

THE INTERNATIONAL OBLIGATION TO COUNTER GENDER APARTHEID IN AFGHANISTAN

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ABSTRACT

Since they returned to power in August 2021, the Taliban are again imposing a regime of gender apartheid in Afghanistan in violation of international law, just as they did in the 1990s. Given that it is pervasively discriminatory, gender apartheid poses specific human rights problems requiring particular, heightened responses. A system of governance based on subordination of women institutionalizes sex discrimination across state political, legal, and cultural infrastructures. It necessitates different counter-strategies.

This Article suggests conceptual architecture for analyzing and responding to this aspect of the current Afghan crisis. Specifically, the robust international legal framework that helped end racial apartheid should be urgently adapted to address gender apartheid and concert the responses of other states to it.

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There are three principal arguments in favor of this approach.

1) It is essential for fulfilling states' international legal commitments on sex discrimination across every document in the International Bill of Human Rights, as well as the specific target they affirmed in the Sustainable Development Goals to achieve gender equality by 2030. 2) Any other stance leads to an unacceptable imbalance in the manner in which international law addresses discrimination on the bases of sex and race. 3) This may be the only way to effectively tackle systematic Taliban abuses, as the organization is deeply committed to its violations of women's rights and already sanctioned by the United Nations Security Council. Such an approach marshals the resources of the international community to constrain the Taliban, and is the best hope for ensuring the credibility, legitimacy and effectiveness of the international legal response.

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INTRODUCTION

“The Taliban are known for being a gender apartheid group. There is no space in the 21st century for any form of apartheid, including gender apartheid.”

Horia Mosadiq
Former Afghanistan Researcher for Amnesty International
and Founder, War Victims Network¹

“If a government is unwilling to recognize half of the population, we should be unwilling to recognize them. If the same restrictions were applied to men, or on the basis of race, what would we do?”

Shaharзад Akbar
Former Chairperson, Afghan Independent Human Rights
Commission²

Today, the world watches as the Taliban re-imposes gender³ apartheid in Afghanistan. This Article explains why the international

1. Zoom Interview with Horia Mosadiq, Former Afghanistan Researcher, Amnesty International and Founder, War Victims Network (Sept. 23, 2021).

2. Zoom Interview with Shaharзад Akbar, Former Chairperson, Afghan Independent Human Rights Commission (Sept. 28, 2021).

3. The classical texts of international human rights law, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), all prohibit discrimination on the basis of “sex,” emphasizing the biological categories of male and female in keeping with the prevailing views in the decades when they were drafted (1940s through 1970s). See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights art. 1, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171, 173 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; Convention on the Elimination of All Forms of Discrimination against Women pmbl. and art. 1, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13, 14–16 (entered into force Sept. 3, 1981) [hereinafter CEDAW]. Since the 1990s, increasing use has been made in human rights parlance of “gender” instead, to emphasize the social construction of sex. Such uses of “gender” tend to focus on the sociological meanings of being male or female. For example, the 2011 Istanbul Convention, in language advocated by feminist international law scholars such as Christine Chinkin, stipulates that “‘gender’ shall mean the socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for women and men.” Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence art. 3, *opened for signature* May 11, 2011, C.E.T.S. No. 210 (entered into force Aug. 1, 2014). In light of such definitional developments, this Article uses the term “gender apartheid,” a term of art in some feminist writing, to describe socio-legal projects aiming to

community is legally required to do more than simply observe. The feminist case was made for recognizing and responding to gender apartheid the first time the Taliban took power,⁴ but the related international legal case was not. This is the particular contribution this Article seeks to make.

One can almost stipulate to the deleterious nature of Taliban rule for women's human rights when the group's abysmal track record and rights-rejecting pronouncements are so well known. However, there is a dangerous international trend of minimization of these abuses and increasing normalization of the Taliban by some states and international bodies, which many Afghans fear will lead to recognition of the group without human rights conditions.⁵ Hence, one must rehearse the nature of Taliban ideology and practices, as this Article does. One fact alone demonstrates the urgency of constructing an effective international response: as Afghan women advocates stress, the organization ironically named "the students" represents the only governing group in the world to have systematically excluded most women and girls from education in the territory it controlled in the late 20th century, and now in the early 21st.⁶

enforce systematic sex discrimination against women through segregation, while recognizing that "gender" is today construed to have broader meanings as well. *See, e.g.*, Victor Madrigal-Borloz (Independent Expert on Protection against violence and discrimination based on sexual orientation and gender identity), *Rep. on the Law of Inclusion*, U.N. Doc. A/HRC/47/27 (June 3, 2021).

4. *See infra* notes 95–103 and accompanying text.

5. *See Taliban Hail Oslo Meet as Success 'In Itself'*, EURACTIV (Jan. 25, 2022), <https://www.euractiv.com/section/global-europe/news/taliban-hail-oslo-meet-as-success-in-itself/> [<https://perma.cc/AA96-Z6FQ>] (reporting on talks between the Taliban and diplomats from the United States, France, Britain, Germany, Italy, the European Union and Norway); Joint Statement, VOICE & Afghan Women's Advocacy Campaign, *Afghan Women Must be at the Center of All Future Peace Talks* (Jan. 26, 2022), <https://voiceamplified.org/afghan-women-peace-talks/> [<https://perma.cc/YT4G-7F9A>] (demanding that the international community urge the Taliban to take a range of steps to ensure women's human rights as a prerequisite of future peace talks).

6. *See infra* notes 110–113, 142–143 and accompanying text. Some universities have reportedly reopened with segregated offerings for women though WHRDs report harassment of women students due to their dress, and fear these universities may be closed again. Ehsan Popalzai, *Afghan Universities Reopen to Female Students but With Strict Rules on Mixing*, CNN (Feb. 3, 2022), <https://www.cnn.com/2022/02/03/asia/afghanistan-women-university-students-intl-hnk/index.html> [<https://perma.cc/AYK3-9YVR>]; Telephone Follow Up Interview Two with Zubaida Akbar, Program Officer, Freedom Now (Nov. 18, 2022). *See also Afghanistan's Education Crisis Under the Taliban*, GEO.

International law has little useful left to say directly to an actor such as the Taliban, which personifies its rejection and whose leadership is already featured on U.N. Security Council sanctions lists.⁷ One of the only remaining vehicles of change is how other states, ostensibly committed to rights and equality, react to Taliban policies and if they do so in keeping with their international legal obligations.⁸

INST. FOR WOMEN, PEACE & SEC. (Feb. 8, 2022), <https://giwps.georgetown.edu/event/afghanistans-education-crisis-under-the-taliban-ensuring-access-for-women/> [<https://perma.cc/Y9DH-ZMKZ>]. The Taliban claimed schools would reopen for some girls in spring 2022 but this did not occur. *Taliban's Backtrack on School Reopening for Girls Irreversibly Impacts Their Future*, AMNESTY INTERNATIONAL (Mar. 28, 2022) <https://www.amnesty.org/en/latest/news/2022/03/afghanistan-talibans-backtrack-on-school-re-opening-for-girls-irreversibly-impacts-their-future/> [<https://perma.cc/4AK6-TU2V>].

7. *Hardliners Get Key Posts in New Taliban Government*, BBC NEWS (Sept. 7, 2021), <https://www.bbc.com/news/world-asia-58479750> [<https://perma.cc/NLL7-XSV4>]. Both the interim de facto “Prime Minister” and “Interior Minister” are on the U.N. Security Council’s Resolution 1988 Sanctions List. *Mohammad Hassan Akhund*, UNITED NATIONS SEC. COUNCIL (Aug. 4, 2014), <https://www.un.org/securitycouncil/sanctions/1988/materials/summaries/individual/mohammad-hassan-akhund> [<https://perma.cc/E43R-NDNE>]; *Sirajuddin Jallaloudine Haqqani*, UNITED NATIONS SEC. COUNCIL (Sept. 13, 2007), <https://www.un.org/securitycouncil/sanctions/1988/materials/summaries/individual/sirajuddin-jallaloudine-haqqani> [<https://perma.cc/7LXN-XWKZ>]. These sanctions include assets freezes, travel bans and arms embargoes. S.C. Res. 1988 (June 17, 2011). The Taliban was initially sanctioned alongside Al Qaida pursuant to S.C. Res. 1267 (Oct. 15, 1999). The sanctions regimes for the two groups were separated in 2011, ostensibly to facilitate negotiations with the Taliban. See S.C. Res. 1989 (June 17, 2011). For more recent developments, see Dipanjan Roy Chaudhury, *All Eyes on UN Sanctions Panel’s Moves on Taliban’s Top Leaders*, ECON. TIMES (Aug. 22, 2021), <https://economictimes.indiatimes.com/news/india/all-eyes-on-un-sanctions-panels-moves-on-talibans-top-leaders/articleshow/85519099.cms?from=mdr> [<https://perma.cc/3KCD-PMYW>]. Human rights groups called for exemptions to these sanctions allowing travel by Taliban leaders involved in violations of women’s rights to be discontinued. Amnesty Int’l, *Death in Slow Motion: Women and Girls Under Taliban Rule*, AI Index ASA 11/5685/2022 94 (July 27, 2022). These exemptions were not renewed due to a principled stand by Ireland. *UN Ends Taliban Travel Ban Exemptions*, DW (Aug. 20, 2022) <https://www.dw.com/en/un-fails-to-reach-deal-to-extend-taliban-travel-ban-exemptions/a-62873851> [<https://perma.cc/BX8S-LJWQ>].

8. In contrast with this view, political scientist Hyeran Jo argues that the Taliban (along with some other Islamist armed groups) are “legitimacy-seeking,” and therefore their compliance with international norms could be, at least minimally, shifted through direct engagement. HYERAN JO, COMPLIANT REBELS: REBEL GROUPS AND INTERNATIONAL LAW IN WORLD POLITICS 269–272 (2015). However, the examples she provides suggest Taliban failure to live up to most compliance commitments, and that any shifts made are likely to be about issues

Hence, this article seeks to provide conceptual architecture for approaching this thorny topic and prescribing what the international legal system could do. In so doing, it foregrounds the international legal obligation of other states and international actors not to be complicit with such a project because it amounts to apartheid, an international crime. Such an inquiry can productively expand our understanding of what Steven Ratner has described as “obligations to refrain from . . . getting too close to abhorrent behavior.”⁹ Thereby, international human rights law can empower and cajole rights-respecting responses from other states and an international community which claims to respect and value these human rights. International pronouncements in favor of rights and equality without commensurate action discredit the women’s human rights project. This impact is magnified as states and international organizations begin to participate in apartheid by, for example, sending all-male delegations to Kabul.¹⁰ While both the Soviet Union (in 1979) and the United States (in 2001) claimed the protection of women’s rights as one justification for the use of force in Afghanistan when they had additional motives for intervening,¹¹ claims which some have criticized,¹² now global powers deprioritize these rights in decision-making.

When considering how to hold states accountable for their responses to the Taliban regime, one confronts the dearth of norms on second state responsibility in international human rights law itself.¹³

(such as choice of munitions) not central to the Taliban agenda, unlike the subordination of women.

9. Steven Ratner, *Complicity and Compromise in the Law of Nations*, 10 CRIM. L. & PHIL. 559, 568 (2016).

10. For photos of these all-male gatherings, involving more than 12 governments, as well as U.N. agencies and reputable aid organizations, see Heather Barr (@heatherbarr1), TWITTER (Oct. 5, 2021, 11:21 PM), <https://twitter.com/heatherbarr1/status/1445635293873205254?s=20> [<https://perma.cc/H4UU-3LWA>].

11. RODRIC BRAITHWAITE, AFGANTSY: THE RUSSIANS IN AFGHANISTAN, 1979–89, 123 (2012).

12. See Janine Rich, “Saving” Muslim Women: Feminism, U.S Policy and the War on Terror, INT’L AFF. REV., Fall 2014 (on file with the *Columbia Human Rights Law Review*).

13. The classical approach to the human rights responsibility of a state focused solely on the area “within its territory and subject to its jurisdiction . . .” ICCPR, *supra* note 3, art. 2. Michael Dennis, *Application of Human Rights Treaties Extraterritorially During Times of Armed Conflict*, 99 AM. J. INT’L L. 119 (2005). Even expanded approaches to “effective control” and “overall control” are too narrow and limited by the “territorial bias” in international human rights law to be

Rules of general international law contained in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (“Draft Articles on Responsibility of States”) concerning this kind of second state responsibility are limited to covering responses to breaches of peremptory norms, the highest-level norms in international law.¹⁴ The International Law Commission enumerates in its commentary that these peremptory norms include “racial discrimination and apartheid,” but makes no specific mention of sex or gender discrimination.¹⁵ Given this lacuna, the concept of gender apartheid offers not only a factually accurate description, and one that carries appropriate stigma, but also an essential mechanism for generating some global legal accountability for the Taliban’s return to power—which was a transnationally created disaster. In the words of Shaharзад Akbar, former Director of the Afghan Independent Human Rights Commission, the gender apartheid framework can be a “powerful mobilizing tool.”¹⁶

When Kabul fell to the Taliban on August 15, 2021, much of what remained of twenty years of flawed, incomplete, hard won, and

helpful here. Janna Wessels, *The Boundaries of Universality – Migrant Women and Domestic Violence Before the Strasbourg Court*, 37 NETHERLANDS Q. HUM. RTS. 336, 336–58 (2019).

For a useful review of norms on complicity in international law, see Ratner, *supra* note 9. “[I]nternational law does not evince any consistent criteria or principles on when a state will have an obligation to prevent evil acts by others, nor how firm that obligation will be in terms of the required conduct of the state.” *Id.* at 569. However, Ratner notes that “the state has a duty under international law to stop certain harms, even if its link to them falls well short of the legal standard that would hold the state directly responsible for the acts.” *Id.* at 570. None of the listed situations in which such duties arise is analogous to the fact pattern under discussion in this article.

14. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, [2001] 2 Y.B. Int’l L. Comm’n 63, U.N. Doc. A/CN.4/SER.A/20021/Add.1 [hereinafter Draft Articles on Responsibility of States].

15. *Id.* at art. 40 ¶ 4. The Draft Articles were adopted after first and second readings from 1955–96 and 1998–2001. No woman from any country served on the International Law Commission until 2001. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, *Opening Remarks at the Roundtable Discussion on Achieving Gender Parity at the International Law Commission: Seven Women in Seventy Years* (May 24, 2018), https://legal.un.org/ola/media/info_from_lc/mss/speeches/MSS_ILC70_gender_side_event-24-May-2018.pdf [<https://perma.cc/7H5K-URGE>].

16. Zoom Interview with Shaharзад Akbar, *supra* note 2.

vital progress for Afghan women was lost in a matter of weeks.¹⁷ In Afghanistan today, the de facto Taliban authorities¹⁸ practice both gender separation and the exclusion of women with dire human rights consequences.¹⁹ Laws protecting women's rights, enacted due to the risky work of Afghan women law reformers and women human rights defenders (WHRDs)²⁰ in the last twenty years, are reportedly slated for abrogation.²¹ Institutions women built to protect their rights are dismantled. The Ministry of Women's Affairs became the Ministry of

17. On the doctrine of non-retrogression in human rights law, forbidding "backwards steps in human rights protection" by authorities, see Ben T.C. Warwick, *Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights*, 19 HUM. RTS. L. REV. 467, 467 (2019).

18. "De facto Taliban authorities" or simply "de facto authorities" is the formulation currently employed by the U.N.. See U.N. Deputy High Comm'r for Hum. Rts., *Oral Update on the Situation of Human Rights in Afghanistan*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS. (Dec. 14, 2021), <https://www.ohchr.org/en/statements/2021/12/oral-update-situation-human-rights-afghanistan> [<https://perma.cc/Q2T3-E88L>] [hereinafter *Oral Update on the Situation of Human Rights in Afghanistan*].

19. To offer a single example, one 16-year-old girl told the BBC on December 8, 2021, as a Taliban official confirmed the ban on secondary school education for girls: "Not being able to study feels like a death penalty." Hugo Williams & Ali Hamedani, *Afghanistan: Girls' Despair as Taliban Confirm Secondary School Ban*, BBC NEWS (Dec. 8, 2021), <https://www.bbc.com/news/world-asia-59565558> [<https://perma.cc/N9ZY-2NXZ>].

20. The Commentary on the U.N. Declaration on Human Rights Defenders uses the term "women human rights defenders" to refer to anyone who "individually or in association with others, act[s] to promote or protect human rights, including women's rights . . . as well as . . . gender issues more generally." Special Rapporteur on the situation of human rights defenders, U.N. Off. of the High Comm'r for Human Rights, *Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, U.N. Doc. A/RES/53/144, at 7 (July 2011), <https://www.ohchr.org/sites/default/files/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf> [<https://perma.cc/XHN7-PW84>]. Diverse religious fundamentalisms pose particular problems for WHRDs and are especially dangerous to tackle. CASSANDRA BALCHIN, ASS'N FOR WOMEN'S RTS. IN DEV., *TOWARDS A FUTURE WITHOUT FUNDAMENTALISMS: ANALYZING RELIGIOUS FUNDAMENTALIST STRATEGIES AND FEMINIST RESPONSES* (2011).

21. Mira Patel, *Explained: The Taliban Plan to 'Temporarily' Adopt Parts of the 1964 Constitution; What it Could Mean*, THE INDIAN EXPRESS (Sept. 30, 2021), <https://indianexpress.com/article/explained/taliban-plan-to-temporarily-adopt-parts-of-1964-constitution-what-it-could-mean-7542412/> [<https://perma.cc/5FKD-9WSM>].

Vice and Virtue.²² Male aid workers may not enter tents in camps while 80% of the millions of displaced persons are women and girls.²³ Women are sent home from their workplaces,²⁴ thereby losing income essential for feeding their families in the middle of one of the world's worst humanitarian crises.²⁵ Most girls above grade six may not go to school.²⁶ University education is segregated, if available.²⁷ Criticizing

22. Frud Bezhani, *Afghan Women's Shelters Vanishing Under Taliban Rule*, GANDHARA (Sept. 26, 2021), <https://gandhara.rferl.org/a/afghanistan-taliban-women—shelters-disappearing/31477947.html> [<https://perma.cc/N965-UXUL>].

23. Telephone Follow Up Interview Two with Zubaida Akbar, *supra* note 6. The impact of this is especially severe when women aid workers are unable to work. *Afghanistan: Taliban Blocking Female Aid Workers*, HUM. RTS. WATCH (Nov. 4, 2021), <https://www.hrw.org/news/2021/11/04/afghanistan-taliban-blocking-female-aid-workers> [<https://perma.cc/6ZFR-3V96>]. On the numbers of displaced persons, see *Afghanistan: 270,000 Newly Displaced This Year*, WARRS UNHCR, UN NEWS (July 13, 2021), <https://news.un.org/en/story/2021/07/1095782> [<https://perma.cc/J7YL-Y8XL>]. 270,000 Afghans were displaced in the first six months of 2021 alone. *Id.* On the gender of displaced persons, see Press Release, U.N. Off. of the High Comm'r for Hum. Rts., *Afghanistan: UN experts urge swift global action, to protect human rights and prevent 'civilian slaughter'* (Aug. 16, 2021), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27384&LangID=E> [<https://perma.cc/6CGB-6T77>] [*hereinafter* Civilian Slaughter].

24. *Afghanistan: Taliban Tell Working Women to Stay at Home*, BBC NEWS (Aug. 24, 2021), <https://www.bbc.com/news/world-asia-58315413> [<https://perma.cc/CBS6-3VG7>]. The U.N. Deputy High Commissioner noted the scale of the resulting harms in a December 2021 statement: "UN partners have estimated that restricting women from working could contribute an immediate economic loss of up to US\$1 billion – or up to 5% of the country's GDP. As more . . . girls are held back and pushed further behind, that economic and social damage will accumulate for future generations." *Oral Update on the Situation of Human Rights in Afghanistan*, *supra* note 18.

25. Yalda Hakim, *Yalda Hakim's Diary: Afghanistan's New Regime, the Feminist Resistance, and the Horror of Famine*, THE NEW STATESMAN (Dec. 1, 2021), <https://www.newstatesman.com/afghanistan/2021/12/yalda-hakims-diary-afghanistans-new-regime-the-feminist-resistance-and-the-horror-of-famine> [<https://perma.cc/P9SW-RKC6>].

26. Williams & Hamedani, *supra* note 19.

27. *Taliban Says Women Can Study in Gender-Segregated Universities*, ALJAZEERA (Sept. 12, 2021), <https://www.aljazeera.com/news/2021/9/12/taliban-say-women-can-study-in-gender-segregated-universities> [<https://perma.cc/REH7-J5TS>] [*hereinafter* Afghan Students Return]; Samya Kullab, *Afghan Students Return to Kabul U, but With Restrictions*, ASSOCIATED PRESS (Feb. 26, 2022), <https://apnews.com/article/afghanistan-education-higher-education-kabul-taliban-e57683e739550cb4a14687a96d5191dc> [<https://perma.cc/R63W-2ZEE>].

the Taliban has reportedly become an officially punishable offense.²⁸ In this hostile environment, Afghan WHRDs have attempted to continue their work on the ground, carrying out demonstrations even under a hail of gunfire, but the space for such dissent constricts increasingly.²⁹ Women engaging in protests, and sometimes members of their families, face arrest, torture and ill-treatment, and incommunicado detention.³⁰

The international community has a responsibility to react decisively to counter such retrogression on women's rights. Using the apartheid framework—which emphasizes the foreign policy responses of second states and the international community—to characterize the situation can help spur such reactions. Given the systematic nature of rights deprivation, the transnational causes of the crisis, and the intractability of the situation, the arsenal of international law must now be enhanced and fully deployed. This matters most for Afghans, but it is also critical for the credibility of the international law project and the U.N. system going forward.

28. See, e.g., Frud Bezhan (@FrudBezhan), TWITTER (July 22, 2022, 2:39 AM), <https://twitter.com/FrudBezhan/status/1550387635297947648> [<https://perma.cc/5BTC-3PVN>] (reporting that the Taliban passed a new decree banning criticism of its leaders and Islamic scholars); Frud Bezhan (@FrudBezhan), TWITTER (July 22, 2022, 6:53 AM), <https://twitter.com/FrudBezhan/status/1550448938788028416> [<https://perma.cc/AZ75-UKQQ>]; Shaharзад Akbar (@ShaharзадAkbar), TWITTER (July 22, 2022, 3:08 AM), <https://twitter.com/ShaharзадAkbar/status/1550392209991782404> [<https://perma.cc/22CG-PR3C>]. As this Article goes to press in December 2022, the Taliban have recently announced the application of what they term sharia law punishments. *Taliban Leader Orders Sharia Law Punishments*, BBC NEWS (Nov. 15, 2022) <https://www.bbc.com/news/world-asia-63624400> (on file with the *Columbia Human Rights Law Review*).

29. Zeba Siddiqui & Parniyan Zemaryalai, *Protests Get Harder for Afghan Women Amid Risks and Red Tape*, REUTERS (Oct. 4, 2021), <https://www.reuters.com/world/asia-pacific/protests-get-harder-afghan-women-amid-risks-red-tape-2021-10-04> [<https://perma.cc/S5QK-SPAC>].

30. United Nations Assistance Mission in Afg., Hum. Rts. Serv., *Human Rights in Afghanistan: 15 August 2021-15 June 2022 24–25* (2022); Amnesty Int'l, *supra* note 7 at 68–79. WHRDs suggest that well-known violations of women's rights, like the ban on girls' education, must be understood in the context of other widespread abuses recently documented. Among these reported abuses are disappearances, killings, torture, and arbitrary detention of both women and men, including those from minorities or allegedly related to resistance to the Taliban. United Nations Assistance Mission in Afg., Hum. Rts. Serv., *Human Rights in Afghanistan: 15 August 2021-15 June 2022 24–25* (2022); Amnesty Int'l, *supra* note 7.

Writing in the tradition of feminist international law,³¹ this article draws from the academic literature and international norms

31. Feminist international law is a genre of international legal scholarship which has burgeoned since the 1990s. In their foundational 1993 article in this genre, *The Gender of Jus Cogens*, Hilary Charlesworth and Christine Chinkin insisted that “[c]onsiderations of gender should be fundamental to an analysis of international human rights law.” Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 63–76 (1993). This is one of the central tenets of this group of legal scholars. Their work focuses primarily on fulfilling international law’s promises of universality and equality. “Fundamental norms designed to protect individuals should be truly universal in application as well as rhetoric, and operate to protect both men and women from those harms they are in fact most likely to suffer. They should be genuine human rights, not male rights.” *Id.* at 75.

The underlying questions posed by feminist international law in the field of human rights are whether or not international human rights law is now or has ever been gender inclusive, and how to enhance it in this regard so as to overcome the divide Charlesworth and Chinkin diagnosed as “dissonance between women’s experiences and international legal principles.” *Id.*

According to the analyses of feminist international lawyers, some classical approaches to international human rights law have overlooked women’s concerns, such as in the gendered enumeration of which norms rise to the level of *jus cogens*, or employed a faulty private/public divide which relegates the sphere in which many women live much of their lives and face abuse to being outside the core of international legal concern. International standards have centered the family with a range of positive and negative consequences. See UDHR, *supra* note 3, art. 16 (listing the rights to marry and found a family); International Covenant on Economic, Social and Cultural Rights art. 10, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, 7 (entered into force Jan. 3, 1976) [hereinafter ICESCR] (outlining the right to family life).

