects of cultural life.”
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – “The Committee regrets the discrepancy between the legal framework and the inequality in practice in sectors such as work, public life, education, and health.”
Afghan National Action Plan on Women, Peace, and Security	“[the Government of Afghanistan] has developed this National Action Plan to achieve . . . protection of women from all types of . . . discrimination.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Deeply concerned about the increasing erosion of respect for the human rights of women and girls in Afghanistan by the Taliban, including. . . women’s full, equal, effective and meaningful participation in public life.”

25. Forced face covering for women TV presenters and other women on screen (May 19, 2022)

Source	BBC , “Afghanistan’s Female TV Presenters Must Cover Their Faces, Say Taliban”
Treaty Violated	International Covenant on Economic, Social, and Cultural Rights – Article 2, Section 2, “. . . the rights . . . in the present Covenant will be exercised without discrimination of any kind as to . . . religion.” International Covenant on Civil and Political Rights – Article 18, Section 2, “no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”
Treaty Ratification Status	Not signed but ratified on Jan. 24, 1983. Not signed but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – “The Committee regrets the discrepancy between the legal framework and the inequality in practice in sectors such as work, public life, education, and health.”
Afghan National Action Plan on Women, Peace, and Security	“[the Government of Afghanistan] has developed this National Action Plan to achieve . . . protection of women from all types of . . . discrimination” and “[the Government of Afghanistan] has developed this National Action Plan to achieve . . . support and provide a capacity building for civil society . . . on UNSCR 1325 and women, peace, and security.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Deeply concerned about the increasing erosion of respect for the human rights of women and girls in Afghanistan by the Taliban, including . . . women’s full, equal, effective and meaningful participation in public life.”

26. Reissuance of the ban on women’s access to public transportation without a *mahram* (May 29, 2022)

Source	Jurist , “Afghanistan Dispatch: Unaccompanied Women Now Banned From Public Transport”
Treaty Violated	International Covenant on Civil and Political Rights – Article 12, Section 1, “. . . the right to liberty of movement.”
Treaty Ratification Status	Not signed but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – “It is particularly concerned at the fact that some provisions of the Shia Personal Status Law remain discriminatory against women, including . . . limitation on movements outside the home.”
Afghan National Action Plan on Women, Peace, and Security	“[the Government of Afghanistan] has developed this National Action Plan to achieve . . . protection of women from all types of . . . discrimination.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Recognizing that limiting women’s freedom of movement has a negative impact on their lives,” and “Reaffirms its unwavering commitment to the full and equal enjoyment of all human rights by all women, girls and children . . . including the right to freedom of movement.”

27. Ban on women's access to music and movies at computer shops unless accompanied by a male family member (June 2, 2022)

Source	Rukshana Media , "Taliban Order Kandahar DJs Not to Transfer Music and Movies Into Women's Phones and Computers, If They Visit Their Shops Alone"
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 13 (c), "The right to participate in recreational activities, sports and all aspects of cultural life."
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – "The Committee regrets the discrepancy between the legal framework and the inequality in practice in sectors such as work, public life, education, and health."
Afghan National Action Plan on Women, Peace, and Security	"[the Government of Afghanistan] has developed this National Action Plan to achieve . . . support and provide a capacity building for civil society . . . on UNSCR 1325 and women, peace, and security."
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	"Deeply concerned about the increasing erosion of respect for the human rights of women and girls in Afghanistan by the Taliban, including . . . women's full, equal, effective and meaningful participation in public life."

28. Ban on women taking taxis without a *mahram*; ban on women sitting next to taxi drivers (June 9, 2022)

Source	BBC Afghanistan
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 13 (c), "The right to participate in recreational activities, sports and all aspects of cultural life."
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – "The Committee regrets the discrepancy between the legal framework and the inequality in practice in sectors such as work, public life, education, and health."
Afghan National Action Plan on Women, Peace, and Security	N/A
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	"Recognizing that limiting women's freedom of movement has a negative impact on their lives," and "Reaffirms its unwavering commitment to the full and equal enjoyment of all human rights by all women, girls and children . . . including the right to freedom of movement."