Feminist international law has set out to tackle each of these defects in the corpus of international law and in the way it has been interpreted, with great success both in academia and within international organizations and human rights mechanisms. For example, feminist international lawyers of Muslim heritage have gendered mainstream human rights concerns such as freedom of expression and extra-judicial executions. See, e.g., Irene Khan (Special Rapporteur on freedom of opinion and expression), *Report on Gender justice and freedom of expression*, U.N. Doc. A/76/258 (July 30, 2021) (reporting on the particular barriers to the enjoyment of freedom of expression that women face and arguing that “gender equality in freedom of expression remains a distant goal”); Asma Jahangir (Special Rapporteur on extrajudicial, summary or arbitrary executions), *Report on extrajudicial, summary or arbitrary executions*, ¶¶ 74–75, U.N. Doc. E/CN.4/1999/39 (Jan. 6, 1999) (recognizing certain “honor killings” as extrajudicial killings). Ultimately, one of the founding scholars of feminist international law, Hilary Charlesworth, was elected to the International Court of Justice (ICJ), the most august international judicial body, in 2021. *Veteran Australian judge Hilary Charlesworth Elected to the International Court of Justice*, UN NEWS (Nov. 5, 2021), <https://news.un.org/en/story/2021/11/1105002> [<https://perma.cc/4FQK-GE6S>]. This

and jurisprudence on women's equality and racial apartheid, as well as on a series of interviews conducted remotely with Afghan WHRDs from September 2021 to February 2022.³² Feminist international law has

suggests that this school of thought has been increasingly accepted as a core approach to international jurisprudence. For an updated review of the development of feminist international law, see Symposium, *Feminist Approaches to International Law Thirty Years on: Still Alienating Oscar?*, 117 AJIL UNBOUND 259 (2022).

For other foundational works in the field, by scholars from around the world, see, e.g., PENELOPE ANDREWS, FROM CAPE TOWN TO KABUL: RETHINKING STRATEGIES FOR PURSUING WOMEN'S HUMAN RIGHTS (2012); HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000); DORINDA G. DALLMEYER, RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW (1993); Asma Mohamed Abdel Halim, *Challenges to the Application of International Women's Human Rights in the Sudan*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 397 (Rebecca J. Cook ed., 1994); Chaloka Beyani, *Toward a More Effective Guarantee of Women's Rights in the African Human Rights System*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 285 (Rebecca J. Cook ed., 1994); Radhika Coomaraswamy, *To Bellow Like a Cow: Women, Ethnicity and the Discourse of Rights*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 39 (Rebecca J. Cook ed., 1994); CATHARINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 41–43 (2007); Cecilia Medina, *Toward a More Effective Guarantee of the Enjoyment of Human Rights by Women in the Inter-American System*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 257 (Rebecca J. Cook ed., 1994); Ruba Salih, *Toward an Understanding of Transnationalism and Gender*, in GENDER AND HUMAN RIGHTS 231 (Karen Knop ed., 2004); and Fareda Banda, *Gender, Religion and Human Rights in Africa*, in WOMEN'S RIGHTS AND RELIGIOUS LAW: DOMESTIC AND INTERNATIONAL PERSPECTIVES 45 (Fareda Banda & Lisa Fishbayn Joffe eds., 2016).

32. Seventeen interviews were carried out for this study with sixteen Afghan women human rights defenders and one male human rights defender. Several additional follow up interviews also took place. Interviews were carried out with some still at home in Afghanistan, some displaced inside the country, and some in exile. They included people from most regions and from many different ethnic groups, including Hazaras, Pashtuns, Tajiks, and Uzbeks, as well as people with mixed identities. The discussions took place on Zoom, telephone, and Signal, in some cases through interpreters. All interviewees were offered the opportunity to give anonymous interviews. Those interviewed were located in ten different countries, including in safe houses inside Afghanistan, refugee centers and camps outside the country, and even in quarantine. All interviews are on file with the author.

Though fieldwork is rarely done in the discipline, it can make a critical contribution to human rights law scholarship and theorizing, bringing together theory and praxis. In relation to Afghan women, this methodology moves away from the much-criticized (usually by non-Afghans. See LILA ABU-LUGHOD, DO MUSLIM WOMEN NEED SAVING? (2013)) "savior" narratives to a solidarity stance those

questioned whether international legal norms adequately respond to women's experiences, pushed for more gender inclusive interpretations, and challenged gendered assumptions in the field of human rights law, such as the public-private divide which had relegated many women's experiences of violation to being outside the scope of international norms.³³ This article takes up those tasks in relation to the current situation of women in Afghanistan, informed by the views of the WHRDs interviewed.

To do so, the article deploys strategies outlined in a foundational 1990 piece, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, by Rutgers professor Charlotte Bunch.³⁴ Bunch identified four key methods for advancing women's rights in the international human rights system: (1) analogizing women's rights to established concepts within civil and political rights, (2) fitting women's human rights concerns within accepted paradigms of economic and social rights, (3) creating new international legal

critics overlook. It can go some way toward fulfilling the commitments of many areas of human rights law to consultation and participation of those most affected. See *International Day of Disabled Persons 2004: Nothing about Us, Without Us*, U.N. DEPT OF ECON. & SOC. AFF. (Dec. 2, 2004), <https://www.un.org/development/desa/disabilities/international-day-of-persons-with-disabilities-3-december/international-day-of-disabled-persons-2004-nothing-about-us-without-us.html> [<https://perma.cc/47AV-RVXW>]. It is also a way to reflect marginalized perspectives more inclusively in the field of international law. Angela Harris argues generally that "[i]n order to energize legal theory, we need to subvert it with narratives and stories, accounts of the particular, the different, and the hitherto silenced." Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 615 (1990). However, it is important not to overclaim. This set of interviews contains helpful insights that inform arguments in the Article, but it is a small set reflecting the specific constituency of Afghan WHRDs.

On methodological questions and ethical considerations relating to interview-based human rights research, see Denisa Kostovicova & Eleanor Knott, *Harm, Change and Unpredictability: the Ethics of Interviews in Conflict Research*, 22 QUALITATIVE RSCH. 56 (2022); *Chapter 11: Interviewing*, in MANUAL ON HUMAN RIGHTS MONITORING (REVISED EDITION) (U.N. Off. of the High Comm'r for Human Rights 2011).

33. Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in HUMAN RIGHTS OF WOMEN, *supra* note 31, at 85; Donna Sullivan, *The Public/Private Distinction in International Human Rights Law*, in WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 126 (Julie Peters & Andrea Wolper eds., 1995).

34. Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486 (1990).

mechanisms to counter sex discrimination, and (4) engaging in feminist transformation of international law.³⁵ Women’s human rights advocates often employ a holistic approach, oscillating between all such strategies, which are overlapping and complementary. This project aims to do just that, in a move to respond vigorously to Taliban policies and to international enablers of the Taliban. Enhanced responses are also needed to shape a more robust and relevant international legal framework.

The needed concepts already exist within international law and can be updated and analogized to cover this situation. This is a commonly used legal device³⁶ which fits in Bunch’s first and second approaches. It involves making existing categories of violations and remedies in international human rights law more gender inclusive. These objectives can also be realized via Bunch’s third approach, establishing new international legal mechanisms, a possibility discussed below. However, the latter is a more difficult route. International law has a paradigm for dealing with apartheid, but it is explicitly drafted to respond only to racial apartheid and has not been deployed to address gender apartheid. This article argues that it should be. Such a feminist transformation of international law is essential in the 21st century.

To make this case, Part One of this Article surveys the international legal regime on racial apartheid and the application of that body of laws to Southern Africa. It assesses why racial apartheid was deemed a grave crime, international complicity with which was forbidden, and why it spawned potent approaches to the obligations of second states. Those approaches were one prong of an effective international response that helped end the practice³⁷ and likewise changed international law.

35. *Id.* at 493–98. Examples of each method are explored below. *See infra* text accompanying notes 340–50.

36. For example, international human rights law borrows the concept of “due diligence” from the fields of corporate law and transnational law on state responsibility to noncitizens to respond to abuses by non-state actors. MARIA MONNHEIMER, *DUE DILIGENCE OBLIGATIONS IN INTERNATIONAL HUMAN RIGHTS LAW* 78–115 (2021). Another example is the creation of the term “femicide” to correct the omission of women as a protected category in the Convention on the Prevention and Punishment of the Crime of Genocide. Rachel Phillips, *Toward A Safer Society: Guatemalan Responses to Femicide*, 33 N.Y. INT’L L. REV. 45, 47–53 (2020).

37. Henry J. Richardson, III, *International Law and the Continuation of Sanctions Against South Africa*, 3 TEMPLE INT’L. & COMP. L.J. 249 (1989).

Building on this framework, Part Two explains the concept and practice of gender apartheid—the use of the systematic segregation of the sexes imposed through law and policy as a governing ideology. In this construct, segregation is sometimes accompanied by the total exclusion of women. Part Two considers the consequences of practicing gender apartheid for women’s human rights, primarily through the prism of Taliban Afghanistan, versions 1.0 and 2.0. Next, it reviews the international response to such practices. This part of the Article assesses the groundbreaking scholarship and advocacy on this issue in the 1990s, including by women of Muslim heritage and Muslim women who were not merely the objects of this work but its protagonists. It builds on arguments that a small number of women’s rights advocates made about gender apartheid during the 1990s Taliban rule of Afghanistan, an approach the international community failed to adequately embrace. Ratifying the analyses of those global feminist pioneers, this Article develops the international legal basis for their arguments, updates them in light of twenty years of development in the field, and avers that now is the time to fully re-assert them.

Having suggested ways of transposing the legal framework on racial apartheid to the gender apartheid context in its opening sections, the Article then responds to the most likely counterarguments. These counterarguments include: (1) the notion that sex discrimination is different than race discrimination in international law, thus meriting a distinct approach; (2) relatedly, the claim that culture offers an alibi for gender apartheid; and, finally, (3) the concern that international law lacks explicit textual support for recognizing the concept of gender apartheid and counteracting its practice. Responses can be found within international law itself to counter all of these rejoinders, as will be outlined in the subsequent portions of the Article.

Part Three compares the international law bans on systematic discrimination on the bases of race and sex, and considers the implications of this comparison. It makes the case that there is no rational justification for failing to use the heightened approach developed to combat governance on the basis of systematic racial discrimination for similar practices on the basis of sex.

Subsequently, Part Four confronts cultural relativism and cultural excuses made by the Taliban and others advocating gender apartheid. These are considered fashionable in certain Western

quarters, including parts of the academy.³⁸ Such arguments are significant obstacles to the full deployment of the construct of gender apartheid. However, as this part of the Article demonstrates, international law categorically rejects such attempted justifications for imposing inequalities on the basis of sex, just as it did for racial harms. Ultimately, with all of these building blocks and rejoinders in place, in Part Five, the Article offers interpretive strategies for countering gender apartheid with international law in Taliban Afghanistan 2.0.

I. Global Norms to “End [a] White Monopoly on Political Power”³⁹: International Anti-Apartheid Law

To consider what contribution a new conceptual architecture on gender apartheid in international law could offer, the Article now turns to the positive example of this body of law’s response to racial apartheid, which supported the efforts of local and international opponents of apartheid. International law should learn from its past successes.

“Apartheid” is an Afrikaans word meaning apartness or separation, a phrase coined by South African Prime Minister Daniel Malan “to denote South African policies of racial segregation between whites and various nonwhite racial groups.”⁴⁰ Nelson Mandela noted that “[a]partheid was a new term but an old idea What had been more or less de facto was to become relentlessly de jure.”⁴¹ In South Africa, apartheid became not just a practice, but the governing ideology and legal framework from 1948–1990. It was also applied in some neighboring Southern African states.⁴²

38. Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 190 (1992); ABU-LUGHOD, *supra* note 32.

39. Nelson Mandela, Mandela’s Address After His Release from Prison (Feb. 11, 1990), in SELECTED SPEECHES AND WRITINGS OF NELSON MANDELA: THE END OF APARTHEID IN SOUTH AFRICA 141 (2010).

40. CHRISTINE BYRON, WAR CRIMES AND CRIMES AGAINST HUMANITY IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 239 (2009).

41. NELSON MANDELA, LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA 97 (1994).

42. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 130 (June 21) [hereinafter *Namibia Opinion*] (“It is undisputed, and is amply supported by documents annexed to South Africa’s written statement in these proceedings, that the official governmental policy pursued by South Africa in Namibia is to achieve a

Legislation structured all aspects of South African society by race, just as Taliban Afghanistan is organized by sex. It also segregated people considered “Bantus,” “coloureds” and “white,”⁴³ as the Taliban divide women and men, even if the geography of spatial separation is different. In apartheid South Africa, a series of laws separated public and residential areas by race and allocated most of the country’s land to white people.⁴⁴ To enforce these restrictions, “pass laws” required nonwhites to carry documents authorizing their presence in white areas.⁴⁵ Racial apartheid also governed employment and education, as gender apartheid does in Taliban Afghanistan. In South Africa, state-run schools were created for Black children (educating them in domestic and manual work), and nonwhites were barred from most universities.⁴⁶

Recognizing that such use of discrimination as a governance model flagrantly violated the then-recently adopted U.N. Charter and Universal Declaration of Human Rights (UDHR),⁴⁷ in 1952 the U.N. General Assembly began issuing an annual denunciation of apartheid (which it did until 1990), with the U.N. Security Council following suit after 1960.⁴⁸ Influenced by political pressure and bolstered by the emerging legal framework, by the 1970s the Security Council began adopting a series of resolutions “prohibiting any aid or assistance in maintaining the illegal apartheid regime”⁴⁹

International political will and local political struggle were essential catalysts for change. Newly decolonized states played a

complete physical separation of races and ethnic groups in separate areas within the Territory.”).

43. NANCY L. CLARK & WILLIAM H. WORGER, *SOUTH AFRICA: THE RISE AND FALL OF APARTHEID* 49 (Clive Emsley & Gordon Martel eds., 2d ed. 2011); Elizabeth S. Landis, *Apartheid Legislation*, 4 *AFR. TODAY* 45, 46 (1957).

44. CLARK & WORGER, *supra* note 43, at 51.

45. *Id.* at 49–50; *Apartheid Legislation 1850s-1970s*, S. AFR. HIST. ONLINE, <https://www.sahistory.org.za/article/apartheid-legislation-1850s-1970s> [https://perma.cc/XT37-WC3F].

46. *Id.*; Landis, *supra* note 43.

47. See discussion *infra* notes 245–250 and accompanying text.

48. John Dugard, *Convention on the Suppression and Punishment of the Crime of Apartheid*, U.N. AUDIOVISUAL LIBR. OF INT’L L. (Aug. 2008), <https://legal.un.org/avl/ha/cspca/cspca.html> [https://perma.cc/65RF-K44Z].

49. This is how the International Law Commission characterized the relevant resolutions. *Draft Articles on Responsibility of States*, *supra* note 14, art. 41 cmt. 12. See, e.g., S.C. Res. 418 (Nov. 4, 1977) (imposing an arms embargo against South Africa); S.C. Res. 569 (July 26, 1985) (calling on member states to restrict economic, sporting, cultural, and other relations with South Africa).

leadership role, seeing the issue as a vital part of a larger struggle for the completion of de-colonization and the achievement of self-determination. The African National Congress was given observer status at the United Nations and carried out its own successful foreign policy.⁵⁰ Highly publicized South African atrocities, such as repression of the 1976 Soweto Uprising, galvanized international opinion and action.⁵¹ The U.N. response and international norms were only one component of concerted Global South-led anti-apartheid initiatives, but they created a powerful advocacy tool and helped mobilize global opprobrium for South African policy that, *inter alia*, helped break the deadlock on sanctions.⁵² As academics David Walsh and J.E. Spence conclude in a review of the relevant external factors:

It would be difficult . . . to attempt a precise weighting for any one of these factors; it was rather their cumulative effect which ultimately undid . . . apartheid What can be asserted with some confidence is that the changes that occurred in the norms governing state behaviour . . . were crucial. Western governments, in particular, had to pay at least some deference to these new norms, the effect of which was to give South Africa a unique status in the international society of states.⁵³

Indeed, building on earlier standards prohibiting race discrimination, international norms banning apartheid emerged in the 1970s, requiring rights-respecting responses by second states. The most important of these new standards was the International Convention on the Suppression and Punishment of the Crime of Apartheid (“Apartheid Convention”), which came into force in 1976.⁵⁴

50. DAVID WELSH & J.E. SPENCE, ENDING APARTHEID 177–181 (2011); G.A. Res. 3280 (XXIX), Co-operation between the United Nations and the Organization of African Unity, ¶ 6 (Dec. 10, 1974); G.A. Res. 3412 (XXX), Co-operation between the United Nations and the Organization of African Unity, ¶ 7 (Nov. 28, 1975).

51. *Id.* at 86–92.

52. Enuga Reddy, *The Struggle against Apartheid: Lessons for Today’s World*, UN CHRON., June 27, 2013.

53. WELSH & SPENCE, *supra* note 50, at 190.

54. International Convention on the Suppression and Punishment of the Crime of Apartheid, *opened for signature* Nov. 30, 1973 (entered into force July 18, 1976) [hereinafter Apartheid Convention]. The General Assembly adopted the Apartheid Convention on Nov. 30, 1973, with 91 votes for, four votes against (Portugal, South Africa, the United Kingdom and the United States), and 26 abstentions. Dugard, *supra* note 48, at 1. It currently has 109 states parties, with the most recent adherence in 2014. Post-apartheid South Africa never became a

South African expert John Dugard described it as “the ultimate step in the condemnation of apartheid.”⁵⁵ The *raison d’être* of this Convention was, according to its preamble, to actualize pre-existing prohibitions of apartheid. It aimed to “make it possible to take more effective measures at the international and national levels with a view to the suppression and punishment of the crime of apartheid.”⁵⁶ This is precisely what is needed in the case of gender apartheid.

The Convention defines apartheid as “inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.”⁵⁷ The list of “inhuman acts” under the definition includes “denial to a member or members of a racial group or groups of the right to life and liberty of a person,” “murder[s] of members of a racial group or groups,” “deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part,” legislative and other measures aimed to “prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups,” measures to “divide the population along racial lines,” and persecution of organizations or persons because they oppose apartheid.⁵⁸ As will be demonstrated below, if gender or sex is substituted for race, every single one of these elements is present in both Taliban 1.0 and 2.0 policies vis-à-vis women.⁵⁹

Recognizing apartheid as a violation of the U.N. Charter, and therefore unlawful, the Convention criminalizes it.⁶⁰ Article III imputes international criminal responsibility to perpetrators of inhuman acts deriving from apartheid. Subsequently, Article IV lays out the responsibilities of states parties in responding to another

party to the Convention. *International Convention on the Suppression and Punishment of the Crime of Apartheid*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-7&chapter=4&clang=en [<https://perma.cc/WG5N-EKQN>].

55. Dugard, *supra* note 48, at 1.

56. *Apartheid Convention*, *supra* note 54, pmb1.

57. *Id.* art. II.

58. *Id.* art. II(a)–(d), (f).

59. See discussion *infra* notes 111–163 and accompanying text.

60. Dugard, *supra* note 48, at 1; R.S. CLARK, *The Crime of Apartheid*, in *INTERNATIONAL CRIMINAL LAW* 299 (M. Cherif Bassiouni ed., 1986); Goler Butcher, *Legal Consequences for States of the Illegality of Apartheid*, 8 *HUM. RTS. Q.* 404 (1986).

state's practice of apartheid: they must adopt "legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime."⁶¹ States must also "adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of" acts prohibited by the Convention.⁶² Finally, this groundbreaking treaty seeks to catalyze further U.N. action by recognizing that any party can call upon U.N. bodies to take Charter-based action to prevent and suppress the crime of apartheid,⁶³ and by giving states parties heightened obligations to implement relevant U.N. resolutions.⁶⁴

Dugard stresses the significance of the fact that the Apartheid Convention enables prosecution of foreign nationals for criminal acts committed on the territory of a non-party if the alleged perpetrator is found within the jurisdiction of a state party. This was both innovative and symbolically important. However, as he notes, "[n]o one was prosecuted for the crime of apartheid while apartheid lasted in South Africa. And no one has since been prosecuted for the crime."⁶⁵ This was in part because South Africa opted instead for a Truth and Reconciliation Commission as part of its democratic transition.⁶⁶ The Convention nonetheless provided a critical advocacy tool for opponents of apartheid;⁶⁷ it was used as a standard for judging national responses and regularly cited in U.N. debates, and it codified the view of the

61. Apartheid Convention, *supra* note 54, art. IV(a).

62. *Id.* art. IV(b).

63. *Id.* art. VIII.

64. *Id.* art. VI.

65. Dugard, *supra* note 48, at 2.

66. See Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.) (establishing the Truth and Reconciliation Commission in South Africa). For diverse views of this development, see ALEX BORAINÉ, *A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION* (2000); RICHARD WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* (2001), and *Azanian Peoples Organisation (AZAPO) and others v. President of the Republic of South Africa* 1996 (4) SA 672 (CC) (S. Afr.) (rejecting an application for an order declaring unconstitutional section 20 of the Promotion of National Unity and Reconciliation Act which covers the granting of amnesty).

67. Henry Richardson, *The Obligation to Withdraw Recognition from Pretoria as the Government of South Africa*, 1 *TEMPLE INT'L. & COMP. L.J.* 153 (1987).

apartheid regime as an illegal situation to be ended⁶⁸ rather than an acceptable object of incrementalist “constructive engagement.”⁶⁹

Following the adoption of the Convention, in 1976, the International Law Commission recognized apartheid as an international crime and deemed its prohibition an “international obligation of essential importance for safeguarding the human being.”⁷⁰ In 1977, Additional Protocol I of the Geneva Conventions of 1949 denoted apartheid a “grave breach,”⁷¹ “without any geographical limitation.”⁷² All of these legal advances contributed to the momentum which emboldened the Security Council to impose a series of sanctions on South Africa as of 1977.⁷³

Specific standards on apartheid in particular fields were also adopted, such as the 1985 International Convention against Apartheid in Sports.⁷⁴ This convention recognizes that sports exchanges with teams “selected on the basis of apartheid directly abets and encourages the commission of the crime of apartheid.”⁷⁵ Sports contact with

68. This drew from the position of the International Court of Justice in the Namibia Opinion, *supra* note 42.

69. Sanford J. Ungar & Peter Vale, *South Africa: Why Constructive Engagement Failed*, 64 FOREIGN AFF. 234 (1985) <https://www.foreignaffairs.com/articles/south-africa/1985-12-01/south-africa-why-constructive-engagement-failed> [<https://perma.cc/8V48-P325>].

70. Article 19. – *International Crimes and International Delicts*, [1976] 2 Y.B. Int'l L. Comm'n 95–96, U.N. Doc. A/CN.4/SER.4/1976/Add.1.

71. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 85 ¶ 4(c), June 8, 1977, 1125 U.N.T.S. 3, 42 (entered into force Dec. 7, 1987) [hereinafter “Protocol I”].

72. Dugard, *supra* note 48, at 2.

73. See, e.g., S.C. Res. 421 (Dec. 9, 1977) (terminated by S.C. Res. 919 (May 26, 1994)).

74. International Convention against Apartheid in Sports, *opened for signature* Dec. 10, 1985, 1500 U.N.T.S. 25822 (entered into force Apr. 1, 1988). Women and men play sports separately in many cases as an ordinary, non-human rights-violating practice. The ban on apartheid in athletics was aimed at rights-violating exclusion and segregation based on race. South Africa’s apartheid sports policy was an integral part of the apartheid system of excluding nonwhites from full and equal participation in society. Richard E. Lapchick, *South Africa: Sport and Apartheid Politics*, 445 CONTEMP. ISSUES IN SPORT 155 (1979). The Afghan context is even more exclusionary as stated Taliban policy is implemented, since women are banned from participation in sports entirely. See discussion *infra* note 148 and accompanying text.

75. International Convention Against Apartheid in Sports, *supra* note 74, at pmb1.

countries practicing apartheid “condones and strengthens apartheid,”⁷⁶ and so is a violation of the Olympic Principles pertaining to international athletics.⁷⁷ Other states cannot be complicit.⁷⁸

After the end of apartheid in South Africa, the 1998 Rome Statute codified that its practice anywhere may rise to the level of a crime against humanity.⁷⁹ In fact, international apartheid law builds on the insights of just such constructs as crimes against humanity and genocide, which provide for heightened international responses to widespread and systematic atrocities against an entire population or group, recognizing the unique and pervasive damage they cause.⁸⁰ Ultimately, the prohibition of apartheid has been recognized by the International Law Commission in its 2001 Commentary on *the Draft Articles on Responsibility of States* as rising to the level of jus cogens,⁸¹ the highest-level norms in the field of international law which override

76. *Id.*

77. *What Is Olympism*, WORLD OLYMPIANS ASS’N, <https://olympians.org/wao/olympism/> [<https://perma.cc/4YED-6FUN>].

78. Parallel to normative developments in the prohibition of apartheid, a series of implementation mechanisms were created. See Comm. on Human Rights, *Study on Ways and Means of Insuring the Implementation of International Instruments Such as the Convention on the Suppression and Punishment of the Crime of Apartheid*, U.N. Doc. E/CN.4/1426 (Jan. 19, 1981); see also G.A. Res. 1761 (XVII) (Nov. 6, 1962) (establishing a Special Committee to periodically review racial policies in South Africa); U.N. Comm. on Human Rights, Resolution 2 XXIII (1967) (creating the Ad Hoc working group on violations of human rights in Southern Africa).

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

80. On genocide, see THE GENOCIDE CONVENTION: TRAVAUX PRÉPARATOIRES (Hirad Abtahi and Philippa Webb, eds., 2009); see also Ana Cristina Rodríguez Pineda, *The Relay Race of Defining Crimes Against Humanity: From the International Tribunals to the Draft Articles*, JUST SECURITY (Sept. 27, 2021), <https://www.justsecurity.org/78360/the-relay-race-of-defining-crimes-against-humanity-from-the-international-tribunals-to-the-draft-articles/> [<https://perma.cc/PE7K-9SLV>] (“It is their large-scale or systematic nature that elevates the specific crimes (horrific on their own merits) to crimes that shock the conscience of the international community and constitute an affront to the very notion of humaneness.”).

81. According to the Vienna Convention on the Law of Treaties, a jus cogens norm is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties arts. 26 and 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 339, 334 (entered into force Jan. 27, 1980).

contradictory norms and instruments.⁸² Given that status, this Article now turns to possibilities for applying a similarly vigorous approach to ending the use of discrimination against women as a governance model.

II. “Not as Human as Men”⁸³: Gender Apartheid and International Law

A. Defining Gender Apartheid

Building upon the international legal framework on racial apartheid, this part of the Article explains the concept of gender apartheid and how its practice likewise violates fundamental norms of international law on equality and non-discrimination. It then offers Taliban Afghanistan 1.0 and 2.0 as the paradigmatic examples to demonstrate the concrete impacts on human rights.

Analogous to racial apartheid, gender apartheid is 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.⁸⁴ It codifies the subordination of women in violation of “fundamental principles recognized under international law,”⁸⁵ as the U.N. Committee on Economic, Social and Cultural Rights characterizes the equal right of men and women to enjoy all human rights.⁸⁶ Gender apartheid is anathema to these foundational norms of international law, every bit as much as racial apartheid was to the analogous principles prohibiting race discrimination.⁸⁷ Ultimately, as racial apartheid was for Black South Africans, gender apartheid is an erasure of the humanity of women. Every aspect of female existence is controlled and scrutinized. It

82. *Draft Articles on Responsibility of States*, *supra* note 14, at art. 40 ¶ 4.

83. Zoom Interview with Shaharзад Akbar, *supra* note 2.

84. Gender apartheid often also significantly constrains women’s rights in the so-called private sphere. Feminist scholars have challenged the public/private divide classically employed in human rights law. Restrictions in public and private life are interdependent, their impacts interwoven. Romany, *supra* note 33. When women cannot access the public realm in equality, they cannot find remedies for harms in the family, and vice versa.

85. Comm. on Econ., Soc. and Cultural Rts., General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights, ¶ 1, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005) [hereinafter General Comment No. 16].

86. See review of these norms *infra* notes 243–51.

87. See *infra* notes 240-290 and accompanying text.

permeates all institutions and spaces, public and private. There is no escape from gender apartheid. The solution cannot be the departure of half the population of the country.⁸⁸

Gender apartheid is a hierarchical system that maintains the inferiority of women and the superiority of men, not simply their equal separation. As with gender apartheid, racial apartheid is grounded in discrimination, but what is crucial to understand is its composite and systematic nature. As the International Law Commission noted of racial apartheid in its Commentary on the Draft Articles on Responsibility of States, “cumulative conduct constitutes the essence of the wrongful act.”⁸⁹ Experts have emphasized the “pervasiveness” of racial apartheid and the way it functioned as a “system of gross human rights violations.”⁹⁰ This is also true of gender apartheid and is clearly identifiable in Taliban Afghanistan. It is intentional, systematic, and pervasively discriminatory. There is nothing incidental or anecdotal about the violations which result. It poses specific human rights problems requiring particular, heightened responses.⁹¹ Notwithstanding the robust international normative framework and the fact that it is prohibited by the touchstone instruments of the contemporary global legal order, discrimination against women remains, in practice, one of the most pervasive human rights violations around the world.⁹²

88. Moreover, women trying to leave are hindered from doing so by apartheid restrictions. Kathy Gannon, *Officials: Taliban Blocked Unaccompanied Women from Flights*, PBS NEWS (Mar. 26, 2022, 11:29 AM), <https://www.pbs.org/newshour/world/officials-taliban-blocked-unaccompanied-women-from-flights> [<https://perma.cc/5FW5-DNP5>].

89. *Draft Articles on Responsibility of States*, *supra* note 14, art. 15 cmt. 4.

90. ANTHONY LÖWSTEDT, APARTHEID – ANCIENT, PAST, AND PRESENT: GROSS HUMAN RIGHTS VIOLATIONS IN GRAECO-ROMAN EGYPT, SOUTH AFRICA, ISRAEL/PALESTINE AND BEYOND 164, 230 (2016).

91. This explains why the United Nations did not simply focus on the abuses attendant on apartheid, but sought to dislodge the idea of racial superiority itself. See G.A. Res. 395 (V), pmbl. (Dec. 2, 1950) (“a policy of ‘racial segregation’ (Apartheid) is necessarily based on doctrines of racial discrimination”). In the preamble to the International Convention on All Forms of Racial Discrimination, states parties commit to preventing and combating “racist doctrines.” International Convention on the Elimination of All Forms of Racial Discrimination pmbl., *opened for signature* Mar. 7, 1966, S. Exec. Doc. C, 95-2, at 2 (1978), 660 U.N.T.S. 195, 212–16 (entered into force Jan. 4, 1969) [hereinafter ICERD].

92. Implementation remains a significant challenge in the field of international law generally, and in international human rights law specifically. However, there have been significant advances in this regard that are too often overlooked. See Lori F. Damrosch, *Enforcing International Law Through Non-Forcible Measures*, in 269 COLLECTED COURSES OF THE HAGUE ACADEMY OF

However, creating a system of governance based on such practices and designed to impose them takes the abuse to another level. This institutionalizes sex discrimination across state political, legal, and cultural infrastructures—a problem that is distinct from more common patriarchal societal norms found to varying degrees in most societies. It necessitates different counter-strategies.

In a context like Taliban Afghanistan, the term “gender apartheid” seeks to foreground the way in which discrimination has been made the system of governance itself rather than an aberration from it, such that the aim of government and public policy is to discriminate. This radically alters the relationship of the state and the government (or the entity exercising de facto control) to the discriminatory practices in question, as it becomes the engine of discrimination. It also transforms the ways in which human rights criticism and scrutiny might be able to affect them. It is no accident that the Taliban have only minimally responded to pressure in this regard. Their enacted hatred of women is the heart of their governing platform.

All this makes clear why ordinary human rights law and non-discrimination norms are important components of critiquing apartheid but are also insufficient for addressing it. The specific problem posed by apartheid, based on race or sex, as opposed to other forms of de facto or periodic discrimination, is the way it upends the assumptions of human rights law. Human rights treaties center the state and address it as the entity to realize equality.⁹³ When the apparatus of the state is organized to mandate systematic inequality and its law or policy codifies discrimination as the norm, the international human rights law model cannot work. The state becomes the primordial source of discrimination, amplifying its practice in society. This is an affront to the principles of the rule of law. International scrutiny and global engagement are absolutely necessary to realize the foundational goals of international law in any such context. In fact, without them or without system-wide change inside

INTERNATIONAL LAW 9 (1997); DAVID C. BALUARTE & CHRISTIAN M. DEVOS, OPEN SOC'Y FOUND., FROM JUDGMENT TO JUSTICE: IMPLEMENTING INTERNATIONAL AND REGIONAL HUMAN RIGHTS DECISIONS (2010).

93. For a summary and critique of this view, see Rebecca Cook, *Accountability in International Law for Violations of Women's Rights by Non-State Actors*, in DALLMEYER, *supra* note 31, at 93–116.

the country brought about in accordance with international law,⁹⁴ those goals will be impossible to achieve.

B. “Abnormal from the Standpoint of Human Rights”:
Early Opposition to Gender Apartheid

In the 1990s, campaigning against an earlier iteration of gender apartheid in Afghanistan brought together Afghan women human rights defenders and global feminist partners to try to galvanize an effective response to Taliban rule 1.0. They recognized the dangers of a Taliban-ruled Afghanistan well before the atrocities of 9/11, at a time when governments were appeasing the armed group and oil companies were seeking lucrative deals with it.⁹⁵ These WHRDs were thereby challenging international law to live up to its foundational promises, and governments to make good on their rhetoric about equality. As Nancy Gallagher explained,

[g]ender discrimination had never been a major issue in international foreign policy making, but feminist and human rights activists now called for an international response to the Taliban similar to the international response to the South African apartheid government. Hence the new term, “gender apartheid” and the idea of an international, anti-gender apartheid campaign.⁹⁶

Women of Muslim heritage who had already been engaging in both local and transnational campaigning against Muslim fundamentalist state and non-state actors were often at the forefront

94. Such change looks virtually impossible at the moment in Afghanistan. Military intervention has already been tried. Local human rights advocacy is important but insufficient. The one realistic possibility on the political horizon is a shift to an even worse regime close to the so-called “Islamic State” if the Taliban government falls. Victor J. Blue et al., *ISIS Poses a Growing Threat to New Taliban Government in Afghanistan*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/11/03/world/asia/isis-afghanistan-taliban.html> [<https://perma.cc/Z6GG-MUW3>].

95. Dan Morgan & David B. Ottaway, *Women’s Fury Toward Taliban Stalls Pipeline*, WASH. POST (Jan. 11, 1998), <https://www.washingtonpost.com/archive/politics/1998/01/11/womens-fury-toward-taliban-stalls-pipeline/8a3d9be1-33ee-4922-84bd-3840baa95f13/> [<https://perma.cc/5X2Y-XVQNQ>].

96. Nancy Gallagher, *The International Campaign Against Gender Apartheid in Afghanistan*, 5 UCLA J. INT’L L. & FOREIGN AFF. 367, 378 (2000).

of advancing such analysis.⁹⁷ Iranian women's rights advocate Mahnaz Afkhami wrote in 2001 that a "resurgence of radical Islamist thought" in some Muslim majority countries has sought to establish "various degrees of gender apartheid in Muslim societies"—from the passage of a bill to segregate hospitals in Iran to the "total segregation" of society promoted by the Taliban in Afghanistan.⁹⁸ This work bore in mind the success of international law in confronting racial apartheid and sought to apply lessons from that experience.

One prominent U.N. human rights expert of Muslim heritage, who recognized that this discussion was about political choices with grave impacts on women, not simply about religion or culture, was also willing to use this approach. During Taliban rule 1.0, Abdelfattah Amor, who held the post of what was then called the U.N. Special Rapporteur on the elimination of intolerance and all forms of discrimination based on religion or belief, specifically charged that Afghan women were being subjected to a form of "apartheid."⁹⁹ According to the U.N. press release on his report, he asserted with grave concern that "[w]omen were subject to a form of religious apartheid, and suffered under religious fundamentalism, for example in Afghanistan."¹⁰⁰

[T]he Taliban has introduced what is in point of fact a system of apartheid in respect of women, based on its interpretation of Islam: exclusion of women from society, employment and schools, obligation for women to wear the burqa in public and restrictions on travel with men other than members of the family. . . . The Special Rapporteur believes that the maintenance,

97. See, e.g., Lisa M. Ayoub, *The Crisis in Afghanistan: When Will Gender Apartheid End?*, 7 TULSA J. COMP. & INT'L L. 513 (2000).

98. Mahnaz Afkhami, *Gender Apartheid and the Discourse of Relativity of Rights in Muslim Societies*, in RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN 67, 68 (Courtney W. Howland ed., 1999).

99. *Taliban Have Created "Apartheid System" for Women: UN Report*, AGENCE FRANCE PRESSE (Mar. 12, 1999) (on file with the *Columbia Human Rights Law Review*); Press Release, Hum. Rts. Comm., Special Rapporteurs on Religious Intolerance and Judicial Independence, Independent Expert on Compensation Address Commission on Human Rights, U.N. Press Release HR/CN/99/32 (Apr. 12, 1999), <https://www.ohchr.org/en/press-releases/2009/10/special-rapporteurs-religious-intolerance-and-judicial-independence> [<https://perma.cc/HJ43-7565>].

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

openly and publicly, of an apartheid policy of this nature is abnormal, from the standpoint of human rights.¹⁰¹

His words are striking against the backdrop of the more general assertions that U.N. mechanisms make today.¹⁰² Ann Mayer, noted scholar of Islam and human rights, correctly explains that, “[a]s a Muslim coming from Tunisia, a Muslim country where progressive laws generally accord women equality in rights, Amor could see through and dismiss the Islamic rationales proffered for the Taliban’s demeaning treatment of women.”¹⁰³

Given such conceptual clarity and human rights leadership, it is surprising how little the term “gender apartheid” has been used in international legal parlance, including in the human rights system, since then. Mayer argued that gender apartheid has been viewed as a relatively “benign apartheid” because it is not seen to have the same linkage to colonialism as racial apartheid, it is subject to cultural relativist justifications¹⁰⁴ and, in her view, the language of the U.N. Convention on the Elimination of All Forms of Discrimination against Women (“the CEDAW Convention”) is relatively weak.¹⁰⁵

The views Mayer critiqued can be dislodged using the tools of 21st century feminist international law. This requires taking three key steps: (1) recognizing that the commitments in international law to ending gender discrimination are as strong as those related to decolonization,¹⁰⁶ (2) refusing to perpetuate a global version of the public-private divide which sees systematic racial discrimination as international and thus appropriate for the strongest rebuke, and sex discrimination as internal and therefore subject to less rigorous of an international response, and (3) boldly interpreting the CEDAW

101. Abdelfattah Amor (Special Rapporteur on the elimination of intolerance and all forms of discrimination based on religion or belief), *Civil and Political Rights, Including Religious Intolerance*, ¶ 26, U.N. Doc. E/CN.4/1999/58 (Jan. 11, 1999).

102. See *infra* notes 201-208 and accompanying text.

103. Ann Elizabeth Mayer, *A “Benign” Apartheid: How Gender Apartheid Has Been Rationalized*, 5 *UCLA J. INT’L L. & FOREIGN AFF.* 237, 237–388 (2000).

104. This counterargument will be addressed *infra* Part IV.

105. Mayer, *supra* note 103.

106. Relevant standards on each topic are contained in the U.N. Charter, in numerous treaties, and in repeated U.N. General Assembly declarations. *Key UN Documents Related to Decolonization*, DAG HAMMARSKJÖLD LIBRARY, <https://research.un.org/en/docs/decolonization/keydocs> [<https://perma.cc/D6PL-SWJK>].

Convention for the 21st century. Each prong of this approach is taken up below. Meanwhile, the following descriptions of Taliban rule in Afghanistan in the 1990s and today further illustrate the reality of gender apartheid and the need for such an international legal response.

C. Gender Apartheid in Afghanistan

1. Taliban rule, take one: 1996-2001

Understanding the impact of Taliban gender apartheid rule on women requires consideration of 20th century Afghan women's history. In contrast with the current situation, Afghan women experienced a positive rights trajectory throughout much of the 20th century until 1979.¹⁰⁷ This occurred under a series of reformist kings and the first communist regime (though the latter also engaged in increasing political repression). After an illegal 1979 Soviet invasion, counter-intervention by the United States, Pakistan, and Saudi Arabia¹⁰⁸

107. Huma Ahmed-Ghosh, *A History of Women in Afghanistan*, 4 J. INT'L WOMEN'S STUD. 1, 5–7 (2003).

108. Unfortunately, the Taliban have not been alone in engaging in widespread and systematic de jure discrimination against women. The Kingdom of Saudi Arabia, a wealthy sponsor of mujahideen groups and one of only three states to recognize the Taliban 1.0 authorities, does so as well. A state party to the CEDAW Convention since 2000, it banned women from driving until 2017. Jamie Tarabay, *Women in Saudi Arabia Still Can't Do These Things*, CNN (Dec. 6, 2017, 4:23 AM), <https://www.cnn.com/2017/09/27/middleeast/saudi-women-still-cant-do-this/index.html> [https://perma.cc/RB55-DUEQ]. The Kingdom still practices sweeping sex segregation, maintaining a male guardianship system requiring permission for women to travel, choose a residence, or access health care. Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined third and fourth periodic reports of Saudi Arabia, ¶¶ 15, 61, U.N. Doc. CEDAW/C/SAU/CO/3-4 (Mar. 14, 2018). The notorious Saudi Commission for the Promotion of Virtue and Prevention of Vice or religious police (mutawa) have even ordered stores to build sex segregation walls in the workplace. “*Wall-Mart?*” *Saudi Shops to Build Sex-Segregation Walls*, ALARABIYA NEWS (Jan. 29, 2013), <https://english.alarabiya.net/articles/2013/01/29/263211> [https://perma.cc/U6EW-6EX4]. In public places, women must use separate entrances off to the side and can only visit if there is a family section separate from single men. Henry Hanks, *Women Welcome at a Saudi Arabia Starbucks Shop After Temporary Ban*, CNN (Feb. 8, 2016), <https://www.cnn.com/2016/02/07/world/saudi-starbucks-women-ban-feat/index.html> [https://perma.cc/VU9C-EA98].

Of late, Saudi Arabia has taken modest steps toward loosening its gender apartheid regime, something Afghan WHRDs interviewed pointed to as a positive

supported mujahideen groups, including extremists. The resulting 1989 Soviet withdrawal paved the way for catastrophic conflict between these mujahideen groups in the 1990s. In this context, the Taliban emerged in 1994, supported by the Pakistani security service or Inter-Services Intelligence, and drawing from war orphans who had been indoctrinated in extremist madrasas (religious schools) and may have had little or no contact with women.¹⁰⁹ During a hellish rocket war, the Taliban conquered Kabul in August 1996 and came to control the majority of the country.¹¹⁰

Taliban rule 1.0 saw the imposition of systematic gender apartheid, including the end of education for women and girls, alongside other widespread human rights abuses.¹¹¹ Taliban policies eviscerated what remained of women's human rights after seventeen years of war.¹¹² They systematized the total social erasure of women. "Upon seizing power, the Taliban regime instituted a system of gender apartheid effectively thrusting the women of Afghanistan into a state

example. However, the international community has acquiesced to this posh version of gender apartheid due to the wealth and power of those who practice it. See the discussion of the problems arising from Saudi Arabia's voluntary contributions to the U.N. in Kristina B. Daugirdas, *Funding Global Governance*, 29 N.Y.U. ENV'T L.J. 639, 646–47 (2021). It is more difficult to convince the Taliban to change when a Western ally engages in practices reminiscent of theirs. While distinguishable from the Taliban, which largely excludes women and girls from sectors such as education, the Saudi government actively promotes gender segregation in other Muslim majority contexts outside its borders. See KARIMA BENNOUNE, *YOUR FATWA DOES NOT APPLY HERE* 105–06 (2013).

109. AHMED RASHID, *TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA* 17–30 (2010).

110. Note that the Taliban did not hold Afghanistan's seat in the U.N. General Assembly. Instead, the Northern Alliance, which represented the former government and controlled some territory, maintained the seat. Michelle Nichols, *Taliban Names Afghan U.N. Envoy, Asks to Speak to World Leaders*, REUTERS (Sept. 21, 2021, 4:19 PM), <https://www.reuters.com/world/asia-pacific/exclusive-taliban-names-afghan-un-envoy-asks-speak-world-leaders-2021-09-21/> (on file with the *Columbia Human Rights Law Review*).

111. Meri Melissi Hartley-Blecic, *The Invisible Women: The Taliban's Oppression of Women in Afghanistan*, 7 ILSA J. INT'L & COMPAR. L. 553 (2001). Reportedly, a small number of girls' schools remained open in two areas of the country. Telephone Follow Up Interview Two with Zubaida Akbar, *supra* note 23.

112. Anastasia Telesetsky, *In the Shadows and Behind the Veil: Women in Afghanistan Under Taliban Rule*, 13 BERKELEY WOMEN'S L.J. 293, 296–98 (1998); Lindsay M. Gray, *Changing Asylum Law for Afghan Women Under the Taliban: Desperate Times, Moderate Measures*, 40 BRANDEIS L.J. 557, 557–60 (2001); Widney Brown & Laura Grenfell, *The International Crime of Gender-Based Persecution and the Taliban*, 5 MELB. J. INT'L L. 347, 350–51 (2003).

of virtual house arrest. Under Taliban rule women were stripped of all human rights[—]their work, visibility, opportunity for education, voice, healthcare, and mobility.”¹¹³

Specific Taliban decrees banned women from working, expelled women and girls from schools and universities,¹¹⁴ forbade women from leaving their homes without a close male relative or *mahram* (a restriction the effects of which were magnified in a country full of war widows¹¹⁵), and even “[p]rohibited women and girls from being examined by male physicians while at the same time prohibit[ing] female doctors and nurses from working.”¹¹⁶ These policies had stark consequences, leading to one of the highest maternal mortality rates in the world¹¹⁷ and “de facto sentencing widows and their children to starvation.”¹¹⁸ The windows of women’s homes were blackened so they could not be seen.¹¹⁹ Violations of the rules would be met with beatings, floggings, executions, and even stoning.¹²⁰

For those who argue that the Taliban can change, it is worth noting the assessment of the campaigning organization known as “Feminist Majority” of the group’s rule in the 1990s:

Even after international condemnation, the Taliban made only slight changes. Some say it was progress

113. *The Taliban & Afghan Women*, FEMINIST MAJORITY FOUND., <https://feminist.org/our-work/afghan-women-and-girls/the-taliban-afghan-women/> [<https://perma.cc/H3RB-T8LX>].

114. Women human rights defenders devised an elaborate scheme of clandestine schools and risked severe punishment for doing so. LATIFA, *MY FORBIDDEN FACE: GROWING UP UNDER THE TALIBAN* (Linda Coverdale trans., 2001).

115. See U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., *REPORT ON THE TALIBAN’S WAR AGAINST WOMEN* (2001) (“As many as 50,000 women, who had lost husbands and other male relatives during Afghanistan’s long civil war, had no source of income. Many were reduced to selling all of their possessions and begging in the streets, or worse, to feed their families.”).

116. See *The Taliban & Afghan Women*, *supra* note 113; *REPORT ON THE TALIBAN’S WAR AGAINST WOMEN*, *supra* note 115. Over time, a few women doctors and nurses were allowed to work in segregated wards. However, women and girls died from lack of medical treatment due to these restrictions.

117. *REPORT ON THE TALIBAN’S WAR AGAINST WOMEN*, *supra* note 115.

118. John R. Allen & Vanda Felbab-Brown, *The Fate of Women’s Rights in Afghanistan*, BROOKINGS INST. (2020), <https://www.brookings.edu/essay/the-fate-of-womens-rights-in-afghanistan> [<https://perma.cc/4RL8-HASN>].

119. *REPORT ON THE TALIBAN’S WAR AGAINST WOMEN*, *supra* note 115.

120. The impact of these punishments was graphically depicted by Afghan writers in KHALED HOSSEINI, *A THOUSAND SPLENDID SUNS* (2008) and MARYAM MAHBOOB, *GUM [THE INVISIBLE]* (1999).

when the Taliban allowed a few women doctors and nurses to work, even while hospitals still had segregated wards for women. In Kabul and other cities, a few home schools for girls operated in secret Women who conducted home schools were risking their lives or a severe beating.¹²¹

The sweeping impacts of discriminatory Taliban policies on women's human rights included violence against women so widespread that many families sent their daughters to Pakistan or Iran for their safety.¹²² High rates of suicide and depression among women resulted from these policies and their consequences. A 35-year-old Afghan widow summed up the dire situation: "We are locked at home and cannot see the sun."¹²³ Despite this grim reality and the advocacy of international and local WHRDs, the international community failed to respond vigorously to gender apartheid, overlooking it as a "warning sign"¹²⁴ of further horror to come. The situation persisted until the United States, with support from international and Afghan coalitions, overthrew Taliban 1.0 rule following 9/11, an attack which the group allowed to be planned from its gender segregated territory.¹²⁵

121. *The Taliban & Afghan Women*, *supra* note 113.

122. REPORT ON THE TALIBAN'S WAR AGAINST WOMEN, *supra* note 115.

123. *Id.*

124. WHRDs, including those of Muslim heritage, have warned of the dire consequences of the international community failing to take fundamentalist violence against women seriously as a "warning sign." AYESHA IMAM, JENNY MORGAN & NIRA YUVAL-DAVIS, WARNING SIGNS OF FUNDAMENTALISMS: WOMEN LIVING UNDER MUSLIM LAWS (2004).

125. In contrast to the 2003 Iraq war, a strong case can be made for the *jus ad bellum* legality of the conflict which overthrew the Taliban. Monica Hakimi, *Defensive Force Against Non-State Actors: The State of Play*, 91 J. INT'L L. STUD. 1, 9–14 (2015). When I visited Afghanistan in 2005, I was also struck by the degree of support there was for this intervention, from Kabul to Kandahar.

However, with regard to the *jus in bello*, there is also credible evidence that the United States and other international actors violated provisions of humanitarian and human rights law during the course of the conflict, causing great suffering even while justifiably seeking to hold the Taliban at bay. Shaharзад Akbar, *Ending the Forever War, But Leaving a Legacy of Impunity in Afghanistan*, JUST SECURITY (June 30, 2021), <https://www.justsecurity.org/77207/ending-the-forever-war-but-leaving-a-legacy-of-impunity-in-afghanistan/> [https://perma.cc/2ZN4-WXV8]; OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, SITUATION IN AFGHANISTAN: SUMMARY OF THE PROSECUTOR'S REQUEST FOR AUTHORIZATION OF AN INVESTIGATION PURSUANT TO ARTICLE 15 (2017). Though providing no justification for abuses by other actors, the data shows that the Taliban's war crimes were far more widespread, and were a deliberate tactic in many circumstances. *Civilian*

2. Taliban rule, take two: August 2021 to the present

Just as with the rise of Taliban 1.0, the new Taliban de facto regime that came to control the country in 2021 should be viewed in light of the trajectory for women's rights in the preceding timeframe. Substantial progress was made for Afghan women after the overthrow of the Taliban in 2001, though this progress was not equally enjoyed

Casualties Set to Hit Unprecedented Highs in 2021 Unless Urgent Action To Stem Violence – UN Report, UNAMA (July 26, 2021), <https://unama.unmissions.org/civilian-casualties-set-hit-unprecedented-highs-2021-unless-urgent-action-stem-violence-%E2%80%93-un-report> [https://perma.cc/XTS7-BGC2]. During this time, the Taliban carried out many targeted attacks—involving bombing and even acid—on women and girls, including on women human rights defenders and on girls' schools. They directed particular ferocity against women members of minority groups, such as the Hazara. Najim Rahim & David Zucchini, *Attacks on Girls' Schools on the Rise as Taliban Make Gains*, N.Y. TIMES (May 20, 2019), <https://www.nytimes.com/2019/05/21/world/asia/taliban-girls-schools.html> (on file with the *Columbia Human Rights Law Review*). There were 185 attacks on girls' schools alone in 2016. Allie Torgan, *Acid Attacks, Poison: What Afghan Girls Risk by Going to School*, CNN (Mar. 17, 2016), <https://www.cnn.com/2012/08/02/world/meast/cnnheroes-jan-afghan-school/index.html>. [https://perma.cc/3UT7-XRKK]. There has been near total impunity for all of these abuses by all actors. Andrew Hilland & Catherina Gilfedder, *The International Criminal Court and Afghanistan*, JUST SECURITY (Sept. 3, 2021), <https://www.justsecurity.org/78080/the-international-criminal-court-and-afghanistan/> [https://perma.cc/N7NF-FQ7F].

by all women¹²⁶ and serious threats to women's rights persisted.¹²⁷ During the Trump administration, the Taliban successfully used

126. For example, Shia women were subjected to a separate and highly criticized Shia Personal Status Law in Afghanistan, adopted in 2009. See analysis in Deniz Kandiyoti, *Disentangling Gender and Politics: Whither Gender Equality?*, 42 IDS BULLETIN 11 (Jan. 2011), https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/7566/IDSB_42_1_10.1111-j.1759-5436.2011.00195.x.pdf. [<https://perma.cc/C99V-7B82>].