29. Ban on tailors from sewing women's clothes or taking measurements of women's bodies (June 10, 2022)

Source	Amu TV, "Taliban Orders Male Tailors to Stop Making Women's Clothing"
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 13 (c), "The right to participate in recreational activities, sports and all aspects of cultural life." International Covenant on Civil and Political Rights – Article 3, "... ensure the equal right of men and women to the enjoyment of all civil and political rights."
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003. Not signed but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – "The Committee regrets the discrepancy between the legal framework and the inequality in practice in sectors such as work, public life, education, and health."
Afghan National Action Plan on Women, Peace, and Security	N/A
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	"Deeply concerned about the increasing erosion of respect for the human rights of women and girls in Afghanistan by the Taliban, including ... women's full, equal, effective and meaningful participation in public life."

30. Ban on women's rights to sue men in Herat (June 16, 2022)

Source	Hasht-e Subh Daily , "Women Have No Right to Sue Men,' Says Taliban in Herat"
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 15, Section 1, "States Parties shall accord to women equality with men before the law," Section 2, "States Parties shall accord to women, in civil matters, a legal capacity identical to that of men," and Section 3, "all contracts and all other private instruments ... which is directed at restricting the legal capacity of women shall be deemed null and void."
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003.
Afghan Reports to CEDAW, CRC, ICESCR	CEDAW Concluding Observations of Third State Report – Section 16 (e), "[the Committee recommends that the State party] Develop partnerships with relevant ... legal aid organizations ... to help women and girls ... to navigate parallel justice systems," and (f), "... raise awareness ... of the importance of addressing violations of women's rights through the formal justice system."
Afghan National Action Plan on Women, Peace, and Security	"[the Government of Afghanistan] has developed this National Action Plan to achieve ... women's access to effective, active and accountable justice system."
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	"Stressing the importance of regarding Afghan women as active agents over their own lives," and "Recognizing that the full realization of the right to education ... is an essential condition for achieving sustainable development ... including the right to participate in the conduct of public affairs."

31. Ban on women attending Friday prayers at mosques in Herat (June 17, 2022)

Source	The Silk Way , “Taliban in Herat; Women Not Allowed to Participate in Friday Prayers and File a Complaint Against Their Husband With the Court”
Treaty Violated	International Covenant on Civil and Political Rights – Article 18, Section 1, “This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom . . . to manifest his religion or belief in worship, observance, practice, and teaching,” and Section 2, “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”
Treaty Ratification Status	Not signed but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – “The Committee regrets the discrepancy between the legal framework and the inequality in practice in sectors such as work, public life, education, and health.”
Afghan National Action Plan on Women, Peace, and Security	N/A
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Deeply concerned about the increasing erosion of respect for the human rights of women and girls in Afghanistan by the Taliban, including . . . women’s full, equal, effective and meaningful participation in public life.”

32. Order women to send men to work instead of women in the Ministry of Finance, Kabul (June 18, 2022)

Source	The Guardian , “Send Us a Man to Do Your Job So We Can Sack You, Taliban Tell Female Officials”
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 15, Section 1, “States Parties shall accord to women equality with men before the law,” Section 2, “States Parties shall accord to women, in civil matters, a legal capacity identical to that of men,” and Section 3, “all contracts and all other private instruments . . . which is directed at restricting the legal capacity of women shall be deemed null and void.” International Covenant on Economic, Social, and Cultural Rights – Article 6, Section 1, “The States Parties to the present Covenant recognize the right to work, which includes the right of everyone.”
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003. Not signed but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – “The Committee notes with concern that the principle of equal remuneration for men and women workers for work of equal value is not guaranteed in the State party.”
Afghan National Action Plan on Women, Peace, and Security	“There are increased numbers of women in the police, military, [and] civil service but still not enough in order to respond to emerging needs of women. Women in the security sector is an encouraging force for more women to join the security forces.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Reaffirms its unwavering commitment to the full and equal enjoyment of all human rights by all women, girls and children . . . including . . . the right to work.”