Rural Afghan women often did not benefit as substantially from advances that were made at the national level, continuing to face male domination and grave impacts from the ongoing conflict with the Taliban, and, in increasing parts of the territory, de facto Taliban rule. In Fall 2021, a widely read article in the *New Yorker* pitted the rights of urban Afghan women against those in rural areas (based largely on one interview with one woman in Helmand province), suggesting that women's rights in the cities had been bought at the price of the suffering of those in the provinces. Anand Gopal, *The Other Afghan Women*, NEW YORKER (Sept. 6, 2021), <https://www.newyorker.com/magazine/2021/09/13/the-other-afghan-women> [<https://perma.cc/6MMT-YWJP>]. While an important reminder of differences among Afghan women, it also dovetailed in unfortunate ways with the Taliban view that "women in urban areas are infidels." Zoom Interview with Shaharзад Akbar, *supra* note 2.

Some Afghan women human rights defenders responded vigorously to Gopal's assessment, but without an equal audience. A few reported particular work carried out precisely with women in villages who have now lost their services due to the new environment, and many reported that such interlocutors are still asking them for help, though they are now powerless to provide it. Zubaida Akbar stressed that WHRDs from Helmand were actively trying to maintain girls' education on the ground, but were not interviewed for the *New Yorker* article. Zoom Follow Up Interview One with Zubaida Akbar, (Dec. 9, 2021). As WHRD Samira Hamidi riposted, "this article highlights the divisions among Afghan women and says that we didn't do anything for the provinces. But, it didn't say why we couldn't go to the provinces. Our lack of access was often due to Taliban violence in those areas." Zoom Interview with Samira Hamidi, South Asia Campaigner, Amnesty International (Oct. 8, 2021).

Shaharзад Akbar commented on the article as follows:

Afghan women are not a homogenous group. Does that mean the battle for women's rights is an isolated idea? I disagree. What about women in Hazarajat [the mountainous, largely rural region populated by the Hazara Shia minority, that have faced discrimination and Taliban targeting]? There, women with nonliterate parents were joining the army and the police and pursuing their educations. . . . Despite the conflict, aspirations of many women changed, including those of women in rural areas such as Helmand and Kandahar, who want to be pilots and engineers. The majority want lives different from their mothers. Now, the most prominent activists are outside the country, but women are still demonstrating.

Zoom Interview with Shaharзад Akbar, *supra* note 2.

negotiating for peace as a weapon of war, and were rewarded with the Doha Agreement.¹²⁸ International actors were willing to set aside women's rights, while mouthing platitudes about empowerment.¹²⁹ Benefitting from one-sided prisoner releases that liberated fighters, international negotiations that often excluded the democratically-elected government, and the demoralization of government forces due to significant casualties, the Taliban's conquest of territory accelerated.¹³⁰ Kabul itself ultimately fell to the armed group on August 15, 2021, twenty-five years after it took power the first time.

This led to panicked mass attempts to flee the country, as foreign countries prioritized evacuation of their own citizens and small numbers of Afghans who had worked with them.¹³¹ This kind of

127. Ashley Lenderman, *We Are All Farkhunda: An Examination of the Treatment of Women Within Afghanistan's Formal Legal System*, 3 IND. J. CONST. DESIGN 1 (2018); Susan Forooqi, *Misogyny and Lawlessness in Afghanistan: The Women's Fight for Equal Rights*, 32 J.C.R. & ECON. DEV. 105 (2018); Benazeer Roshan, *The More Things Change, the More They Stay the Same: The Plight of Afghan Women Two Years After the Overthrow of the Taliban*, 19 BERKELEY WOMEN'S L.J. 270 (2004); Shafiqah Ahmadi, *Theory v. Practice: Women's Rights and Gender Equity in Afghanistan*, 18 J. GENDER RACE & JUST. 361 (2016); Mark A. Drumbl, *Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan*, 42 COLUM. J. TRANSNAT'L L. 349, 356 (2004).

128. Makhfi Azizi, *Afghans' Views on the Doha Peace Process and the Biden Administration's Review of the US-Taliban Peace Agreement*, ATLANTIC COUNCIL (Feb. 25, 2021), <https://www.atlanticcouncil.org/blogs/southasiasource/what-do-afghans-think-of-the-ongoing-doha-peace-process-as-well-as-the-us-taliban-peace-deal-and-what-do-they-expect-from-the-biden-administrations-review/> [https://perma.cc/KSK3-73V2].

129. See Sari Kouvo & Corey Levine, *Who Defines the Red Lines?: The Prospects for Safeguarding Women's Rights and Securing Their Future in Post-Transition Afghanistan*, in THE OXFORD HANDBOOK OF GENDER AND ARMED CONFLICT 485 (Fionnuala Ní Aoláin et al. eds., 2018).

130. See Azizi, *supra* note 128; Patricia Gossman, *US Should Help Afghan Civil Society Partners at Risk*, HUM. RTS. WATCH (July 13, 2021), <https://www.hrw.org/news/2021/07/13/us-should-help-afghan-civil-society-partners-risk> [https://perma.cc/LU4A-WQ96].

131. Sanam N. Anderlini, *Why Don't Afghan Lives Matter?*, NEWSWEEK (Sept. 3, 2021), <https://www.newsweek.com/why-dont-afghan-lives-matter-opinion-1625563> [https://perma.cc/F8ZR-87FW]. The way the evacuations were conducted added to the trauma. As one WHRD interviewed recounted the impact: "Evacuation changed me as a person. There is a version of me from before the evacuations and a different version from afterwards." Zoom Interview with Zubaida Akbar (Oct. 9, 2021). On the obligations of states to withdraw from armed conflicts in a way that prevents violations of international humanitarian law and human rights law, see Paul Strauch & Beatrice Walton, *Jus ex Bello and International*

withdrawal was based on bipartisan policy in the United States, carried forward by the Biden administration.¹³² As early as 2013, the then-immediate-past State Department legal advisor Harold Koh advocated for what he termed “reconcil[ing]” with the “moderate Taliban”¹³³ as the United States sought a way out of Afghanistan. In August 2021, the Western media published many stories about the supposedly new and improved Taliban.¹³⁴

It is instructive to contrast this thesis with the views of the WHRDs interviewed for this article. One had asked me about this construct back in 2011 in Kabul: “If they are moderate, then why they are Taliban?”¹³⁵ Another WHRD, Zubaida Akbar, expressed her frustration at the “narrative of the changed Taliban,” that some governments and even aid organizations which want to work with the group used, “without thinking of the human cost of this.”¹³⁶ She was aghast at the way significant platforms were given to the Taliban to bolster this view. Some of those interviewed asserted that the “new” Taliban “was even worse than the previous Taliban, because the new Taliban uses technology against Afghans.”¹³⁷

Humanitarian Law: States' Obligations When Withdrawing From Armed Conflict, 102 INT'L REV. RED CROSS 923, 947 (2020).

132. Azizi, *supra* note 128.

133. Donald Francis Donovan, *Retrospective on International Law in the First Obama Administration*, 107 ASIL PROC. 131, 144, 150 (2013); ASIL 1906, *Retrospective on International Law in the First Obama Administration*, YOUTUBE (Apr. 4, 2013), <https://www.youtube.com/watch?v=2Dx7ucfmBKs> [<https://perma.cc/ER8N-4F72>].

134. Alex Crawford, *Afghanistan: Taliban Fighters Claim They 'Have Changed' and Afghanistan Now 'Safest Country in the World'*, SKY NEWS (Sept. 13, 2021), <https://news.sky.com/story/afghanistan-taliban-fighters-claim-they-have-changed-and-afghanistan-now-safest-country-in-the-world-12404378> [<https://perma.cc/VRW8-SAH6>]; Gavin Cordon, *Afghanistan Could Be 'More Inclusive' Under Taliban, Says Forces Chief*, EVENING STANDARD (Nov. 9, 2021), <https://www.standard.co.uk/news/uk/nick-carter-afghanistan-taliban-british-kabul-b965302.html> [<https://perma.cc/RN8K-Z6SK>].

135. BENNOUNE, *supra* note 108, at 259.

136. Zoom Interview with Zubaida Akbar, *supra* note 131. Note, for example, the extraordinary opening of the New York Times Op Ed pages to a U.N.-sanctioned Taliban leader, who claimed that his organization has been acting in self-defense, with no recognition of its atrocities or its role in terrorism. Sirajuddin Haqqani, *What We, The Taliban, Want*, N.Y. TIMES (Feb. 20, 2020), <https://www.nytimes.com/2020/02/20/opinion/taliban-afghanistan-war-haqqani.html> (on file with the *Columbia Human Rights Law Review*).

137. Signal Interview with Zahra Sepehr, Journalist and Founder, Development and Support of Afghan Women and Children (Nov. 4, 2021).

Egyptian political scientist Mariz Tadros considered the narrative of the “improved Taliban” against the recent history of her home country, as well as that of Iran, Tunisia, and Turkey.¹³⁸ Her research found that the optimistic narrative about the Taliban’s improving trajectory, that hardliners become more malleable with their ideologies as they adapt to governance, has proven to be inaccurate with regard to Muslim fundamentalist groups.¹³⁹ “Across the political spectrum of Islamist movements assuming power, whether ‘moderates’ or ‘extremists,’ the inclination, once in power, is to adopt a hardline ideological stance.”¹⁴⁰

In keeping with this analysis, Taliban 2.0 inaugurated an all-male interim administration, featuring few members from minorities and possessing little governing expertise.¹⁴¹ Women have again been barred from employment and girls excluded from school after sixth grade.¹⁴² One Afghan human rights defender from Kandahar indicated he had heard reports that in the south, younger girls were also being kept home due to fears for their safety, effectively stopping nearly all girls’ education.¹⁴³ One WHRD from the north explained that “the freedom that women did have in public spaces, including in cities and rural areas does not exist anymore. The Taliban distributed posters and brochures in Friday prayers to men, instructing women to not leave the house without a *mahram*, and on how to dress.”¹⁴⁴

In December 2021, the Office of the U.N. High Commissioner for Human Rights reported that

women, except for some teachers, health and NGO workers, are largely prohibited from working—and may not take products to market due to the local *de facto* authorities’ closure of women-operated bazaars. Many Afghan women and girls now have to be accompanied by a male relative, whenever they leave

138. Mariz Tadros, *Who is Afraid of the Taliban*, INST. OF DEV. STUD. (Aug. 19, 2021), <https://www.ids.ac.uk/opinions/who-is-afraid-of-the-taliban/> [<https://perma.cc/7C4G-YH77>].

139. *Id.*

140. *Id.*

141. *Hardliners Get Key Posts in New Taliban Government*, *supra* note 7.

142. *Id.* Some women have reportedly been returning to segregated university classes as of February 2022. *Afghan Students Return*, *supra* note 27.

143. Zoom Interview with Anonymous I (Nov. 9, 2021).

144. Zoom Interview with Kubra Balooch, Director, Afghan Civil Society Forum in Balkh Province (Oct. 16, 2021).

their residence. These are strictly enforced in some places, but not all.¹⁴⁵

Additionally, Taliban spokesmen have suggested plans to dismantle the entire legal structure of women's rights, including by abrogating the 2004 constitution¹⁴⁶ and the 2009 Elimination of Violence against Women Law,¹⁴⁷ as well as a ban on women and girls

145. *Oral Update on the Situation of Human Rights in Afghanistan*, *supra* note 18. These are not ad hoc violations but the implementation of Taliban ideology. According to a senior figure in the Taliban, Waheedullah Hashimi: "We have fought for almost 40 years to bring [the] sharia law system to Afghanistan . . . Sharia . . . does not allow men and women to get together or sit together under one roof." Alasdair Pal, *Exclusive: Afghan Women Should Not Work Alongside Men, Senior Taliban Figure Says*, REUTERS (Sept. 13, 2021), <https://www.reuters.com/world/asia-pacific/exclusive-afghan-women-should-not-work-alongside-men-senior-taliban-figure-says-2021-09-13/> [https://perma.cc/V2MA-MGJY]. In November 2022, the Taliban prohibited women from entering public parks. *Taliban Ban Women From Parks, Morality Ministry Says*, REUTERS (Nov. 11, 2022), <https://www.reuters.com/world/asia-pacific/taliban-ban-women-parks-morality-ministry-says-2022-11-11/> [https://perma.cc/K2VR-CV3Q].

146. Following the overthrow of the Taliban in 2001, the Afghan government, as flawed as it was, created space for juridical and practical advances, such as through the adoption of a robust new constitutional framework in 2004 which guaranteed both women's equality and the application of international treaties. It simultaneously ratified the CEDAW Convention, without limiting reservations. Eva Herzer, *Equal Rights for Women in Afghanistan*, 89 WOMEN LAW. J. 11 (2004). The 2004 constitution went beyond previous constitutions in the specificity of its rights guarantees for women, stipulating that "citizens of Afghanistan, man and woman, have equal rights and duties before the law." THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, Jan. 26, 2004, art. 22. This was important both for women and for members of minorities such as the Hazara. *See also* discussion in Allen & Felbab-Brown, *supra* note 118.

Razia Sayad argued in November 2021 that the Taliban have not yet decided on the legal system of Afghanistan, and they consider that "our laws are Islam." Zoom Interview with Razia Sayad, Former Commissioner and Children's Rts. Expert, Afghan Independent Human Rights Commission (Nov. 3, 2021). She further noted that the suggestion regarding the abrogation of the 2004 constitution in favor of the Zahir Shah constitution came from the Taliban's Acting Minister of Justice and was later denied by the group. "We cannot analyze the legal system of Afghanistan based on the talk of a few Mullahs." *Id.*

147. The 2009 Elimination of Violence against Women law banned certain forms of gender-based violence against women. This led to an increase in reporting even if such practices continued to be widespread. Law on Elimination of Violence against Women, Official Gazette No. 989 of 2009 (Afg.). On its impact, see HUM. RTS. WATCH, "I THOUGHT OUR LIFE MIGHT GET BETTER": IMPLEMENTING AFGHANISTAN'S ELIMINATION OF VIOLENCE AGAINST WOMEN LAW (2021),

playing sports.¹⁴⁸ Measures such as a tepid December 3, 2021 decree on women's right to consent to marriage,¹⁴⁹ that do not address their rights to work or to education or recognize their equality, appear to be largely designed to impress the international audience rather than to advance women's rights at home.¹⁵⁰ Women and girls are being subjected to forced marriages with Taliban fighters notwithstanding this decree.¹⁵¹ A number of those interviewed reported receiving information suggesting increasing levels of domestic violence due to the stressful country situation and the total impunity. The shelters have closed and those who ran them have been forced into exile.¹⁵²

A significant percentage of WHRDs were compelled to flee the country given threats to their safety and attacks on their colleagues. This greatly reduced the cohort of those who can raise the international alarm about the human rights impact of these policies, scattering them around the world to refugee centers where they will be less able to

[https://www.hrw.org/report/2021/08/05/i-thought-our-life-might-get-better/](https://www.hrw.org/report/2021/08/05/i-thought-our-life-might-get-better/implementing-afghanistans-elimination)
[implementing-afghanistans-elimination \[https://perma.cc/ZN8H-XBQ8\]](https://perma.cc/ZN8H-XBQ8).

148. Press Release, U.N. Off. of the High Comm'r for Hum. Rts., Afghanistan: UN experts deplore women sports ban, call for vigorous response (Sept. 14, 2021), <https://www.ohchr.org/en/press-releases/2021/09/afghanistan-un-experts-deplore-women-sports-ban-call-vigorous-response> [<https://perma.cc/S2K9-XQSB>]; Rashida Yosufazi, Anna Henderson, Adrian Arciuli & Abdullah Alikhil, *Afghanistan's Cricket Board Signals Taliban Backtrack on Women's Cricket Ban*, SBS NEWS (Sept. 10, 2021), <https://www.sbs.com.au/news/afghanistan-s-cricket-board-signals-taliban-backtrack-on-women-s-cricket-ban/5b917714-3d1a-4dd0-80c2-2326f9447c4c> [<https://perma.cc/36XW-F8TU>]. The Taliban are likely to rule by proclamation and to thrive on confusion by announcing negative policy changes domestically, then later expressing uncertainty about their application when faced with international criticism, as they have done both with the possibility of repealing laws and the sports ban.

149. Islamic Emirate of Afghanistan, Commission for Cultural Affairs, Office of the Spokesperson, Special Decree Issued by Amir al-Momenin on Women's Rights, Decree No. 395 (Dec. 3, 2021).

150. *Oral Update on the Situation of Human Rights in Afghanistan*, *supra* note 18.

151. Philip Smucker, *The Taliban's Forced Marriages*, THE DIPLOMAT (Oct. 12, 2021), <https://thediplomat.com/2021/10/the-talibans-forced-marriages/> [<https://perma.cc/Z8HU-BFT8>].

152. *Frud Bezhan*, *supra* note 22.

carry on their work.¹⁵³ Many of them are trying to do just that despite massive logistical obstacles.¹⁵⁴

Other WHRDs were left behind and are now hiding in “safe houses,” which may not be. Many of them feel increasing concerns about appearing in public and are dealing with ongoing demands for their help, to which they are now largely unable to respond. “Talking about our situation puts our life at risk,” Kubra Balooch explained.¹⁵⁵ Women protestors brave enough to voice their opposition in public have been shot at, beaten, arrested, and reportedly tortured by male Taliban fighters, though small protests continue.¹⁵⁶ To underscore the dangers, one WHRD in exile spoke about another activist in her family who remained behind: “My sister was trying to teach girls at home [in Kabul, in October 2021] and the Taliban saw, and they said, ‘We will kill your whole family in front of others so they know not to teach the girls.’”¹⁵⁷

Meanwhile, one of the world’s worst humanitarian crises is unfolding, with millions facing hunger and deprivation, and resultant abuses, including reports of the sale of children, girls in particular.¹⁵⁸ This aspect of the current crisis also has disproportionate impacts on women due to the apartheid restrictions.¹⁵⁹ When women suffer, such

153. Welsey Dockery, *Afghan Women’s Rights Activist: The Taliban ‘Will Come and Kill Me’*, DEUTSCHE WELLE (Aug. 14, 2021), <https://www.dw.com/en/afghan-womens-rights-activist-the-taliban-will-come-and-kill-me/a-58861827> [https://perma.cc/S837-LFNB].

154. This was demonstrated during interviews carried out with those who had to stand outside in the cold in military camps to have telephone reception or to speak while in one room with their families in refugee accommodation.

155. Zoom Interview with Kubra Balooch, *supra* note 144.

156. Heather Barr, *List of Taliban Policies Violating Women’s Rights in Afghanistan*, HUM. RTS. WATCH (Sept. 29, 2021), <https://www.hrw.org/news/2021/09/29/list-taliban-policies-violating-womens-rights-afghanistan> [https://perma.cc/Y9B6-XEZS]; David Zucchini & Yaqoob Akbary, *Threatened and Beaten, Afghan Women Defy Taliban With Protests*, N.Y. TIMES (Jan. 26, 2022), <https://www.nytimes.com/2022/01/24/world/asia/afghan-women-taliban-protests.html> (on file with the *Columbia Human Rights Law Review*).

157. Zoom Interview with Massouda Kohistani, Senior Research Assistant, Gender, Afghanistan Research and Evaluation Unit (Oct. 29, 2021).

158. Hakim, *supra* note 25; *780,000 Afghan Children Without Shelter: Save The Children*, TOLONNEWS (Dec. 3, 2021), <https://tolonews.com/afghanistan-175733> [https://perma.cc/K9CU-N87H]. Afghan WHRDs pointed out in interviews that despite the scale of the humanitarian crisis, the Taliban have spent more time regulating women’s behavior than responding to the crisis.

159. *Afghanistan Facing Famine*, HUM. RTS. WATCH (Nov. 11, 2021), <https://www.hrw.org/news/2021/11/11/afghanistan-facing-famine>

as by being denied employment during an economic catastrophe, their families suffer too. The spillover effects of gender apartheid on families and the population at large are far-reaching, as in the case of racial apartheid.

In just a few months, twenty years of hard fought, incomplete progress was almost entirely lost as gender apartheid again descended on the land of the Hindu Kush. “We are being erased,” Kubra Balooch lamented.¹⁶⁰ Taken together, all of this has given rise to a situation so dire that journalist Emma Graham-Harrison opined: “Afghanistan is currently the worst place to be a woman.”¹⁶¹ In July 2022, German Foreign Minister Annalena Baerbock echoed this assessment, saying that Afghanistan is experiencing “the biggest violation on earth of women’s rights” under Taliban rule.¹⁶² Quoting an Afghan female journalist, Amnesty International characterized the situation of women under Taliban rule as “Death in Slow Motion.”¹⁶³ If international law has no solutions to offer here, it will discredit itself. This time, gender apartheid should receive the effective, concerted response it merits.

3. Assessments by Afghan WHRDs: “Starting over from zero with empty hands”¹⁶⁴

[<https://perma.cc/3AQC-533Q>]. Many WHRDs interviewed for this Article expressed concern about the humanitarian situation, and called for an urgent and effective international response which would protect the population without empowering the Taliban.

160. Zoom Interview with Kubra Balooch, *supra* note 144.

161. Yalda Hakim (@BBCYaldaHakim), TWITTER (Dec. 2, 2021, 2:46 PM), <https://twitter.com/BBCYaldaHakim/status/1466539333486219272?s=20> [<https://perma.cc/D7YM-ERZW>]. Throughout 2022, the Taliban have continued to place additional restrictions on women, including limits on their ability to leave their homes and a rigid dress code. Press Release, U.N. Off. of the High Comm’r for Hum. Rts., facing critical human rights challenges, Afghanistan at a crossroads, says UN expert in Kabul (May 26, 2022), <https://www.ohchr.org/en/press-releases/2022/05/facing-critical-human-rights-challenges-afghanistan-crossroads-says-un> [<https://perma.cc/6VYJ-YBGD>].

162. Ray Furlong, *Afghanistan Faces ‘Worst Violations of Women’s Rights on Earth,’ Says German Foreign Minister*, RADIO FREE EUROPE (July 26, 2022), <https://gandhara.rferl.org/a/germany-afghanistan-taliban-human-rights-women/31960655.html> [<https://perma.cc/356J-MZ99>].

163. AMNESTY INT’L, *supra* note 7.

164. Telephone Interview with Yalda Royan, Country Technical Team Lead, Voice Amplified (Oct. 21, 2021).

The Afghan WHRDs interviewed for this Article were asked to assess the current situation in their home country, and whether using the construct of “gender apartheid” could be an accurate and productive response to it. Most agreed with describing it as such. According to Yalda Royan, “apartheid is a good expression to use. They are totally denying the existence of women.”¹⁶⁵ In the words of Zarqa Yaftali, “The Taliban is not accepting women as human, and ignoring one half of the country. This is very dangerous.”¹⁶⁶ For Palwasha Hassan,

“gender apartheid” is the right term, not just segregation alone. They think of women as less than the other half of society—men. They think they have the right to tell women what is good or not based on their own misperception and misinterpretation of Islam, and use that as a framework with which to govern Afghanistan.¹⁶⁷

Another WHRD emphasized the necessity of highlighting the heightened impact of the Taliban’s systemic discrimination because it “removes women from government and society.”¹⁶⁸

One interviewee, a human rights lawyer, disagreed with using the gender apartheid label because she argued that the Taliban have not formally changed Afghan law yet, and therefore the group’s practices are de facto rather than de jure. This is a helpful reminder of the ambiguity of the current situation human rights defenders confront.¹⁶⁹ Existing, formal Afghan law continues to mandate equality of all citizens, yet de facto authorities themselves are systematically contravening that law as a matter of policy. “There is now zero access to justice,” as WHRD Kubra Balooch expressed it.¹⁷⁰ Given this contradictory reality, the dissenter’s insight informs this Article’s

165. *Id.*

166. Zoom Interview with Zarqa Yaftali, Executive Director, Women and Children Legal Research Foundation (Oct. 16, 2021).

167. Telephone Interview with Palwasha Hassan, Director, Afghan Women’s Education Center (Oct. 9, 2021).

168. *Id.*

169. “Gender apartheid happens when . . . discrimination happens systematically. The Taliban does not have a system. This is only a terrorist group which, based on their Islamic opinion and perspective, denies women and girls education. We cannot call it gender apartheid because right now the laws of Afghanistan guarantee women’s rights.” Zoom Interview with Razia Sayad, *supra* note 146.

170. Zoom Interview with Kubra Balooch, *supra* note 144.

insistence on defining gender apartheid to include systematic discrimination in both law and policy, by recognized governments and de facto authorities. Though there may be important juridical differences between the two situations, the outcome on the ground for women's human rights in Afghanistan is similar. For now, the Taliban are the law.

The WHRDs interviewed were trying to continue their work against gender apartheid. One was openly campaigning for girls' education from northern Afghanistan when she was interviewed in October 2021, working virtually with Nobel laureate Malala Yousoufzai. Unfortunately, she has since been forced into exile. She stressed that even a short-term practice of gender apartheid has grave long-term consequences, and quickly becomes self-perpetuating: "If girls do not go back to school for one to two years, the impact will be very harmful in the future, for the next ten to fifteen years. We will have a generation of nonliterate girls who will not be able to play a role in the country."¹⁷¹ Most of those interviewed wanted governments around the world to take a firm stand against Taliban policies and strictly condition any recognition on progress in the field of human rights especially regarding education and employment for women, as well as on their representation in government. Some—but not all—supported sanctions. However, they also expressed concern about ensuring that pressure is applied in ways that compel the Taliban to change, but do not harm the population in the face of the humanitarian crisis. Suggested methods of doing so included providing assistance through the conduit of international organizations and civil society, especially women-led organizations, rather than through Taliban channels.

Many of the interlocutors expressed disappointment and even outrage at the international community's stance toward the Taliban takeover of their country. "They just handed us over to them with two hands," one said.¹⁷² Another opined: "When I see the international community's response, I am hopeless. They do not believe in the future of Afghan women. They have declarations, but they do not push the

171. Zoom Interview with Zarqa Yaftali, *supra* note 166.

172. Telephone Interview with Mary Akrami, former director, Afghan Women Skills Development Center, (Oct. 17, 2021). The Afghan Women Skills Development Center ran the first women's shelter in Kabul. Shirin Jaafari, *Women's Shelters in Afghanistan Face an Uncertain Future*, THE WORLD (Aug. 30, 2021, 5:45 PM), <https://theworld.org/stories/2021-08-30/women-s-shelters-afghanistan-face-uncertain-future>. [<https://perma.cc/2ARY-RVKB>].

Taliban. Words are not enough. We need actual action to support Afghans.”¹⁷³

A number of those interviewed resented what they described as the international community’s acquiescence to the Taliban’s current policies, and expressed a sense of profound isolation and abandonment. One went so far as to say, when asked about what she would like the world to know about the country’s situation, “I do not have any more messages for the international community.”¹⁷⁴ Another remained pragmatic, asserting that even now “the international community’s reaction is very, very important. The only entity that can help is the international community because the Taliban need its support, financial assistance, recognition and humanitarian aid.”¹⁷⁵ The fact that many international actors are now participating in gender apartheid by sending all-male delegations to meet with the Taliban, what one termed “meetings with one gender,”¹⁷⁶ was a source of frustration: “Have you seen any women in the teams of those meeting with the Taliban? The Taliban does not believe in women’s rights, but why aren’t these outside governments taking any women with them?”¹⁷⁷

A woman journalist interviewed stressed that when international organizations and other countries “only have male faces, not female ones” representing them in talks with the Taliban, especially in discussions of women’s rights, they are showing “recognition of and respect for Taliban ideology.”¹⁷⁸ “How can an all-male delegation ask the Taliban, ‘where are the women?’”¹⁷⁹ Many of the WHRDs suggested a more aggressive, principled approach. “Send a delegation of five women. That will shame the Taliban.”¹⁸⁰ Moreover they warned the international community of the long-term, global consequences of Taliban policies, with one noting: “We are the losers now. But it will be a dangerous time for the rest of the world.”¹⁸¹

173. Signal Interview with Zahra Sepehr, *supra* note 137.

174. Telephone Interview with Yalda Royan, *supra* note 164.

175. Zoom Interview with Zarqa Yaftali, *supra* note 166.

176. *Id.*

177. Telephone Interview with Yalda Royan, *supra* note 164.

178. Zoom Interview with Mobina Sai, Northern Regional Director, Nai Supporting Open Media in Afghanistan (Oct. 16, 2021).

179. Zoom Interview with Zarqa Yaftali, *supra* note 166.

180. *Id.*

181. Telephone Interview with Mary Akrami, *supra* note 172.

D. Government Reactions to Taliban Practice of Gender Apartheid

The international law on racial apartheid sought to push other states to isolate, stigmatize, and pressure the apartheid state, notwithstanding the reticence and economic interests of some of those other states.¹⁸² Drawing from the holding of the International Court of Justice (ICJ) in the *Namibia* case, second states must demonstrate the illegality of apartheid through concrete action in response to it, as well as by refraining from any action that implies recognition of, or lends support or assistance to the commission of apartheid.¹⁸³ Unconstrained by such norms, governmental and international responses to the Taliban's gender apartheid regime have been ambiguous. They need to be tempered by similar standards.

For now, as was the case the last time they took power, the Taliban do not hold Afghanistan's seat in the United Nations and almost no governments have formally recognized them (though some have "inched" toward such a step).¹⁸⁴ However, there is a fear that this will change. Some states and international organizations have roundly condemned the Taliban's exclusion of women from public life, but have gone no further.¹⁸⁵ Unfortunately, some of those same states were willing to negotiate with a group openly committed to such practices without insisting the practices be renounced, to accept minimal

182. Butcher, *supra* note 60, at 429. For example, the Security Council passed Resolution 181 in 1963, with abstentions from the United Kingdom and France. Sir Patrick Dean, then-permanent representative of the United Kingdom to the United Nations, stated that his country could not participate in a full embargo due to its military cooperation with South Africa. U.N. SCOR, 18th Sess., 1056th mtg. at 8 ¶ 33, U.N. Doc. S/PV.1056 (Apr. 7, 1963).

183. Butcher, *supra* note 60, at 429, citing *Namibia Opinion*, *supra* note 42, para. 126.

184. Tess Bridgeman & Ryan Goodman, *Expert Backgrounder: Recognition and the Taliban*, JUST SECURITY (Aug. 17, 2021), <https://www.justsecurity.org/77794/expert-backgrounder-recognition-and-the-taliban/> [https://perma.cc/C4KN-BNL7]; Michelle Nichols, *Exclusive: Taliban Names Afghan U.N. Envoy, Asks to Speak to World Leaders*, REUTERS (Sept. 21, 2021), <https://www.reuters.com/world/asia-pacific/exclusive-taliban-names-afghan-un-envoy-asks-speak-world-leaders-2021-09-21/> [https://perma.cc/DBW2-XV3V]; Catherine Amirfar et al., *Representation of Member States at the United Nations: Recent Challenges*, 26 AM. SOC'Y OF INT'L L. INSIGHTS (Aug. 10, 2022), <https://www.asil.org/insights/volume/26/issue/6> [https://perma.cc/XZ56-8A57].

185. Press Release, Org. of Islamic Coop., OIC Concerned Over Afghan Interim Government's Ban on Girls' Schools (Mar. 24, 2022), https://www.oic-oci.org/topic/?t_id=33958&t_ref=22699&lan=en [https://perma.cc/93FX-SFB9].

participation of women in those negotiations, and ultimately to hastily abandon a civilian population to their rule.¹⁸⁶

Since then, some other powerful states have refrained from criticizing the Taliban and have sought to do business with the de facto authorities, notwithstanding their institutionalized discrimination. For example, the Chinese Foreign Minister described the Taliban as “a pivotal military and political force,”¹⁸⁷ and his government has been criticized by experts in other countries in Asia for “actively lobby[ing] for the Taliban authorities in international formats like the U.N. as well as more widely in advance of desired Taliban goals.”¹⁸⁸ Policies such as these can potentially rise to the level of complicity with apartheid or the aiding and abetting of its commission.¹⁸⁹

The Russian Government, which has long had high-level contacts with the Taliban, held the Moscow Format Consultations on Afghanistan on October 20, 2021. This process included China, Iran, India, Kazakhstan, Kyrgyzstan, Pakistan, Turkmenistan, Uzbekistan, and the Taliban. The participants decided they would work with the Taliban in the future and cooperate, regardless of whether the group is recognized by the international community. Russian officials have praised the group’s security efforts while only offering mild criticism of its rights record, and there are allegations that the Russian government provided arms to the Taliban.¹⁹⁰

186. Peter Hilpold, *The Afghan War and the Responsibility to Rebuild*, EJIL: TALK! (Aug. 25, 2021), <https://www.ejiltalk.org/the-afghan-war-and-the-responsibility-to-rebuild/> [https://perma.cc/AUC5-TD9F].

187. Steven Lee Meyers, *China Offers the Taliban a Warm Welcome While Urging Peace Talks*, N.Y. TIMES (Sept. 21, 2021), <https://www.nytimes.com/2021/07/28/world/asia/china-taliban-afghanistan.html> (on file with the *Columbia Human Rights Law Review*).

188. Asim Kashgarian, *With US Away, China Gets Friendly With Afghanistan’s Taliban*, VOA NEWS (Feb. 1, 2022), <https://www.voanews.com/a/with-us-away-china-gets-friendly-with-afghanistan-s-taliban/6422284.html> [https://perma.cc/55YE-JNUX].

189. See discussion of complicity in STEVEN RATNER & JASON ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 129–32 (2d ed. 2001). According to the commentary on the Rome Statute, the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia has stated that “[T]he most marginal act of assistance’ can constitute complicity.” WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 577 (2d ed. 2016).

190. Samuel Ramani, *Russia and the Taliban: Prospective Partners?*, RUSI (Sept. 14, 2021), <https://rusi.org/explore-our-research/publications/commentary/russia-and-taliban-prospective-partners> [https://perma.cc/AUJ9-K6E3].

A number of countries and delegations, including China, the European Union, Kazakhstan, Kyrgyzstan, Qatar, Russia, Turkmenistan, the United Kingdom, and Uzbekistan; as well as international organizations such as the U.N. Development Program, UNICEF, and the International Committee of the Red Cross; and prominent non-governmental organizations such as Doctors Without Borders, have engaged in repeated talks with the Taliban involving all-male delegations.¹⁹¹ Some of these monogender dialogues have actually been about women's rights.¹⁹² Shaharзад Akbar acerbically labelled this "the new requirement of discussing anything in Afghanistan: having only men in the room."¹⁹³ Some aid organizations have reportedly been willing to practice gender segregation, to send female staffers home altogether, and to impose Taliban dress code on them.¹⁹⁴ Such responses may "aid[], abet[], [or] encourag[e]" the international crime of apartheid in violation of Article III of the Apartheid Convention.¹⁹⁵

Even Norway, a longtime champion of Afghan women's rights, hosted a high-level delegation of Taliban representatives in its capital city, including U.N.-sanctioned terrorists, without preconditions. The Norwegian government sent an expensive private plane to collect them, risking the conferral of considerable legitimacy.¹⁹⁶ At least these Talibs were required to meet representatives of Afghan civil society,

191. See Heather Barr (@heatherbarr1), *supra* note 10 for photos of these meetings.

192. 'Grotesque And Wrong': Foreign Diplomats Called Out for Meeting Taliban Without Women, GANDHARA (Nov. 19, 2021), <https://gandhara.rferl.org/a/foreign-diplomats-taliban-meetings-no-women/31570045.html> [<https://perma.cc/Z28A-8H7K>].

193. Shaharзад Akbar (@ShaharзадAkbar), TWITTER (Oct. 6, 2021, 11:33 PM), https://twitter.com/ShaharзадAkbar/status/144600066385517700?s=20&t=8esQC6_AxAzHUHhp1r12w [<https://perma.cc/5N2W-USAR>].

194. Zoom Interview with Zubaida Akbar, *supra* note 131.

195. Acts of complicity "exist along a continuum" in international law, and may include mere facilitation. BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 713 (2007).

196. Somayeh Malekian, *Afghanistan's Women's Rights Activists Tested Taliban in Oslo, But Expect Few Advancements*, ABC NEWS (Feb. 3, 2022, 3:31 AM), <https://abcnews.go.com/International/afghanistans-womens-rights-activists-tested-taliban-oslo-expect/story?id=82584874> [<https://perma.cc/3C3Y-U3EL>]; *PHOTO: Taliban Delegation On its Way to Oslo in Chartered Private Plane*, NORWAY TODAY (Jan. 22, 2022), <https://norwaytoday.info/news/photo-taliban-delegation-on-its-way-to-oslo-in-chartered-private-plane/> [<https://perma.cc/9R8P-UXRE>].

including WHRDs. However, some of the women who participated in the meeting subsequently faced death threats and were unable to return home, and Taliban oppression of WHRDs has only escalated since the Oslo meeting with increasing reports of abductions of WHRDs and their families.¹⁹⁷

As noted above, using an apartheid framework implicates not only the immediate perpetrators but also the international obligations of all states and international actors that interact with them.¹⁹⁸ If backed up with political will, doing so can constrain policy choices and spark the necessary coordinated riposte. Jamaica's U.N. ambassador Egerton Richardson argued in 1966 about discussions of racial apartheid at the then-forthcoming World Conference on Human Rights that "[t]he objective should be a discussion of apartheid . . . from the point of view of the possible application of human rights techniques as a means of dissuading States from aiding and abetting the South African Government's policy."¹⁹⁹ This approach must now also be applied to apartheid Afghanistan. Otherwise, we may see ever greater normalization of gender apartheid, gravely undercutting Afghan women and diluting the value of international women's rights norms globally.

E. International Human Rights Bodies Respond to Gender Apartheid

Afghanistan is a state party to the CEDAW Convention without limiting reservations, as well as to all the human rights treaties enumerated below guaranteeing women's equality, including in education and employment. Any entity seeking to rule the country inherits these human rights obligations. Such commitments cannot be evaded since withdrawal from these treaties is impermissible.²⁰⁰

197. Zoom Interview with Anonymous II (Feb. 11, 2022).

198. See *supra* text accompanying notes 60-64.

199. STEVEN L. B. JENSEN, *THE MAKING OF INTERNATIONAL HUMAN RIGHTS: THE 1960S, DECOLONIZATION, AND THE RECONSTRUCTION OF GLOBAL VALUES* 99 (2016).

200. With regard to the ICCPR, the Human Rights Committee has made clear that "once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State Party." U.N. Hum. Rts. Comm., General Comment No. 26: Continuity of Obligations, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997). Neither the CEDAW Convention nor the ICESCR contains any provision about withdrawal, which means that, under

Given the Taliban's open and widespread violation of these international norms, U.N. human rights bodies and mechanisms have been highly critical of their practices toward women. However, U.N. mechanisms, including the Committee on the Elimination of Discrimination against Women ("CEDAW Committee"), have mostly avoided use of the term "gender apartheid" and have often insufficiently foregrounded the meanings of the systematic practice of sex discrimination and its entrenchment in official policy. When they have used the term "apartheid," they have largely used it to reference racial apartheid in Southern Africa.²⁰¹ In fact, voices in the human rights system have at times used tepid language to describe gender apartheid which would not be deemed acceptable in regard to systematic racial discrimination. For example, a U.N. official speaking in a February 2022 CEDAW Committee meeting noted simply that "women continued to be excluded from social, economic and political spheres across Afghanistan and were largely prohibited from working."²⁰²

Since Afghanistan did not ratify the CEDAW Convention until after the overthrow of Taliban 1.0, and the CEDAW Committee has only considered two state party reports—both related to the record of the now-ousted elected government of Afghanistan, in 2013²⁰³ and

Article 56 of the Vienna Convention on the Law of Treaties, withdrawal is only possible if "(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty." Vienna Convention on the Law of Treaties, *supra* note 81, art. 56(1). The Human Rights Committee's analysis should be applied to also prohibit withdrawal from these foundational treaties.

201. See, e.g., Rep. of the *Working Group on discrimination against women and girls, Women's and Girls' Sexual and Reproductive Health Rights in Crisis*, ¶ 63, U.N. Doc. A/HRC/47/38 (Apr. 28, 2021). The CEDAW Convention's own preamble "Emphasiz[es] that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination . . . is essential to the full enjoyment of the rights of men and women." CEDAW, *supra* note 3, pmbl.

202. Press Release, U.N. Geneva, Committee on the Elimination of Discrimination against Women Opens Eighty-First Session: Meeting Summary (Feb. 7, 2022), <https://www.ungeneva.org/en/news-media/meeting-summary/2022/02/le-comite-pour-lelimination-de-la-discrimination-legard-des> [https://perma.cc/QSM6-P2H6].

203. Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Initial and Second Periodic Reports of Afghanistan*, U.N. Doc. CEDAW/C/AFG/CO/1-2 (July 30, 2013). One of the processes used to promote implementation of human rights treaty norms is the review of state party

2020²⁰⁴—the Committee has not had a meaningful opportunity to comment on this issue through concluding observations. However, the Committee has helpfully sought an early opportunity to do so by requesting an exceptional report, under Article 18(c).²⁰⁵

There are some hopeful signs regarding the U.N. system’s response. The post of Special Rapporteur on the situation of human rights in Afghanistan was revived by the Human Rights Council as of May 2022.²⁰⁶ Many other Special Procedures of the U.N. Human Rights Council have also reacted to Taliban rule 2.0 in a robust, if inconsistent, fashion.²⁰⁷ However, the U.N. system still mostly

reports by the expert U.N. treaty monitoring bodies, such as the CEDAW Committee.

204. Comm. on the Elimination of Discrimination against Women, *Concluding Observations on the Third Periodic Report of Afghanistan*, U.N. Doc. CEDAW/C/AFG/CO/3 (Mar. 10, 2020).

205. Ms. Gladys Acosta Vargas (Chairperson of the Committee on the Elimination of Discrimination against Women), Closing Remarks at the Eightieth Session of the Committee on the Elimination of Discrimination against Women 1 (Feb. 9, 2022) (on file with the *Columbia Human Rights Law Review*). The Committee established a task force “to consider the impact of the evolving political, economic and social situation in Afghanistan on the rights of women and girls in the country . . .” *Id.*

206. For mandate homepage, see Special Rapporteur on Afghanistan, U.N. OFF. OF THE HIGH COMM’R FOR HUMAN RIGHTS, <https://www.ohchr.org/en/special-procedures/sr-afghanistan> [<https://perma.cc/X4Q6-8T32>]. In his public statement on his first mission to Afghanistan, the Special Rapporteur decried “the advancing erasure of women from public life . . . and a pattern of absolute gender segregation . . . aimed at making women invisible in society . . .” Press Release, Special Rapporteur on the situation of human rights in Afghanistan, Afghanistan at a Crossroads, says UN expert in Kabul (May 26, 2022), <https://www.ohchr.org/en/press-releases/2022/05/facing-critical-human-rights-challenges-afghanistan-crossroads-says-un> [<https://perma.cc/GZ22-TZLC>]. Notably, there has never been a female U.N. Special Rapporteur on Afghanistan. Stephanie Farrior, *U.N. Special Rapporteurship on Afghanistan*, INTLAWGRRLS (Apr. 3, 2022), <https://ilg2.org/2022/04/03/un-special-rapporteurship-on-afghanistan/> [<https://perma.cc/WN6P-QPCT>]. For a list of individuals who have held the mandate, see Special Rapporteur on the situation of human rights in Afghanistan, U.N. OFF. OF THE HIGH COMM’R FOR HUMAN RIGHTS, <https://www.ohchr.org/en/special-procedures-human-rights-council/special-rapporteur-situation-human-rights-afghanistan> [<https://perma.cc/KQB8-5UFP>].

207. *Civilian Slaughter*, *supra* note 23; U.N. Human Rights Experts, Statement on Women’s Full Participation in Afghanistan’s Public and Political Life as a Guarantee of Their Fundamental Human Rights (Sept. 15, 2021), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27466&LangID=E> [<https://perma.cc/E9HT-WW67>] [hereinafter Statement on Women’s Full Participation]. The one truly worrying note in the approach of Special

classifies Taliban policies simply as unlawful discrimination. This approach alone fails to adequately acknowledge the particular harm that a governance model based on systematic segregation and exclusion inflicts. Ordinary anti-discrimination norms alone are insufficient because they focus primarily on individual violations, rather than systemic or industrial-scale violations.²⁰⁸ Moreover, even the concept of systematic discrimination does not adequately invoke responsibilities of other states not to be complicit. Hence, the effectiveness of the work of the U.N. human rights system could be enhanced, and the situation on the ground brought into starker relief, if the gender apartheid formulation used by Abdelfattah Amor in the 1990s was revived and strengthened.

F. Considering Counter-Arguments and Alternative Strategies

Possible arguments against the gender apartheid approach merit careful consideration and response. For example, Austrian academic Anthony Löwstedt suggests that gender apartheid should not be called apartheid because those who impose it are “indigenous” and not a minority, in contrast to those in power in systems characterized by racial apartheid: “In real apartheid, people are ethnically cleansed and replaced: politically, economically and physically, and new power

Procedures mandate holders has been the unprecedented initiative of the Special Rapporteur on violence against women to use her interpretation of sharia law as a standard to hold the Taliban accountable, rather than using only international human rights norms as the benchmark for determining compliance (which is the modus operandi of the U.N. system with regard to all countries, including those that are Muslim-majority). Letter from the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on minority issues, and the Special Rapporteur on violence against women, its causes and consequences to Mr. Khan Muttaqi (Nov. 4, 2021), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26763> [https://perma.cc/5S3L-DAXY]. While some WHRDs carry out important work around the world within a religious paradigm, this approach by a Special Rapporteur is a radical departure from the practice of the U.N. human rights system with potentially grave implications, and one that has been criticized to this author by some Afghan and international WHRDs.

208. Note the International Law Commission’s assertion, in its commentary on the Draft Articles, on the Responsibility of States, when emphasizing the cumulative nature of certain breaches that “apartheid is different in kind from individual acts of racial discrimination, and genocide is different in kind from individual acts even of ethnically or racially motivated killing.” *Draft Articles on Responsibility of States*, *supra* note 14, at 63.

is ultimately established by invaders from afar. Indigenous culture is also replaced by the settlers' culture"²⁰⁹ Such opinions mistakenly limit apartheid to the particular South African experience, when it is now clearly understood as a concept with wider relevance. This narrow view recognizes only one potential axis of dispossession, one which comes at the hands of certain kinds of outsiders. It cannot be reconciled with the definitions of apartheid in the Rome Statute or by the International Law Commission, which do not require a link to settler colonialism. Moreover, this is another example of the private-public divide being applied to delegitimize women's experience of subordination as not being as severe as other forms because it is not understood as constituting alien domination. Such a view of apartheid is not shared by human rights advocates who have readily applied it in other contexts. For example, Human Rights Watch has been willing to label the treatment of so-called lower caste people, or Dalits, in India by higher caste people in the same society a "hidden apartheid," as have some scholars.²¹⁰ In fact, a preparatory meeting for the World Conference on Racism held that "caste as a basis for the segregation and oppression of peoples in terms of their descent and occupation is a form of apartheid."²¹¹

One of the arguments Löwstedt makes is that Afghan women were not in power prior to the imposition of Taliban rule and thus its system cannot be termed apartheid.²¹² This is akin to saying that women were too subordinated to qualify for the most heightened category of oppression (and would likewise exclude Dalits and other marginalized groups as well). It also overlooks the radical shift in Afghanistan's culture that the Taliban seek to impose, often with foreign influence.²¹³

Another possible counter-argument mirrors the perennial concern that if norms are expanded they will be diluted. This, in turn, undermines the integrity and credibility of international law and state

209. LÖWSTEDT, *supra* note 90, at 89.

210. See HUM. RTS. WATCH, *Caste Discrimination: A Global Concern*, 6, HRW 13/3(G) (Aug. 29, 2001); Sandy Rao, *India's Hidden Apartheid: The Caste System and Its Continuation to the Caribbean and America*, cited in *id.*

211. *Final Declaration of the Global Conference Against Racism and Caste-based Discrimination: Occupation and Descent-based Discrimination Against Dalits*, HUM. RTS. WATCH, ¶¶ 2, 44, 45 (Mar. 1–4, 2001), https://www.hrw.org/legacy/campaigns/caste/final_declaration.htm [<https://perma.cc/HWQ5-JQST>].

212. LÖWSTEDT, *supra* note 90, at 82.

213. RASHID, *supra* note 109, at 17–30. See *infra* text at notes 295-305.

commitment to it.²¹⁴ Some states routinely rail in the U.N. against the expansion of human rights. Yet, there is also a high price to pay for pretending we can meet the 21st century goal of ending gender discrimination with 20th century interpretations of human rights. Women were grossly underrepresented in the U.N. system when many of these norms were agreed upon and their interpretations developed.²¹⁵ All too often, women's human rights have been omitted from narrow interpretations of concepts like torture. Rectifying such imbalances is vital. The urgency of doing so outweighs the methodological risks. Moreover, the building blocks of this approach are contained in international law, making this a reinterpretation rather than an expansion.

Nevertheless, it is worth considering applicable alternatives to the concept of gender apartheid which could require less normative heavy lifting and still offer effective remedies for Taliban practices against women. One framework that could be deployed is persecution on the grounds of gender as a crime against humanity, an innovation of the Rome Statute of the International Criminal Court.²¹⁶ To date, only one prosecution for this crime has been brought, against a commander of the Malian Islamist armed group Ansar Dine. The case is currently underway.²¹⁷ The rationale for this charge includes that

214. See, e.g., Hurst Hannum, *Book Review: Michael Ignatieff, Human Rights and Idolatry*, 97 AM. J. INT'L L. 1006, 1007 (2003) (stating that Ignatieff "suggests that too great an emphasis on human rights broadly defined may lead to instability and, perversely, to greater violations of human rights in the short and medium term").

215. For example, from 1946 until the 2021 election of Hilary Charlesworth, only 3.7% of ICJ judges were female. Fionnuala Ní Aoláin, *Gendering the International Court of Justice*, JUST SECURITY (Nov. 2, 2021), <https://www.justsecurity.org/78839/gendering-the-international-court-of-justice> [<https://perma.cc/RK7B-SSGX>].

216. Alexandra Bakker, *Gender-Based Persecution at the International Criminal Court: Questions and Implications*, PUB. INT'L LAW & POL'Y GRP. (Nov. 25, 2020), <https://www.publicinternationallawandpolicygroup.org/lawyring-justice-blog/2020/11/25/gender-based-persecution-at-the-international-criminal-court-questions-and-implications> [<https://perma.cc/4QSB-KSFM>]; see also Lisa Davis, *Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20 NW. J. HUM. RTS. 2–3 (2021).