33. Forcing young women to marry Taliban soldiers in the Balkhab district of Sar e Pol (July 11, 2022)

Source	Nimrokh Media , “One Girl Out of Ten Is Forced to Marry a Taliban Fighter in Balkhab”
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 16 (b), “The same right to freely choose a spouse and to enter into a marriage only with their free and full consent.” International Covenant on Economic, Social, and Cultural Rights – Article 10, Section 1, “Marriage must be entered into with the free consent of the intending spouses.”
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003. Not signed but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	CRC State Report 2019 – Section 33, “The marriage age for girls. .. is 16. .. The marriage of a girl under 15 is not permitted.”
Afghan National Action Plan on Women, Peace, and Security	“The laws of Afghanistan guarantee the protection of women’s rights and freedom. .. [against] offenses including forced marriage.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	N/A

34. Ban on the interaction between women and men employees of the Directorate of Public Health in Ghazni (July 21, 2022)

Source	Hasht-e Subh Daily , “Male and Female Health Workers Do Not Have the Right to Talk to Each Other”
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 12, Section 1, “. . . equality of men and women, access to healthcare services.” International Covenant on Economic, Social, and Cultural Rights – Article 6, Section 1, “. . . the right of everyone to the opportunity to gain his living by work which he freely chooses.”
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003. Not signed but ratified on Jan. 24, 1983.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – “The Committee . . . remains concerned at the low level of women’s representation in decision-making position[s] in Afghanistan.”
Afghan National Action Plan on Women, Peace, and Security	“[the Government of Afghanistan] has developed this National Action Plan to achieve . . . participation of women in the decision making and executive levels of the Civil Service”; “Create [an] enabling environment for women’s participation in the civil service through [the] development of [the] policy of mutual respect in the workplace.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Recognizing that the full, equal, effective and meaningful participation, inclusion and empowerment of all women and girls . . . is essential for sustainable peace.”

35. Suspended university education for all female students (Dec. 20, 2022)

Source	CNN, “Taliban Suspend University Education for Women in Afghanistan”
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 10 (a), “The same conditions for . . . access to studies,” and (b), “access to the same curricula.”
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003.
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR State Report 2009 – “The Government of Afghanistan is making efforts to eliminate gender disparities in all levels of education no later than 2020.”
Afghan National Action Plan on Women, Peace, and Security	“[the Government of Afghanistan] has developed this National Action Plan to achieve . . . increase access to education and higher education for girls and women.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“. . . bilateral and regional efforts to promote the rights of women . . . in particular the right to education,” and “. . . the right to education for all is an essential condition for achieving sustainable development.”

36. Ban on women working for NGOs (Dec. 24, 2022)

Source	Reuters , “Taliban Bans Female NGO Staff, Jeopardizes Aid Efforts”
Treaty Violated	Convention on the Elimination of All Forms of Discrimination Against Women – Article 15, Section 1, “States Parties shall accord to women equality with men before the law,” Section 2, “States Parties shall accord to women, in civil matters, a legal capacity identical to that of men,” and Section 3, “all contracts and all other private instruments . . . which is directed at restricting the legal capacity of women shall be deemed null and void”; International Covenant on Economic, Social, and Cultural Rights – Article 6, Section 1, “The States Parties to the present Covenant recognize the right to work, which includes the right of everyone.”
Treaty Ratification Status	Signed on Aug. 14, 1980, and ratified on March 5, 2003; Not signed but ratified on Jan. 24, 1983
Afghan Reports to CEDAW, CRC, ICESCR	ICESCR Concluding Observations 2010 – “The Committee notes with concern that the principle of equal remuneration for men and women workers for work of equal value is not guaranteed in the State party.”
Afghan National Action Plan on Women, Peace, and Security	“There are increased numbers of women in the police, military, [and] civil service but still not enough in order to respond to emerging needs of women. Women in the security sector is an encouraging force for more women to join the security forces.”
Human Rights Council Resolutions and Security Council Resolution – July 6, 2022	“Reaffirms its unwavering commitment to the full and equal enjoyment of all human rights by all women, girls and children . . . including . . . the right to work.”