217. Prosecutor v. Al Hassan, ICC-01/12-01/18, Rectificatif à la Décision relative à la confirmation de charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ¶¶ 667, 697 (Nov. 13, 2019). For updates, see Mali, INT'L CRIM. CT., <https://www.icc-cpi.int/mali> [<https://perma.cc/ME87-LAUP>] (last visited Nov. 19, 2022). Two other country situations are being considered for prosecutions of this charge: Ukraine and Nigeria. FIDH, ACCOUNTABILITY FOR SEXUAL AND

the defendant “targeted women and young girls on the basis of gender, imposing restrictions on them motivated by discriminatory opinions regarding gender roles.”²¹⁸ This charge is also among those against the Taliban that the ICC prosecutor’s office began investigating in 2017, when it was simply an armed group controlling some Afghan territory.²¹⁹

Though “underutilized,”²²⁰ rules against gender-based persecution are already explicitly codified in international law, requiring no expansion of concepts. Taliban Afghanistan could be incorporated into this new jurisprudence given that Afghanistan is a party to the Rome Statute and already under investigation. However, the International Criminal Court’s approach to Afghanistan is controversial, especially since the Prosecutor singled out ISIS-K and Taliban perpetrators due to their sanctioning by the U.N. Security Council while declining to continue investigating others.²²¹ Additionally, the ICC can try a few individual defendants at most. Therefore, it would not, by itself, achieve the wholesale change in policy required to end gender apartheid.

Moreover, the persecution approach fails to adequately implicate the institutionalized and ideological nature of the abuses in question or reflect on the responsibilities of other international actors to respond appropriately. This insufficiency is underscored by the significant difference between the relevant definitions in the Rome Statute. According to Article 7(2)(g), “Persecution’ means the

GENDER-BASED CRIMES AT THE ICC: AN ANALYSIS OF PROSECUTOR BENSOUDA’S LEGACY 9 (2021), <https://www.fidh.org/IMG/pdf/cpiproc772ang-1.pdf> [<https://perma.cc/9MZX-ES8Y>].

218. These restrictions included segregation from men, being unable to leave home, and some prohibitions on employment, infractions of which were punishable by severe sanctions. Such acts were also accompanied by sexual violence. *Id.* at 13.

219. *Id.* at 16, 22. For updates, see *Afghanistan*, INT’L CRIM. CT., <https://www.icc-cpi.int/afghanistan> [<https://perma.cc/NK5H-TUYZ>] (last visited Nov. 19, 2022). According to the Court’s website, “On 31 October 2022, Pre-Trial Chamber II of the International Criminal Court (ICC) authorised the Prosecution to resume investigation into the Afghanistan Situation. The judges considered that Afghanistan is not presently carrying out genuine investigations in a manner that would justify a deferral of the Court’s investigations” *Id.*

220. FIDH, *supra* note 217, at 16.

221. *Statement of the Prosecutor of the International Criminal Court, Karim A. Khan QC, Following the Application for an Expedited Order Under Article 18(2) Seeking Authorisation to Resume Investigations in the Situation in Afghanistan*, INT’L CRIM. CT. (Sept. 27, 2021), <https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan> [<https://perma.cc/P8YB-4SJU>].

intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”²²² This definition helpfully stresses the severity and the discriminatory motivation that characterizes Taliban policy toward women. Like any crime against humanity, gender-based persecution occurs within the context of a widespread or systematic attack against a civilian population when there is a “policy to commit such attack.”²²³ However, domination of women is a core element of the group’s ideology and a key prong of its governing platform. The definition of apartheid in Article 7(2)(h) much more fully captures this context, if one transubstantiates gender for race in the following passage: “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.”²²⁴

Another possibility is an enumerative approach, cobbling together violations of disparate international law standards—including the CEDAW Convention, the covenants on human rights, and ILO conventions on non-discrimination—to which Afghanistan is also a state party.²²⁵ As is the case with human rights treaties, the ILO conventions require governments to pursue policies committed to equality in the field of employment.²²⁶ This again presumes a state willing to take action against job discrimination and centers the state as the motor of implementation.

Ultimately, all of these approaches could be complementary and are worth trying, but none of them equally captures the nature of these abuses or empowers international actors to play an effective role in stopping them as the gender apartheid approach does. This is admittedly not an easy political move, nor the sole international legal approach envisageable, but it represents both a necessary and potentially promising step forward.

222. Rome Statute, *supra* note 79, art. 7(2)(g).

223. *Id.* art. 7(2)(a).

224. *Id.* art. 7(2)(h).

225. See International Labour Organization, Discrimination (Employment and Occupation) Convention, June 25, 1958, ILO No. 111, 362 U.N.T.S. 31.

226. *Id.* art. 2 (“Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.”).

G. The Added Value of the Gender Apartheid Approach Today

Racial apartheid law accomplished what discrimination law alone could not and contributed to ending the practice. In the process, it changed international human rights law by opening the door to new implementation mechanisms and bringing second state responsibilities directly into human rights law.²²⁷ The General Assembly became comfortable with not just condemning violations, but also calling for the application of sanctions in response to apartheid.²²⁸ Getting to this point was not an easy process, with some powerful states opposing the development of the relevant legal framework and sometimes advocating “constructive engagement” with apartheid South Africa instead (as one hears now about the Taliban).²²⁹ However, tackling racial apartheid in the second half of the 20th century was undoubtedly easier than tackling gender apartheid will be today, because racial apartheid was recognized as being linked to colonialism and viewed as a quintessentially international issue. This put it in the public sphere writ large, the primordial setting for the application of international human rights norms, before the 1990s women’s human

227. See Jensen, *supra* note 199, at 97–99. In 1967, the U.N.’s Economic and Social Council adopted resolution 1235 authorizing the then-Commission on Human Rights to “make a thorough study of situations which reveal a consistent pattern of violations of human rights, as exemplified by the policy of apartheid as practised in the Republic of South Africa . . .” Economic and Social Council Res. 1235 (XLII), ¶ 3 (June 6, 1967). Notably, the title of the resolution uses the phrase “in all countries”: “Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, *in all countries*, with particular reference to colonial and other dependent countries and territories” (emphasis added). This created a basis for action on a wide range of country situations. Three years later, ECOSOC built on this precedent to give the Commission and its subsidiary body the capacity to take up cases that demonstrated “a consistent pattern of gross and reliably attested violations of human rights . . .” Economic and Social Council Res. 1503 (XLVIII), ¶ 1 (May 27, 1970).

228. LORI FISLER DAMROSCH & SEAN D. MURPHY, *INTERNATIONAL LAW: CASES AND MATERIALS* 911 (Lori Fidler Damrosch & Sean D. Murphy eds., 7th ed. 2019).

229. William Blum, *South Africa: Voting for Apartheid at the UN*, *NEW AFR.*, 32 (2003). Some saw certain Western countries as “active allies of the White supremacist regimes.” Ayi Kwei Armah, *South Africa: Liberating Mandela’s Memory*, *NEW AFR. MAG.* (Dec. 18, 2013), <https://newafricanmagazine.com/4106/> [<https://perma.cc/4VJU-PL96>]. Those countries’ positions evolved, for example, with the advent of the Carter administration in the United States and its emphasis on human rights. WELSH & SPENCE, *supra* note 50 at 43.

rights revolution pushed the private sphere onto the international stage.²³⁰ Furthermore, with decolonization, the anti-racial-apartheid cause had a constituency of governments at the table in the U.N. in a way that the movement against gender apartheid does not due to women's ongoing political underrepresentation.²³¹

Given the success of the international legal regime in the 20th century in contributing to ending racial apartheid and explicitly supporting local movements against racial apartheid,²³² as well as the way in which it galvanized the international community and the U.N. system, it is essential to use an analogous framework to respond to gender apartheid in the 21st century. One Afghan woman journalist interviewed, who decried the international community's failures, optimistically stressed that the conditions of Black South Africans have improved due to the international response and argued that the best hope for a similar trajectory for Afghan women would result from using a similar approach to tackle gender apartheid.²³³ The international legal concept of apartheid is important to harness, where appropriate, because of the way it surfaces the composite or systematic nature of the abuses, because of the wide-ranging global legal obligations it entails, and because of the "special stigma"²³⁴ that it carries.

In fact, the symbolic and expressive importance of applying the apartheid concept to a situation like Taliban Afghanistan is profound. Like "genocide," using the term "apartheid" enhances the "mobilization

230. UNIFEM, INTEGRATION OF WOMEN'S HUMAN RIGHTS INTO THE WORK OF THE SPECIAL RAPORTEURS (1996); Rep. of the Expert Group Meeting on the Development of Guidelines for the Integration of Gender Perspectives into United Nations Human Rights Activities and Programmes, U.N. Doc. E/CN.4/1996/105 (July 3–7, 1995). Feminist international lawyers drew from developments in other areas of human rights, such as disappearances by non-state actors. *See* Case of Velásquez Rodríguez v. Honduras, Merits, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

231. In 2021, the 193 U.N. member states had a total of twelve women ambassadors at the U.N. in New York and eight at the U.N. in Geneva, which represented an improvement over past numbers. ANWAR GARDASH DIPLOMATIC INSTITUTE, WOMEN IN DIPLOMACY INDEX 2021 4 (2021), <https://www.agda.ac.ae/docs/default-source/Publications/agda-women-in-diplomacy-mar-2021.pdf?sfvrsn=4> [<https://perma.cc/A4Z6-G6C8>].

232. G.A. Res. 32/105, Policies of Apartheid of the Government of South Africa, B ¶ 5.

233. Signal Interview with Zahra Sepehr, *supra* note 137.

234. The European Court of Human Rights used this terminology to describe torture. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 59 (1978).

of shame,” which is a critical international law compliance tool. It does so more effectively than using terms such as “discrimination” or even “systematic discrimination” alone.²³⁵ This framing puts pressure on governments, international organizations, and transnational corporations²³⁶ to avoid engaging with the Taliban in ways that show tolerance for and help perpetuate grave abuses. Using the term “apartheid” implies the pariah status of its perpetrators who are denoted as *hostis humani generis*, the enemies of all humankind. It also elevates the status of the practice’s local opponents. Conversely, the failure to employ a heightened concept and an enhanced response to a regime whose well-known policies are this relentlessly misogynistic sends a terrible message to women everywhere that their rights do not matter.

By recognizing the dangers of systematic discrimination for human rights and transcending the territorial state in those it held responsible, the international law on racial discrimination poked large holes in all sorts of preconceived notions about international human rights law.²³⁷ The anti-apartheid law that sprung from race discrimination norms enhanced these impacts and melded them with commitments to decolonization. Building on these achievements can help strengthen human rights protection for women who have been for too long at the margins of the international system.

235. DAMROSCH, *supra* note 92, at 19–20.

236. Note the lawsuits brought against various foreign banks for allegedly financing apartheid in South Africa. *Apartheid Victims Sue Big Business*, BBC (June 17, 2002), <http://news.bbc.co.uk/2/hi/africa/2049809.stm> [<https://perma.cc/D37V-LMK4>]. Today, the gender apartheid approach could be used, for example, to pressure Twitter to heed the widespread #BanTaliban campaign and remove the group’s leaders—perpetrators of apartheid—from its platform. *See Afghans Launch Ban Taliban Campaign on Twitter, Receive Massive Support*, BUSINESS STANDARD (July 23, 2022), https://www.business-standard.com/article/international/afghans-launch-ban-taliban-campaign-on-twitter-receive-massive-support-122072300145_1.html [<https://perma.cc/E8E8-GGN3>]. This possibility is subject to developments in the unpredictable situation at Twitter as this Article goes to press in December 2022.

237. To give one example of this, human rights treaties had traditionally focused on the obligations of states and limiting state conduct. However, the International Convention on the Elimination of All Forms of Racial Discrimination clearly encompassed the conduct of private entities. *See* related discussion in Stephanie Farris, *Challenges to Dominant Conceptions of International Law Presented by the International Law on Racial Discrimination* (forthcoming) (on file with author).

The underlying values that racial apartheid offended, including principles of non-discrimination and equality in the UDHR, are the same as those implicated by gender apartheid in Afghanistan. Importantly, diverse South African feminists, including Black women scholars, have found this transposition appropriate. Writing in 2012, Penelope Andrews argued that a “recognition that the systemic subordination of and discrimination against women in Afghanistan constituted gender apartheid, would demand a more concerted effort”²³⁸

Ending racial apartheid was correctly framed as a necessary part of completing decolonization, giving it additional impetus in the U.N. of the 1960s and 1970s. Similarly, the commitment of U.N. member states to achieving gender equality by 2030 in the Sustainable Development Goals (SDGs) is as central to the human liberation the U.N. Charter seeks to achieve.²³⁹ It is just as impossible to achieve that goal without confronting gender apartheid as it was to decolonize without challenging systematized racial suppression. There is no rational explanation for a variegated approach unless one either: (1) sees the prohibition of sex discrimination as less fundamental to human dignity than the prohibition of racial discrimination, (2) accepts cultural relativist justifications applied to gender apartheid that were rejected in the case of racial apartheid, or (3) sees the absence of specific text in international law as an insurmountable obstacle. Given the hurdles they represent, these three possible rejoinders receive detailed consideration in the subsequent parts.

III. Sex and Race Discrimination in International Law

The three elements of the crime of apartheid, drawing from the Apartheid Convention and the Rome Statute, can be distilled as follows: (1) intent to maintain domination by one racial group over another; (2) a context of systematic oppression by one racial group over another; and (3) inhumane acts.²⁴⁰ Taliban Afghanistan 1.0 and 2.0 can easily fulfill each required element if “gender” and/or “sex” is substituted for “racial group.” Penelope Andrews engages in the useful exercise of redrafting the definitional article of the Apartheid Convention, replacing “racial group” with “gendered group,” and “South Africa” with “Afghanistan,” pronouncing the resulting

238. ANDREWS, *supra* note 31, at 159.

239. *See infra* text accompanying note 341.

240. OMAR SHAKIR, HUM. RTS. WATCH, A THRESHOLD CROSSED 5–6 (2021).

applicability “apparent.”²⁴¹ Other experts have also accepted this approach, as noted above.²⁴² The question one then encounters is whether international law can sustain such a substitution. This Article argues that such a transposition is warranted in international law. To make this case, it now turns to international law’s respective handling of sex and race discrimination.

A. International Law’s “Faith . . . in the Equal Rights of Men and Women”

The prohibition of discrimination on the basis of sex, like that on race discrimination, is a cornerstone of the modern international legal order. In fact, the right not to be discriminated against on the basis, *inter alia*, of sex is the only substantive human right explicitly mentioned in the U.N. Charter.²⁴³ The ringing words of the UDHR preamble insist that “the peoples of the United Nations have in the Charter reaffirmed *their faith in* fundamental human rights, in the dignity and worth of the human person and *in the equal rights of men and women . . .*”²⁴⁴

Building on this foundation, every substantive text in the International Bill of Human Rights guarantees sex equality.²⁴⁵ The two binding treaties that codify the range of rights in the UDHR—the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—contain not only prohibitions of sex discrimination, but also affirmative requirements of the substantive equality of men and women in the enjoyment of all rights.²⁴⁶ ICCPR Article 2 states that all

241. See ANDREWS, *supra* note 31, at 156–57.

242. See *supra* text accompanying notes 95–101.

243. Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT’L L. 783, 784 (2006) (referencing U.N. Charter arts. 1, ¶ 3, 55, ¶ b).

244. UDHR, *supra* note 3, pmb. This language was included due to advocacy by Minerva Bernardino of the Dominican Republic. REBECCA ADAMI, WOMEN AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 8 (2020).

245. This category includes the UDHR, the two covenants which codify most of the rights it contains (the ICCPR and the ICESCR), and the optional protocols thereto, which are primarily implementation mechanisms.

246. ICCPR, *supra* note 3, arts. 2 and 3; ICESCR, *supra* note 31, arts. 2 and 3. The implications of the interwoven nature of sex equality are far-reaching. As the Human Rights Committee, which oversees the implementation of the ICCPR, noted in 2000, “Article 3 implies that all human beings should enjoy the rights provided for in the Covenant, on an equal basis and in their totality.” U.N. Hum. Rts. Comm., General Comment No. 28: Article 3 (The Equality of Rights Between Men and

parties must respect and ensure all rights in the covenant “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁴⁷ More specifically, Article 3 states that all parties must “ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”²⁴⁸ The addition of the Article 3 requirement, focusing on sex alone amongst bases of discrimination, highlights the centrality to the human rights project of dislodging this particular form of discrimination.²⁴⁹ ICESCR Articles 2 and 3 afford virtually identical guarantees.²⁵⁰ Every one of these standards is binding on Afghanistan and any entity that governs it.²⁵¹

While the U.N. Charter provides the foundations and the International Bill of Human Rights supplies the walls, the CEDAW Convention is the upper level of the structure of rights protection in this area. This entire treaty focuses solely on ending the discriminatory treatment of women.²⁵² It currently has 189 states parties and two signatories, making it one of the most adhered to universal human rights treaties in principle, while admittedly also being one of the most

Women), ¶ 2, U.N. Doc. CCPR/C/21Rev.1/Add.10 (Mar. 29, 2000) [hereinafter General Comment No. 28]. Hence, sex equality is deeply embedded within the corpus of general human rights law and not just in standards specific to women’s rights.

247. ICCPR, *supra* note 3, art. 2.

248. *Id.*, art. 3.

249. See discussion of Article 3 in MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 76–82 (2005).

250. ICESCR, *supra* note 31, arts. 2 and 3.

251. See *supra* text accompanying note 200.

252. CEDAW, *supra* note 3. The states parties are fully bound to implement the convention in good faith. Vienna Convention on the Law of Treaties, *supra* note 81, art. 26. There are only 6 states which have taken no action in relation to this convention due to a range of factors, including ideological opposition and lack of technical capacity: Holy See, Iran, Niue, Somalia, Sudan and Tonga.

The text of the CEDAW Convention was prepared by a working group of the Third Committee of the General Assembly from 1977 to 1979. *Short History of CEDAW Convention*, U.N. WOMEN, <https://www.un.org/womenwatch/daw/cedaw/history.htm> [<https://perma.cc/S79R-8P2P>]. It was not a Western-driven process. In fact, many Asian countries took a particularly active role. THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY (Marsha A. Freeman et al. eds., 2012). The final text of the Convention was adopted by the General Assembly in 1979 by a vote of 130 to none, with 10 abstentions, in Resolution 34/180. *Id.* Only two years later, on September 3, 1981, 30 days after the twentieth member state had ratified it, the Convention entered into force—faster than any previous human rights convention had. *Id.*

reserved²⁵³ and violated in practice. It is the international yardstick for measuring states' efforts in the area.

The CEDAW Convention contains many relevant provisions, including those in Article 2 requiring states:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation . . . and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination . . . [and]
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation²⁵⁴

It also explicitly requires combating sex discrimination in relation to many of the human rights in the interdependent framework of international human rights law, including the rights to political participation and to access to public space;²⁵⁵ the rights to education,

253. *Ratification of 18 International Human Rights Treaties*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., [https://indicators.ohchr.org/\[https://perma.cc/2FJC-BD3N\]](https://indicators.ohchr.org/[https://perma.cc/2FJC-BD3N]). Only the Convention on the Rights of the Child has more ratifications, with 196 states parties. *See also* Rebecca Cook, *The Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L LAW 643–44 (1989–1990) (noting that “[t]he rate and extent of ratification are tempered . . . by recognition of the acute problem of substantive reservations”).

254. CEDAW, *supra* note 3, art. 2.

255. The July 2019 Report of the Special Rapporteur in the field of cultural rights, written by the author and presented to the U.N. General Assembly, states the following:

The full participation of women in public spaces allows them . . . to visibly manifest equal citizenship. . . . Taken together, articles 3, 7 and 13 of the [CEDAW Convention] guarantee equality in public and cultural life, underscoring that women have equal rights to access and enjoy public spaces De facto and de jure norms which exclude women

employment, health, and equality before the law; and the right “to participate in recreational activities, sports and all aspects of cultural life”;²⁵⁶ as well as rights in the areas of marriage and family life. The Convention contains a more general requirement of non-discrimination in all areas, grounded in the broad language of Articles 1–3.

As if this were not already far-reaching enough, the CEDAW Convention offers the most ambitious provision of the entire corpus of international human rights law: Article 5(a). It requires that:

States Parties shall take all appropriate measures:
 (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women²⁵⁷

WHRDs around the world view this transformative norm as essential.²⁵⁸ It indicates that, as will be elaborated below, far from culture trumping women’s rights in international law, it is women’s equality which forges the human rights-respecting cultures of the future.²⁵⁹ As the authoritative commentary on the CEDAW Convention stresses, the CEDAW Committee, the treaty body monitoring implementation of the CEDAW Convention, “has underscored State

altogether from certain public spaces . . . are incompatible with international human rights norms and must be abrogated.

Karima Bennoune (Special Rapporteur in the field of cultural rights), *Rep. of the Special Rapporteur in the field of cultural rights*, ¶ 38–40, U.N. Doc. A/74/255 (July 30, 2019). No member of the U.N. General Assembly questioned these assertions when this report was presented.

256. CEDAW, *supra* note 3, art. 13.

257. *Id.* art. 5(a). In the early years of the Convention’s existence, Theodor Meron critiqued this provision, arguing that it could lead to violations of privacy and freedom of religion or belief. THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS: A CRITIQUE OF INSTRUMENTS AND PROCESS 66-67 (1986). This is a passé view in an era when the international community has accepted as a formal legal matter that religious beliefs and culture are not justifications for discrimination and rights violations. However, it remains relevant to consider how to mitigate possible human rights costs of the transformative agenda of human rights law. Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT’L L. & POL. 795, 805 (1992) [hereinafter Sullivan, *Gender Equality and Religious Freedom*].

258. An example is the reference made to this by the All India Women’s Democratic Association when intervening in the recent case of Indian Young Lawyers Association v. The State of Kerala, (2018) 11 SCC 1, 11, ¶ 38 (India).

259. See *infra* notes 313–318 and accompanying text.

parties' obligation to address cultural obstacles to equality rather than relying on culture as an excuse for lack of progress."²⁶⁰ Even culture (which is read to include religion since the CEDAW Convention makes no specific reference to it²⁶¹) cannot override the "faith" international law puts in women's equality.

Weaving these strands together, the fabric of women's equality in international law, which covers the situation of women in Afghanistan, is normatively strong, admitting no override. The Committee on Economic, Social and Cultural Rights (CESCR), the U.N. treaty monitoring body that oversees the implementation of the ICESCR, was undoubtedly correct when it asserted in its General Comment No. 16 that "[t]he equal right of men and women to the enjoyment of all human rights is one of the fundamental principles recognized under international law and enshrined in the main international human rights instruments."²⁶²

B. A Hierarchy of Discriminations?

Similar to the framing of sex discrimination, the founding instruments of international law, including the U.N. Charter and the entire International Bill of Human Rights, all prohibit racial discrimination in unequivocal and non-derogable terms.²⁶³ Analogous to the CEDAW Convention, an entire treaty, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), was drafted in order "to build an international community free from all forms of racial segregation and racial discrimination . . ."²⁶⁴ Distinctively, the ICERD asserts in its Article 3 that "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction."²⁶⁵

ICERD was adopted in 1966 and entered into force in 1969—a full decade before the CEDAW Convention, which was adopted in 1979

260. THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY, *supra* note 252, at 31.

261. NAZILA GHANEA, WOMEN AND RELIGIOUS FREEDOM: SYNERGIES AND OPPORTUNITIES 1–2 (2017).

262. General Comment No. 16, *supra* note 85, ¶ 1.

263. UDHR, *supra* note 3, art. 2; ICCPR, *supra* note 3, arts. 2(1), 4(1), 26; ICESCR, *supra* note 31, art. 2(2).

264. ICERD, *supra* note 91, pmb.

265. *Id.* art. 3.

and became effective in 1981.²⁶⁶ The race standards came first, likely because they were seen as regulating an international problem (or at the least an inter-group problem) whereas sex was seen as an internal, domestic, intra-group matter. Nevertheless, each convention contains a sweeping ban on the relevant form of discrimination, defining the concept in nearly the same language. In fact, when the CEDAW Convention was drafted, the definition of discrimination and the structure of the instrument were borrowed from ICERD.²⁶⁷

There are some important differences in the treaty frameworks, for example, in the ways in which reservations are handled²⁶⁸ and the copious reservations that have been made to the CEDAW Convention. However, the Optional Protocol to the CEDAW Convention has corrected the imbalance in the implementation tools allocated to each instrument by establishing a mechanism for complaints and inquiries.²⁶⁹

Nevertheless, Mayer argues that the CEDAW Convention does not condemn sex discrimination as forcefully as ICERD does race discrimination and that it does not frame discrimination against women as a political problem rising to the level of oppression and domination of women.²⁷⁰ This, in her view, “opens the door to various depictions of women’s status that attempt to portray the treatment of women as the product of culture rather than politics.”²⁷¹ There is no reason, however, that these 20th century defects cannot be cured by an ambitious interpretation worthy of the 21st century that reflects contemporary commitments on sex equality.²⁷² Such approaches can also draw from the equal footing of race and sex discrimination in the

266. SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 411, 413 (3rd ed. 2018).

267. Ved P. Nanda & Dawn M. McKnight, *The International Convention on the Elimination of All Forms of Racial Discrimination*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 285 (Kelly D. Askin & Dorean M. Koenig eds., 2000); Laura A. Donner, *Gender Bias in Drafting International Discrimination Conventions: The 1979 Convention Compared with the 1965 Racial Convention*, 24 CAL. W. INT’L L. J. 241, 248 (1994).

268. Compare ICERD, *supra* note 91, art. 20(2) with CEDAW, *supra* note 3, art. 28(2).

269. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, *adopted* Oct. 6, 1999, 2131 U.N.T.S. 83 (entered into force Dec. 22, 2000).

270. Mayer, *supra* note 103, at 245–248.

271. *Id.* at 245.

272. See *infra* notes 348–351 and accompanying text.

U.N. Charter, and indeed the extra emphasis placed on sex equality in the International Bill of Human Rights.

Unfortunately, while racial discrimination is correctly considered a *jus cogens* norm, some continue to perceive the case for gender discrimination to fit in this category as an argument *de lege ferenda* (the law as it should be).²⁷³ In 2019, the International Law Commission (ILC) (a body which has included few women) declined to add any new *jus cogens* norms to its existing list, which includes systematic race, but not sex, discrimination.²⁷⁴ However, the jurisprudence of the Inter-American Court of Human Rights has treated the principles of equality and non-discrimination generally as *jus cogens* norms,²⁷⁵ stating that “the principle of equality before the law . . . and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.”²⁷⁶As

273. Charlesworth & Chinkin, *supra* note 31.

274. Int’l Law Comm’n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10 (2019) at 146–147. This approach has been strongly criticized by Patricia Sellers, the former Special Advisor on gender to the former Prosecutor of the International Criminal Court, who cited the distinct approach of the ICC in the *Ntaganda* case. Sellers stressed the way in which the International Law Commission’s approach perpetuated unacceptable gendered bias in international law. Patricia Sellers, *Jus Cogens: Redux*, 116 AJIL UNBOUND 281 (2022) (“Neither normative nor positivist legal conceptualizations of *jus cogens* have grappled substantively with gender or other values that are prioritized by females. . . . By default, a masculine approach to preemptory norms persists. . . . Apparently, freedom from gender discrimination would disrupt and dislodge the gender hierarchies still embedded in *jus cogens*.”)

275. Int’l Law Comm’n, *supra* note 274, note 760.

276. Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 2003). The opinion states:

Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*.

Id. Some countries have also endorsed this approach. See, e.g., GENDER EQUALITY UNIT OF THE NATIONAL SUPREME COURT OF MEXICO, JUDICIAL DECISION-MAKING WITH A GENDER PERSPECTIVE: A PROTOCOL 26 (2013), <https://www.unodc.org/res/>

Mary Hansel noted in her criticism of the ILC's methodology, the body's approach ignores positive evidence, including the human rights norms guaranteeing sex equality reviewed above as well as international jurisprudence over the past several decades. It serves to "marginalize gender and devalue the interests and experiences of women [and] girls . . ." ²⁷⁷ Hence, the gender apartheid approach is also needed as a correction to such institutional failures.

Some scholars have argued that, as a result of the explicit categorization of racial discrimination as a *jus cogens* norm and the differences in the treaties, international law has developed a "hierarchy of forms of discrimination" in which racial discrimination is prioritized above other forms.²⁷⁸ However, such an interpretation contravenes the clear language of the U.N. Charter, which requires states to take action to promote universal observance of human rights without discriminating on the basis of sex as well as race.²⁷⁹ Moreover, both the treaties that make up the International Bill of Human Rights and newer international instruments include language that explicitly place race and sex (and other forms of) discrimination on the same footing.²⁸⁰ An important line of feminist scholarship rejects a relative normativity approach to different bases of discrimination that suggests

ji/import/guide/judicial_decision_making_gender_protocol/judicial_decision_making_gender_protocol.pdf [https://perma.cc/N2XV-EL2H] (affirming that the right to equality is a peremptory norm); see also Patricia Palacios Zuloaga, *The Path to Gender Justice in the Inter-American Court of Human Rights*, 17 TEX. J. WOMEN & L. 227 (2008).

277. Mary H. Hansel, "Magic" or Smoke and Mirrors? *The Gendered Illusion of Jus Cogens in PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (JUS COGENS): DISQUISITIONS AND DISPUTATIONS* 471, 490 (Dire Tladi ed., 2021).

278. Alice Edwards, *Violence Against Women as Sex Discrimination: Judging the Jurisprudence of the United Nations Human Rights Treaty Bodies*, 18 TEX. J. WOMEN & L. 1, 14 (2008). This argument is not to minimize the grave harm and persistence of race discrimination, or to suggest that it is a solved problem in international human rights law, nor to suggest that race and sex discrimination amount to the same experience. On the perils (and promise) of analogizing other marginalizing factors to race as a human rights strategy, see Russell Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010 (2014).

279. U.N. Charter arts. 55 and 56.

280. For example, in the Treaty on the Functioning of the European Union (TFEU), article 19 now reads that the European Commission may take action to combat "discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." Consolidated Version of the Treaty on the Functioning of the European Union art. 19, December 13, 2007, 2016 O.J. (C 202) 47.

that racial discrimination is more egregious than sex discrimination, and questions the basis for this hierarchy.²⁸¹

The increasingly dominant understanding of the intersectionality of bases of marginalization²⁸² should also counsel rejection of hermetically sealed ways of comprehending prohibitions of race and sex discrimination in international human rights law and refusal to pit them against one another. As diverse South African women scholars have noted, racial apartheid also involved a significant component of sex discrimination or “racialized sexual subordination,”²⁸³ confronting nonwhite women with multiple layers of disadvantage.²⁸⁴ Moreover, Taliban practice is also virulently discriminatory against Afghan ethnic and religious minorities, putting minority women, such as those who are Hazara Shia, in particular danger.²⁸⁵ Rather than being understood through the prism of an “oppression Olympics,”²⁸⁶ multiple forms of discrimination can more usefully be described as interlocking in international human rights

281. Elisabeth Holzleithner, *Mainstreaming Equality: Dis/Entangling Grounds of Discrimination*, 14 *TRANSNAT'L L. AND CONTEMP. PROBS.* 927, 943 (2005).

282. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241 (1991). Similar perspectives have now been adopted by U.N. human rights bodies. *See, e.g.*, U.N. Committee on the Elimination of Racial Discrimination, General Recommendation No. 25: Gender-Related Dimensions of Racial Discrimination, ¶3, U.N. Doc. A/55/18, annex V (Mar. 20, 2000) (“Recognizing that some forms of racial discrimination have a unique and specific impact on women, the Committee will endeavour in its work to take into account gender factors or issues which may be interlinked with racial discrimination.”).

283. Penelope E. Andrews, *From Gender Apartheid to Non-Sexism: The Pursuit of Women’s Rights in South Africa*, 26 *N.C. J. INT’L L. & COM. REG.* 693, 698 (2001); *see also* Shireen Hassim, *Decolonising Equality: The Radical Roots of the Gender Equality Clause in the South African Constitution*, 34 *S. AFR. J. ON HUM. RTS.* 342 (2018) (detailing efforts of diverse South African WHRDs to raise questions of both race and sex-based exclusions during the apartheid era).

284. ANDREWS, *supra* note 31, at 100-102.

285. Telephone Interview with Yalda Royan, *supra* note 164 (“Hazara women have to suffer two times over.”).

286. This term was reportedly first used in Angela Y. Davis & Elizabeth Martínez, *Coalition Building Among People of Color*, UC SANTA CRUZ CTR. CULTURAL STUDIES (May 12, 1993), <https://culturalstudies.ucsc.edu/inscriptions/volume-7/angela-y-davis-elizabeth-martinez/> [<https://perma.cc/D9H5-7LPN>] (“[T]he general idea is no competition of hierarchies should prevail.”).

law,²⁸⁷ with each branch of non-discrimination norms benefitting from a rigorous and holistic approach to enforcing the others. No credible reading of international law in the twenty-first century can reflect a hierarchy among the various impermissible grounds for discrimination. The norms on discrimination cannot themselves discriminate. Any distinction in approach to these issues has largely been a reflection of political will at the international level.

Perhaps because gender discrimination such as that practiced by the Taliban has often been incorrectly coded as largely “cultural” while race discrimination is correctly understood as a political project, there is less reflection in the international system on the human rights implications of systemic discrimination against women.²⁸⁸ This is an incorrect framing which overlooks the political implications of women’s subordination and the political commitment of some governments and de facto rulers to discriminating against women. It is a view that is increasingly being jettisoned. As U.N. Secretary-General António Guterres noted on International Women’s Day in 2019, “[g]ender equality is fundamentally a question of power.”²⁸⁹ Systematic crimes against women would be more helpfully described as political and structural, rather than solely cultural. International law needs to furnish appropriate language and concepts that recognize this.

As was the case with South African apartheid and norms on racial equality, Taliban violations of the norms on sex discrimination are so pervasive and obvious that tolerance of them is an injury to the

287. U.N. Comm. on Rts. of Persons with Disabilities, General Comment No. 3 on women and girls with disabilities, ¶¶10, 13 and 16, U.N. Doc CRPD/C/GC/3 (Sept. 2, 2016).

288. The most recent example of this is the December 2021 call by then-Pakistani Prime Minister Imran Khan, a supporter of the Taliban, for the international community to be sensitive to the “cultural traditions” of Afghanistan, including in the debate about girls’ education, at a summit of the Organization of Islamic Cooperation. Afghanistan International (@AFIntlBrk), TWITTER (Dec. 19, 2021, 4:16 AM), <https://twitter.com/AFIntlBrk/status/1472541273139597314?s=20> [<https://perma.cc/RU5U-FYBQ>]. These comments have been widely derided by Afghan human rights defenders on social media. See, e.g., Nilofar Sakhi (@NilofarSakhi), TWITTER (Dec. 19, 2021, 7:22 AM), <https://twitter.com/NilofarSakhi/status/1472588035225235458?s=20> [<https://perma.cc/VZ5A-FZR4>].

289. António Guterres (@antonioguterres), TWITTER (Feb. 27, 2020, 3:43 PM), <https://twitter.com/antonioguterres/status/1233175874138230789?s=20&t=iOZJd1FAXBq0pPRgrlO8Nw> [<https://perma.cc/CAY3-ECSC>]; *Make This the Century of Women’s Equality: UN Chief*, UN NEWS (Feb. 27, 2020), <https://news.un.org/en/story/2020/02/1058271> [<https://perma.cc/YJU3-LTWH>].

entire international system protecting women's rights and undermines those rights everywhere. The Taliban have shown themselves in the past to be mostly immune to mere criticism. This means that a vigorous international response is needed to protect rights on the ground, but also to preserve the integrity (in both senses of the word) of the international system guaranteeing women's rights everywhere.

"It was the legislative enshrinement of racial inequality 'in all the spheres of living' that distinguished South Africa from other repressive regimes."²⁹⁰ The essence of apartheid is the situation of state-sponsored and maintained systemic discrimination. Its illegality was first recognized on grounds of race in South Africa, but the principle can and should be maintained according to other grounds of prohibited discrimination, including the systematizing of sex inequality across all spheres. Despite claims to the contrary, there is no exemption from such prohibitions in the name of culture, a topic to which the article now turns.

IV. The Unacceptability of Cultural Relativist Justifications for Gender Apartheid²⁹¹

A. Does Afghan Culture Excuse Discrimination against Women?

In her 1990s work on gender apartheid, Mahnaz Afkhami stressed that "Islamists use the argument of cultural relativity, now in vogue in the West, to deny women's rights by introducing regimes of gender segregation."²⁹² This has certainly been the case in Afghanistan.²⁹³ Taliban leaders have resorted to this canard. In one recent example, Anas Haqqani, a member of the Taliban's negotiating team in Doha, deployed cultural diversity as a justification during a

290. WELSH & SPENCE, *supra* note 50, at 190.

291. This part draws from Karima Bennouna (Special Rapporteur in the field of cultural rights), *Rep. on Universality, Cultural Diversity and Cultural Rights*, U.N. Doc. A/73/227 (July 25, 2018) [hereinafter Bennouna Report].

292. Afkhami, *supra* note 98, at 18.

293. Dr. Sima Samar (Former Minister for Women's Affairs in Afghanistan), Comments at *Women's Human Rights and Security in Afghanistan: A Dialogue on Next Steps*, WOMEN'S LEARNING PARTNERSHIP (Dec. 8, 2021), <https://learningpartnership.org/resource/womens-human-rights-afghanistan-dialogue-next-steps> [https://perma.cc/8XNU-6QX3].

BBC interview: “[W]e’ve been portrayed as monsters One thing needs to be made clear, Afghanistan is not Europe or the US.”²⁹⁴

Such claims that Afghan cultural particularities justify discrimination are highly contested. The stories of Afghan men, including in rural areas, defending the rights of women and girls to education—such as through motorcycle protests²⁹⁵—are compelling but do not receive nearly enough airtime.²⁹⁶ The Afghan WHRDs interviewed for this study rejected the Taliban’s efforts to position themselves as defenders of Afghan culture and disagreed with some outsiders’ ascription of the group’s approach to Afghan culture. Women’s rights advocate Palwasha Hassan acerbically commented: “The Taliban are claiming to reconvert an already Islamic country containing 99% Muslims.”²⁹⁷ Despite the significant percentage of practicing Muslims, she also insisted that, “Afghan culture is not homogenous. We have a lot of diversity. That diversity should be respected. Afghan culture is not defined by only one group of militants.”²⁹⁸ In fact, she saw this question against the backdrop of inaccurate international stereotypes of Afghans: “The definition of an Afghan seems to be a man with a gun and a woman with a burqa. If a woman speaks for herself, then she is not an Afghan.”²⁹⁹

294. Yalda Hakim (@BBCYaldaHakim), TWITTER (Dec. 5, 2021, 11:46 AM), <https://twitter.com/BBCYaldaHakim/status/1467581188533633034?s=20> [<https://perma.cc/EGW7-VBDU>]; see also Taliban “education minister” Abdul Baqi Haqqani’s assertion that co-education violates not only Islam, but also “is in conflict with national values and is against the customs and traditions of Afghans.” *Afghanistan: Taliban Announce New Rules for Women and Girls’ Education*, DW (Sept. 12, 2021), <https://www.dw.com/en/afghanistan-taliban-announce-new-rules-for-women-and-girls-education/a-59157395> [<https://perma.cc/R2X7-BKR9>].

295. Omid Sobhani, *A Motorcycle Campaign Reopens 100 Schools in Afghanistan’s War Prone Regions*, TRANSCON. TIMES (May 2, 2021), <https://www.transcontinentaltimes.com/a-motorcycle-campaign-reopens-100-schools-in-afghanistans-war-prone-regions/> [<https://perma.cc/AL7Q-95L9>].

296. For example, the Former Deputy Minister of Women’s Affairs shared the story of an Afghan Pashtun man in rural Paktia Province who walked his daughters to school three hours every day. Hosna Jalil (@hosnajalil), TWITTER (Dec. 19, 2021, 11:11 AM), <https://twitter.com/hosnajalil/status/1472645904440172544?s=20> [<https://perma.cc/C2HY-M6XB>]. In the same vein, note the work of Matiullah Wesa, a man campaigning for girls’ education in southern Afghanistan. Matiullah Wesa (@matiullahwesa), TWITTER (Dec. 19, 2021, 2:24 PM), <https://twitter.com/matiullahwesa/status/1472694338270466051?s=20> [<https://perma.cc/ZPT4-2WRR>].

297. Telephone Interview with Palwasha Hassan, *supra* note 167.

298. *Id.*

299. *Id.*

Many of the Afghan interlocutors claimed an equal right to interpret their religion and culture and openly disputed the Taliban's religious claims. A human rights lawyer said, "Islam is against people who say that women should not be educated or who target women. We are all Muslim. The issue is interpretation."³⁰⁰ A girls' education campaigner, who proudly described providing her children with Islamic religious education at home, said of the Taliban, "I don't know which Islam they are talking about."³⁰¹

A woman who used to run Kabul's first women's shelter insisted that:

We are proud to be Muslim. But the way they are imposing this fundamentalism on us, this is not the reality of Afghanistan We accept they are part of Afghanistan but they are not the whole country. In every country you can see differences in culture and religion.³⁰²

One young WHRD expressed that she is non-religious, and knows others in her generation with the same views who cannot say so publicly. She resented the effort of the Taliban to impose a claimed religious code on those with different beliefs—within religion or outside of it. This is an important reminder that the nature of all Afghans' beliefs cannot be presumed. Freedom of religion or belief for all—the Muslim majority, but also religious minorities and non-religious persons—is as essential for Afghans as for anyone else.

A woman humanitarian worker framed the cultural debate with a vital question on agency: "Who makes the culture? The people of a society. The culture of Afghanistan has always been patriarchal, but there has also been respect for women as well. I know there are various barriers culturally, but women were allowed to work."³⁰³ Some viewed Taliban policies as entirely alien: "This is not the culture of Afghanistan. This is the culture of the Taliban."³⁰⁴ One interviewee, however, recognized a complex cocktail of culture, religion, and fundamentalist politics as giving rise to the Taliban's policies. She noted that in some regions some people kept their daughters out of school before the Taliban seized power, labelling this "partly cultural

300. Telephone Interview with Humaira Rasuli, Human Rights Lawyer, Visiting Scholar, William & Mary Law School (Oct. 16, 2021).

301. Zoom Interview with Zarqa Yaftali, *supra* note 166.

302. Telephone Interview with Mary Akrami, *supra* note 172.

303. Telephone Interview with Yalda Royan, *supra* note 164.

304. Zoom Interview with Zarqa Yaftali, *supra* note 166.

issues, partly political.”³⁰⁵ She also stressed that “most people are religious, but . . . they want their girls to go to school. They want female family members to be independent and to work and take part in social activities. They do not want the ideas of the Taliban. They want their daughters educated.”³⁰⁶ Despite these realities on the ground, some of those interviewed reported encountering acceptance of cultural justifications for Taliban abuses by international actors—including even by some voices in the U.S. State Department—about which they expressed great frustration.

B. Cultural Relativism Versus Cultural Rights

Cultural relativism,³⁰⁷ which views rights as culturally dependent rather than universal, and its more polite cousin, cultural sensitivity,³⁰⁸ are often deployed by both perpetrators and apologists to justify gender apartheid and sex discrimination. Analogous arguments have been clearly and correctly recognized as unacceptable in the context of racial apartheid and race discrimination.³⁰⁹ However, many

305. Zoom Interview with Razia Sayad, *supra* note 146.

306. *Id.*

307. Cultural relativism may also suggest that transcultural rights cannot exist. Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984).

308. There is also a significant human rights challenge posed by discrimination against Muslims, which complicates the task of addressing gender apartheid internationally when its most infamous (but not only) perpetrators today are Muslim fundamentalists. Using a multidirectional framework critical along multiple axes at once, and sensitive to both sex discrimination and discrimination on the basis of religion, is essential. Many of those advocating the use of the gender apartheid framework are feminist anti-racists, often from marginalized groups. See Pragna Patel, *The Story of a Feminist Victory Against Fundamentalists and Gender Segregation in UK Schools*, OPENDEMOCRACY (Jan. 11, 2018), <https://www.opendemocracy.net/en/5050/feminist-victory-fundamentalists-gender-segregation-uk-schools/> [<https://perma.cc/PP7N-93RY>]. The problem of anti-Muslim hatred in the West, which cultural sensitivity is sometimes deployed to address, cannot be solved by diluting the human rights of half the Muslim population: women. Unfortunately, the move of some critical theorists has amounted to precisely that. See the critique of this approach in FATIHA AGAG-BOUDJAHLAT, *LE GRAND DETOURNEMENT: FEMINISME, TOLERANCE, RACISME, CULTURE* (2017).

309. Courtney Howland has argued that the International Court of Justice implicitly refused to entertain religious justifications for racial apartheid—which were in circulation in apartheid South Africa—in the Namibia advisory opinion. She writes:

practices and norms that discriminate against women are purportedly justified by reference to culture, religion, and tradition, leading experts to conclude that “no social group has suffered greater violation of its human rights in the name of culture than women,” and that it is “inconceivable” that a number of such practices “would be justified if they were predicated upon another protected classification such as race.”³¹⁰

The U.N.’s Advisory Committee has noted that “[t]hose who benefit most from the status quo are more likely to appeal to tradition to maintain power and privilege, and also to speak on behalf of tradition, while those most marginalized . . . have the most to lose from a traditional values approach to human rights.”³¹¹ Many abuses considered entirely repugnant today, such as slavery and systematic racial discrimination, were justified by recourse to “traditional values.”³¹² In current times, such arguments are almost exclusively heard at the international level in relation to questions of gender.

The most productive approaches indicate that achieving women’s equality is not a question of choosing between culture and rights, but of engaging both in an integrated way. Cultural rights and

Afrikaners believed that they were the chosen people with a divine mission to rule over all others, and from this followed their belief in white supremacy and a policy of racial segregation. . . . [T]he ICJ found as a matter of law that the government’s intent and motives concerning its systematic discrimination were irrelevant. . . . [N]o motive or intent, whatever the source, could justify such systematic discrimination . . . under the Charter.

See Courtney Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter*, 35 COLUM. J. TRANSNAT’L. L. 271, 347–348 (1997) (citations omitted).

310. Farida Shaheed (Special Rapporteur in the field of cultural rights), *Rep. on cultural rights*, ¶ 3, U.N. Doc. A/67/287 (Aug. 10, 2012). Such misuses of cultural claims often involve “politicised appropriations of imagined cultures and traditions [and] homogenised religious norms”. Mariz Tadros and Ayesha Khan, *Challenging Binaries to Promote Women’s Equality*, 3 FEMINIST DISSENT 1, 4 (2018).

311. U.N. Hum. Rts. Council Advisory Comm., Study of the Human Rights Council Advisory Committee on promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind, ¶ 40, U.N. Doc. A/HRC/22/71 (Dec. 6, 2012).

312. On the attempts by some governments to use “traditional values” to override universal human rights in the United Nations, see Maggie Murphy, *‘Traditional values’ vs Human Rights at the UN*, OPENDEMOCRACY (Feb. 18, 2013), <https://www.opendemocracy.net/en/5050/traditional-values-vs-human-rights-at-un/> [<https://perma.cc/84CW-CPMG>].

cultural diversity are as important for women's human rights as for anyone else's. International law and the universal human rights framework also protect these rights and diversities.³¹³ However, "cultural rights are not a justification for violations of human rights or attacks on universality," and are to be respected within the broader human rights framework.³¹⁴ A post-apartheid South African constitutional court judgment in the *Bhe* case makes this point by asserting the need to respect and recognize indigenous customary norms, which have positive dimensions, but insisting that those norms are circumscribed by constitutional guarantees, including of women's equality.³¹⁵

In the field of cultural rights, there has been a paradigm shift from a view of culture primarily as an obstacle to women's rights to one that seeks to ensure women's equal enjoyment of cultural rights.³¹⁶ Women have equal rights to have access to, participate in, and contribute to all aspects of cultural life. This encompasses their rights to participate in cultural practices, or not to participate in them, and to participate in equality in determining which cultural practices to discontinue because they no longer comport with our understanding of human dignity. These are "transformative rights" which can help secure other human rights.³¹⁷ This point has not been lost on Afghan WHRDs. For example, many Afghan women used images of their diverse, multi-colored Afghan traditional dresses, which look nothing like a burqa, to advocate against Taliban dress restrictions in the #DoNotTouchMyClothes campaign.³¹⁸

Cultural relativism rears its head in different forms in many regions, but is particularly in vogue in discussions of the rights of women in Muslim majority contexts, which are often slotted into what Afkhami has termed "Islamic exceptionalism."³¹⁹ Such excuses for abuse are often deemed more palatable to others than to many women of Muslim heritage themselves, as the research for this Article

313. UDHR, *supra* note 3, art. 27; ICESCR, *supra* note 31, art. 15.

314. See Bennoune Report, *supra* note 291, at 6.

315. *Bhe v. Khayelitsha Magistrate* 2004 (1) SA 580 (CC) ¶ 50-51 (S. Afr.).

316. Shaheed, *supra* note 310, at ¶ 5.

317. *Id.*

318. Tuqa Khalid, *Afghan women rebel against Taliban strict dress code: 'Do not touch my clothes,'* AL ARABIYA (Sept. 14, 2021), <https://english.alarabiya.net/News/world/2021/09/14/Afghan-women-rebel-against-Taliban-strict-dress-code-Do-not-touch-my-clothes-> [https://perma.cc/9CQS-QQEE].

319. BENNOUNE, *supra* note 108, at 197.

shows.³²⁰ As Fatiha Agag-Boudjahlat asks, “why should some women accept what others refuse for themselves and their daughters?”³²¹ Relativist arguments that offer such second class status to some women have been facilitated by increasing attacks on the universality of human rights, including from within the academic field of human rights itself.³²²

However, international law completely rejects such cultural excuses, and both of the first two holders of the mandate of U.N. Special Rapporteur in the field of cultural rights, one Pakistani and the other of Algerian descent, have condemned them.³²³ These Special Rapporteurs were not alone. In its General Comment No. 28, the Human Rights Committee determined that “[a]rticle 18 [guaranteeing freedom of religion or belief] may not be relied upon to justify discrimination against women”³²⁴ Former Special Rapporteur on freedom of religion or belief Heiner Bielefeldt has noted that “freedom of religion or belief can never serve as a justification for violations of the human rights of women and girls.”³²⁵ His successor, Ahmed Shaheed (a practicing Muslim from Maldives) also followed the same approach.³²⁶

320. For blistering critiques of the treatment of women by fundamentalists, authored by feminist scholars and advocates of Muslim heritage (including some practicing Muslims), see DJEMILA BENHABIB, *LES SOLDATS D’ALLAH À L’ASSAUT DE L’OCCIDENT* (2011); AMEL GRAMI, *L’APOSTASIE DANS LA PENSÉE ISLAMIQUE MODERNE* (2018); ELHAM MANEA, *WOMEN AND SHARI’A LAW* (2016); and WASSYLA TAMZALI, *UNE FEMME EN COLÈRE* (2009).

321. See AGAG-BOUDJAHLAT, *supra* note 308, at 86 (translated by the author).

322. See Karima Bennoune, *In Defense of Human Rights*, 52 *VAND. J. TRANSNAT’L L.* 1209, 1231 (2019) (arguing that “[h]uman rights advocates and experts must redouble their efforts to defend the universality of human rights”).

323. Shaheed, *supra* note 310, ¶ 56 (“It is essential to recall that international human rights norms provide a clear negative answer to the question of whether restrictions on the cultural rights of women . . . may be legitimately imposed under international law to preserve cultural diversity.”); see also *id.* ¶ ¶ 60, 75; Karima Bennoune (Special Rapporteur in the field of cultural rights), *Rep. of the Special Rapporteur in the field of cultural rights*, ¶ 27, U.N. Doc. A/HRC/31/59 (Feb. 3, 2016) (“[Cultural rights] are not tantamount to cultural relativism. They are not an excuse for violations of other . . . rights. . . . They are firmly embedded in the universal human rights framework.”).

324. General Comment No. 28, *supra* note 246, ¶ 21.

325. Heiner Bielefeldt (Special Rapporteur on freedom of religion or belief), *Elimination of All Forms of Religious Intolerance*, ¶ 30, U.N. Doc. A/68/290 (Aug. 7, 2013).

326. Ahmed Shaheed (Special Rapporteur on freedom of religion or belief), *Gender-based violence and discrimination in the name of religion or belief*, ¶ 68,

Freedom of religion or belief is, like gender equality, a core human right guaranteed by international law. Under international legal documents, such as the ICCPR and the Universal Declaration of Human Rights, individuals are guaranteed the right to hold religious beliefs and practice a religion of their choosing.³²⁷ However, international law permits states to impose limits on the practice of religion which “are necessary to protect . . . the fundamental rights and freedoms of others.”³²⁸ Hence, “restrictions may be imposed on religious law and practice if they are necessary to protect women’s human rights and fundamental freedoms”³²⁹

Likewise, the CEDAW Committee,

[w]hen confronted with damaging cultural beliefs and practices . . . always reminds State parties of Article 5 [of the CEDAW Convention], often in combination with Article 2(f), and argues that ‘cultural characteristics could not be allowed to undermine the principle of the universality of human rights, which remained inalienable and non-negotiable, nor to prevent the adoption of appropriate measures in favor of women.’³³⁰

The CEDAW Committee has also written that

the most significant factors inhibiting women’s ability to participate in public life have [included] the cultural framework of values and religious beliefs In all countries, cultural traditions and religious beliefs have played a part in confining women to the private spheres of activity and excluding them from active participation in public life.³³¹

U.N. Doc. A/HRC/43/48 (Aug. 24, 2020) (“The Special Rapporteur . . . stresses that the universal right to equality is unqualified in a way that the obligation to promote the right to manifest religion or belief, which can be subject to limitation where necessary to protect the rights of others, is not.”).

327. See Sullivan, *Gender Equality and Religious Freedom*, *supra* note 257, at 805; ANAT SCOLNICOV, *THE RIGHT TO RELIGIOUS FREEDOM IN INTERNATIONAL LAW: BETWEEN GROUP RIGHTS AND INDIVIDUAL RIGHTS* 126–29 (2011).

328. ICCPR, *supra* note 3, art. 18(3).

329. Sullivan, *Gender Equality and Religious Freedom*, *supra* note 257, at 810.

330. Rikki Holtmaat, *Article 5*, in *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY*, *supra* note 252, at 141, 159 (citing Comm. on the Elimination of Discrimination against Women, Concluding Comments of the Comm.: Morocco, ¶ 64, U.N. Doc. A/52/38/Rev.1 (Jan. 13–31, 1997)).

331. Comm. On the Elimination of Violence against Women, General Recommendation No. 23, ¶ 10, U.N. Doc. A/52/38/Rev.1 (1997).

Religious practices (and what are claimed to be religious practices) that impede women's ability to participate fully in public life are a barrier to be overcome, rather than something that must be tolerated to protect freedom of religion. The U.N. General Assembly has affirmed this approach in its 1993 Declaration on the Elimination of Violence against Women: "States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination."³³² Equality and universal human rights are not overridden by culture or what is claimed to be culture.

Moreover, some scholars have questioned whether the type of gender discriminatory segregation policies at issue in Taliban Afghanistan are truly religious in origin.³³³ Often, they are based more in fundamentalist politics than in upholding the religious freedom of citizens. After all, men and women mix relatively freely in many Muslim-majority contexts.³³⁴ In the context of Taliban rule, the issue is a particularly harsh form of Islamist cultural politics, not Muslim culture per se.³³⁵ Former U.N. Secretary-General Kofi Annan argued in 2006 that "politicization of culture in the form of religious 'fundamentalisms' in diverse . . . religious contexts has become a serious challenge to efforts to secure women's human rights."³³⁶ This remains true.

Lest academic advocates of cultural relativism, or the governments they accidentally defend, think they have succeeded in moving international human rights law away from the crystal clear provisions of the older standards on the universality of human rights contained in the International Bill of Human Rights, it is vital to recall that all the most recently drafted human rights treaties specifically

332. G.A. Res. 48/104, Declaration on the Elimination of Violence against Women, U.N. Doc A/RES/48/104, Art. 4 (Dec. 20, 1993).

333. Marieme Hélie-Lucas, *What Is Your Tribe?: Women's Struggles and the Construction of Muslimness*, in WOMEN LIVING UNDER MUSLIM LAWS, DOSSIER 23/24 (Harsh Kapoor, ed., 2001).

334. Ann Elizabeth Mayer, *Religious Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women: What Do They Really Mean?*, in RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN, *supra* note 98, at 105.

335. *Id.*

336. U.N. Secretary-General, *In-Depth Study on All Forms of Violence Against Women*, ¶ 81, U.N. Doc. A/61/122/Add.1 (July 6, 2006).

reaffirm universality.³³⁷ Special Procedures mandate holders, treaty monitoring bodies, and the Office of the United Nations High Commissioner for Human Rights have likewise continually reasserted this tenet and emphasized the importance of ensuring that “traditions,” “attitudes,” and “customary practices” are not elevated above universal human rights standards.³³⁸

Indeed, efforts to advance the universality of rights have been made in every part of the world, though some are more recognized than others. As Chetan Bhatt argues, “[i]t is too easy to forget that movements . . . against slavery, against colonization, for self-determination . . . and anti-apartheid in South Africa were vitalized and articulated using the universal language of rights and equality, what we call human rights today.”³³⁹

Thus, it makes sense that the 2030 Agenda for Sustainable Development,³⁴⁰ the touchstone document in the contemporary global development debate, envisages

337. See, e.g., G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities, U.N. Doc. 61/106, pmb. ¶¶ 2-3 (Dec. 13, 2006) (“Reaffirming the universality . . . of all human rights and fundamental freedoms . . .”).

338. Economic and Social Council Res. 2006/61/Add.5, ¶¶ 9, 20, 76, 80 (Feb. 15, 2006); Human Rights Council Res. 4/34, ¶ 47 (Jan. 17, 2007); Human Rights Council Res. 18/35/Add.5, ¶ 67 (July 11, 2011); U.N. Off. of the High Comm’r for Hum. Rts., *Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children* (Aug. 1995).

339. Chetan Bhatt, Presentation on the Challenges to Universalism at the Expert Consultation held by the Special Rapporteur in the field of cultural rights (Feb. 28, 2018).

340. G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Sept. 25, 2015). An ambitious global development framework, the Sustainable Development Goals (SDGs) are today the dominant referent in U.N. debates on development. *OHCHR and the 2030 Agenda for Sustainable Development*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/issues/SDGS/pages/the2030agenda.aspx> [<https://perma.cc/9BDL-UPVG>]. They are championed by many states that might oppose a move to adapt the law on racial apartheid to challenge gender apartheid. Though not formally binding, the SDGs represent a kind of “soft law plus” which can “help to lay the groundwork for codification and help to constitute new customary international law.” Markus Kaltenborn & Heike Kuhn, *Acceptance, Not Enforcement*, DEVELOPMENT AND COOPERATION (Apr. 6, 2017), <https://www.dandc.eu/en/article/2030-agenda-largely-reflects-and-reinforces-existing-international-law> [<https://perma.cc/PK5M-3P2S>]. The former German Minister for Economic Cooperation and Development called them “a contract for the future of the world.” *Id.*

a world of universal respect for human rights and human dignity . . . equality and non-discrimination; of respect for race, ethnicity and cultural diversity; and of equal opportunity A world in which every woman and girl enjoys full gender equality and all legal, social and economic barriers to their empowerment have been removed.³⁴¹

The 2030 Agenda refers to the concept of the “universal” no fewer than 29 times. The SDGs set out in it cannot be achieved without the vigorous defense of universality. Furthermore, one of the goals to which states committed is to “end discrimination against women and girls” by 2030.³⁴² This target cannot be met without dismantling gender apartheid, including in Afghanistan, a process to which international law can make a significant contribution.

V. Interpretive Strategies for Countering Gender Apartheid with International Norms

Some may resist the gender apartheid approach even today because it lacks an explicit textual basis in the language of the Apartheid Convention, adopted nearly fifty years ago. In their eyes, we simply do not have the text we need. For such skeptics, the gender apartheid paradigm represents an extension of norms beyond the acceptable bounds of state consent. The question is whether or not, in the face of contemporary patterns of systematic discrimination, we want to have a 21st century version of international law and if we dare imagine what that could look like.³⁴³ Its building blocks are contained in existing law, merely needing recognition and sufficient interpretive

341. G.A. Res. 70/1, *supra* note 340, ¶ 8.

342. *Id.* at 18.

343. Methodologically, it is instructive to consider the analysis of Rosalyn Higgins (the first woman to serve on the U.N. Human Rights Committee and on the International Court of Justice) on the boundaries of legal argument:

The making of legal choices will not even contribute to justice if it purports totally to ignore political and social contexts. To remain ‘legal’ is not to ignore everything that is not ‘rules’. To remain ‘legal’ is to ensure that decisions are made by those authorized to do so, with important guiding reliance on past decisions, and with available choices being made on the basis of community interests and for the promotion of common values.

ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 9 (1994).

ambition.³⁴⁴ Moreover, this approach cures a legal absurdity in the imbalance in the treatment of race and sex. A number of strategies can be envisaged.

The existing law on apartheid can provide a template for a forward-looking, gender inclusive way to realize the SDG of gender equality agreed upon by all states. In other words, the conventions and standards on racial apartheid can be directly applied to gender apartheid.³⁴⁵ A statement I negotiated while U.N. Special Rapporteur in the field of cultural rights, with the U.N. Working Group on discrimination against women and girls³⁴⁶ and the U.N. Special Rapporteur on freedom of religion or belief, legal academic and former foreign minister of the Maldives Ahmed Shaheed, moved in this direction. It argued that the spirit of the Declaration on Apartheid in

344. There have been serious omissions due to non-gender inclusive interpretations of human rights law in the past. For example, it took until 1992 for the U.N. Special Rapporteur on torture to make explicit that rape of women in the custody of state officials could constitute a form of torture. Peter Kooijmans (Special Rapporteur on torture), *Rep. on Torture and Ill Treatment*, ¶ 35, U.N. Doc. E/CN.4.1992/SR.21 (Feb. 21, 1992). Even some in human rights organizations previously saw this as different than other forms of custodial abuse. See discussion in KARIMA BENNOUNE, *Productive Tensions: Women's Rights NGOs, the "Mainstream" Human Rights Movement, and International Law-Making*, in NON-STATE ACTORS, SOFT LAW AND PROTECTIVE REGIMES: FROM THE MARGINS 125, 136-40 (Cecilia M. Bailliet ed., 2012). Moreover, it took protracted campaigning for certain forms of gendered violence by non-state actors, to which the state fails to respond with due diligence, to be recognized as forms of torture or ill-treatment. MACKINNON, *supra* note 31, at 28-40; Radhika Coomaraswamy (Special Rapporteur on violence against women, its causes and consequences), *Rep. of the Special Rapporteur on violence against women, its causes and consequences*, ¶¶ 42–50, U.N. Doc. E/CN.4/1996/53 (Feb. 5, 1996). Unfortunately, this progress is now imperiled. See Felice Gaer, *Engendering Torture: The Experience of the Committee Against Torture*, 27 AUSTL. J. HUM. RTS. 554 (2021).

345. This is an archetypal example of Bunch's first and second strategies for advancing women's human rights in the international human rights system: fitting women's human rights concerns within established frameworks of civil and political rights, and of economic and social rights respectively. Taken together, these efforts could lead to her fourth and most comprehensive approach, which is feminist transformation of international law. See Bunch, *supra* note 34. The same is true of many of the possible strategies described in this part of the Article, except as noted.

346. The U.N. Working Group on discrimination against women and girls is a body comprising prominent international lawyers from many regions of the world. *Working Group on discrimination against women and girls*, U.N. OFF. OF THE HIGH COMM'R FOR HUMAN RIGHTS, <https://www.ohchr.org/en/special-procedures/wg-women-and-girls> [<https://perma.cc/MR64-FTB8>].

Sports and the Convention on Apartheid in Sports should be applied to the Taliban's ban on women and girls in athletics.³⁴⁷

Such a move is not unprecedented in international law. For example, the CEDAW Committee brought violence against women within the ambit of the CEDAW Convention by labeling it a form of discrimination against women when it issued its General Recommendation No. 19, even though the 1970s Convention never mentions the word "violence."³⁴⁸ No states have objected to this significant expansion of their obligations, though it must be conceded that these obligations remain in the sphere of sex.³⁴⁹ Another pertinent precedent shows that even the introduction of a gender-specific category to a non-gender focused treaty via interpretation is within the realm of possibility. The International Criminal Tribunal for Rwanda, in the *Akayesu* case, interpreted the Genocide Convention to include rape as a means of committing genocide, despite the fact that this is not specifically enumerated in the text of the 1948 convention, nor are women a specified protected category.³⁵⁰

While the re-interpretation here admittedly requires a bigger change in existing definitions than either of these examples, it can

347. Press Release, U.N. Off. of the High Comm'r for Hum. Rts., Afghanistan: UN experts deplore women sports ban, call for vigorous response (Sept. 14, 2021), <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=27454&LangID=E> [<https://perma.cc/54WB-H5FM>]; see also Andrew Wu, 'Gender apartheid': UN Experts Call for International Ban on Afghan Sporting Teams, THE SYDNEY MORNING HERALD (Sept. 15, 2021), <https://www.smh.com.au/sport/cricket/gender-apartheid-un-experts-call-for-international-ban-on-afghan-sporting-teams-20210915-p58ryr.html> [<https://perma.cc/8DDU-FYDS>].

348. Comm. on the Elimination of Discrimination against Women, General Recommendation No. 19: Violence against women, U.N. Doc. A/47/38 (1992).

349. See the reconfirmation and expansion of General Recommendation No. 19's advances in Comm. on the Elimination of Discrimination against Women, General Recommendation No. 35: on gender-based violence against women, updating general recommendation No. 19, ¶ 2, U.N. Doc. CEDAW/C/GC/35 (July 14, 2017). ("For more than 25 years, in their practice, States parties have endorsed the Committee's interpretation. The *opinio juris* and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law. General recommendation No. 19 has been a key catalyst for that process."). This was a highly successful example of deploying Bunch's first and second enumerated techniques, involving the interpretation of women's human rights into existing human rights legal frameworks, leading to a markedly successful feminist transformation of international law. Bunch, *supra* note 34.

350. The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Judgement (Sept. 2, 1998). See discussion in MacKinnon, *supra* note 31, at 209.

build on these methods of carrying out feminist transformation of international law. One possibility would be for the CEDAW Committee to issue a General Recommendation defining and setting out international obligations to prevent gender apartheid and how they spring from the CEDAW Convention, read in the light of international law on racial apartheid.³⁵¹ Another option for advancing the concept would be innovative prosecutions for gender apartheid in Afghanistan in the International Criminal Court, given that the prosecutor Karim Khan has indicated his concern about these issues.³⁵² Such a move would help combat other international crimes explicitly within the court's statute. As political scientist Charli Carpenter notes of the Afghan context, "Gender apartheid begets other types of crimes against humanity as well. For example, forced marriage is now rampant . . ." ³⁵³

In the future, it may be that we need a specific standard on gender apartheid, either as an optional protocol to the racial apartheid standards in existence³⁵⁴ or to the CEDAW Convention, or as a stand-alone.³⁵⁵ This would take political will and the expending of political

351. This would be analogous to the Committee's work to bring the impact of climate change on women within the ambit of the Convention. Comm. on the Elimination of Discrimination against Women, General recommendation No. 37: Gender-related dimensions of disaster risk reduction in the context of climate change, U.N. Doc. CEDAW/C/GC/37 (Mar. 13, 2018).

352. Charli Carpenter, *The Taliban's Gender Apartheid Is a Case for the International Criminal Court*, WORLD POLITICS REVIEW (Oct. 29, 2021), <https://www.worldpoliticsreview.com/articles/30079/for-women-afghanistan-s-gender-apartheid-is-a-case-for-the-icc> [<https://perma.cc/2NQC-ZWFQ>]. It is worth recalling that the ICC's own statute requires that the Court's "application and interpretation of law . . . must . . . be without any adverse distinction founded on grounds such as gender [as defined by the statute] . . ." Rome Statute, *supra* note 79, art. 21(3). See discussion of opportunities and challenges related to the ICC's engagement on Afghanistan *supra* text accompanying notes 216-224.

353. Carpenter, *supra* note 352.

354. There is a precedent for expanding categories of protection this way in the 1967 Protocol to the Refugee Convention, which "removed the Refugee Convention's temporal and geographical restrictions so that the Convention applied universally." *The 1967 Protocol Factsheet*, ANDREW AND RENATA KALDOR CTR. FOR INT'L REFUGEE L., 1 (Sept. 2018), https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Factsheet_1967%20Protocol_Sep2018.pdf [<https://perma.cc/2XZH-G7W9>].

355. In contradistinction to other strategies explored here, such a bold step would bring into play Bunch's third method of mainstreaming women's human rights (and one of the most difficult): the creation of new legal mechanisms for combatting sex discrimination. Bunch, *supra* note 34.

capital in the U.N. system, just as recently de-colonized states took up the issue of apartheid in the U.N. in the 1960s and 1970s. Those states claiming to have feminist foreign policies or with female heads of state, or Muslim-majority countries with commitments to gender equality such as Albania and Tunisia, could be called on to play this role.

As Zubaida Akbar stressed, “the international community should hold by principles they claim they have.”³⁵⁶ This means that gender apartheid, like racial apartheid, must be recognized as an international crime, specifically a crime against humanity. It also means that other states must not take part in this crime or be complicit with its commission in Afghanistan or anywhere else and must bring its perpetrators to justice. They cannot engage with perpetrators of gender apartheid without imposing the condition that the practice be ended. States are also not allowed to recognize as lawful a situation created by a serious breach, nor may they render aid or assistance in maintaining such situations. Only such a robust approach to human rights law can adequately fulfill the founding commitments of international law to women’s equality, and only then can it become a law appropriate for the 21st century—the first era when states have collectively committed to actually achieving that equality by a specific date.

CONCLUSION: “APARTHEID HAS NO FUTURE”³⁵⁷

This article has established that the Taliban are re-constructing gender apartheid in Afghanistan in violation of international law, contravening both fundamental norms on women’s human rights and equality and the U.N. Charter itself. This is a flagrant example of retrogression in the field of human rights, a trajectory which is of particular concern.³⁵⁸ Moreover, the article has reviewed the sophisticated body of international law that not only prohibits the analogous practice of racial apartheid, but requires second states to take steps to combat that practice.³⁵⁹ Today, the abuse of governance for the purpose of engaging in systematic discrimination, whether on the basis of race or sex, must be criminalized. It should be

356. Zoom Interview with Zubaida Akbar, *supra* note 131.

357. MANDELA, *supra* note 41, at 139.

358. U.N. experts expressed concerns about retrogression in Statement on Women’s Full Participation, *supra* note 207.

359. On complicity, *see* Ratner, *supra* note 9.

remedied through sanctions and a panoply of targeted international measures in Afghanistan, as in the case of apartheid South Africa.

The failure to be gender inclusive in the contemporary understanding of apartheid cannot be reconciled with international legal commitments to women's equality. I share the view of the late Nigerian physician Babatunde Osotimehin, the former Executive Director of the U.N. Population Fund, and U.N. Under Secretary General: "[D]espite universal promises made at the highest levels . . . gender equality remains an unfinished agenda for the twenty-first century, a century that should enter history as the period that ended gender apartheid."³⁶⁰

Systematic discrimination against women is the colonialism of the 21st century. I do not make this assertion lightly. I lost a grandfather and two uncles in the struggle against colonialism in Algeria, and my father was imprisoned and tortured by colonial authorities for his resistance. In fact, he told me that when he was detained for his participation in the anti-colonial struggle, he first began to think critically about the situation of women in Algeria because his status, deprived of liberty, began to resemble theirs.³⁶¹ While one form of domination represents the dispossession of entire national groups by foreigners, the other represents the systematic denial of personal self-determination for half the population by local hegemony. The geography and demography diverge, but both are widespread and categorical denials of human equality and agency incompatible with the U.N. Charter. The Charter offers an equally urgent imperative for ending both. The U.N. Secretary-General has himself insisted that: "Just as slavery and colonialism were a stain on previous centuries, women's inequality should shame us all in the 21st."³⁶² This means that gender apartheid can be no less staunchly opposed and effectively stamped out than racial apartheid, unless the fundamental provisions of international law guaranteeing recognition of women's equal humanity are accepted as nothing more than a mirage.

360. Babatunde Osotimehin, *Confronting Gender Apartheid in 21st Century*, REUTERS (Mar. 1, 2011), <https://www.reuters.com/article/uk-women-unfpa/confronting-gender-apartheid-in-21st-century-idUSLNE72007J20110301> [<https://perma.cc/K43M-FHGZ>].

361. MAHFOUD BENNOUNE, *LES ALGERIENNES: VICTIMES D'UNE SOCIETE NEOPATRIARCALE: UNE ETUDE SOCIO-ANTHROPOLOGIQUE* (1999).

362. Guterres, *supra* note 289.

Such unacceptable acceptance weakens the entire framework to the detriment of all women. This is nowhere more true than in other Muslim majority countries and diaspora populations where the Taliban victory put wind in the sails of the fundamentalists that WHRDs of Muslim heritage resist.³⁶³ The transnational response to gender apartheid in Afghanistan has national, regional, and global repercussions. As Human Rights Watch researcher Heather Barr rightly expressed: “2021 was a bad year for women’s rights. . . . [T]he weak international response to the return of the Taliban in Afghanistan has implications for women everywhere. It tells us how little our rights—and we—are respected, still.”³⁶⁴

Consistent failure to enforce international law principles on women’s rights undermines the entire project. Effectively engaging with the normativity of international law bans on discrimination against women is essential.

This is also a question of effectiveness, a principle of treaty interpretation which has been used to ensure the goals of the U.N. Charter and of human rights instruments can be realized.³⁶⁵ Given the current situation in Afghanistan, there is likely no other way to achieve the goals set by the U.N. Human Rights Council than to concert the efforts of the international community.³⁶⁶ In its 2021 resolution on Afghanistan, the Council

[r]eaffirm[ed] its unwavering commitment to the full and equal enjoyment of all human rights by all women, girls and children in Afghanistan, including their right to freedom of movement, the right to education, the right to the enjoyment of the highest attainable

363. *Talibans Everywhere*, MPV NEWSLETTER (Sept. 2021), <https://app.robly.com/archive?id=4e88c42718cc87e76d0f847219977b22&v=true> [<https://perma.cc/G5GH-4WWY>].

364. Heather Barr (@heatherbarr1), TWITTER (Dec. 19, 2021, 10:19 PM), <https://twitter.com/heatherbarr1/status/1472813860017029122?s=20> [<https://perma.cc/5NHY-L8DG>].

365. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, at 182 (1949); Jean-Marc Sorel & Valérie Boré Eveno, *Article 31 of the Convention of 1969*, in 1 THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 804, 804–37 (Olivier Corten and Pierre Klein eds., 2011).

366. The Council is the highest political body in the field of human rights in the U.N. system and is comprised of states. *Welcome to the Human Rights Council*, U.N. HUM. RTS. COUNCIL, <https://www.ohchr.org/en/hr-bodies/hrc/about-council> [<https://perma.cc/LZ87-UXL9>].

standard of physical and mental health, including their sexual and reproductive health, the right to work and the right to access to justice on an equal basis with others.³⁶⁷

These words are meaningless without a framework that can breathe life into their promises. The recognition of gender apartheid can offer such a framework.

One Afghan woman human rights defender interviewed for this article said to me in Kabul in 2011: “I really hope Afghanistan one day is a country where everyone can feel that they are a human being.”³⁶⁸ The only way this humble aspiration becomes possible is if the international community makes clear that Afghan women are equal members of what the Universal Declaration of Human Rights calls “the human family” and takes gender apartheid in Afghanistan as seriously as other forms of apartheid elsewhere.³⁶⁹ This is the best way to realize the hope Nelson Mandela expressed as he left prison that, as a mode of governance, “apartheid has no future.”³⁷⁰

367. Human Rights Council Res. 48/1, U.N. Doc. A/HRC/48/L.24/Rev.1, ¶ 3 (Oct. 13, 2021). In July 2022, the Council adopted a further resolution, without a vote, which repeats this language and underscores that the “ongoing oppression of women and girls in Afghanistan is grave, institutionalized, widespread and systematic.” Human Rights Council Res. 50/14, Situation of Human Rights of Women and Girls in Afghanistan, U.N. Doc. A/HRC/50/L.62, pmb1. (July 8, 2022). The resolution “*Calls upon* the Taliban in particular to reverse the policies and practices that currently restrict the human rights and fundamental freedoms of Afghan women and girls.” *Id.* ¶ 4.

368. BENNOUNE, *supra* note 108, at 264.

369. In Fall 2022, increasing reference was made to the concept of gender apartheid in discussions of Afghanistan at the United Nations and beyond, including by Afghan WHRDs, other civil society representatives, UN experts and even government representatives. *See* Heather Barr (@heatherbarr1), TWITTER (Oct. 21, 2022, 8:21 AM), <https://twitter.com/heatherbarr1/status/1583433288915783681?s=20&t=AnIip8DkMnrPxyI21g03MA> [<https://perma.cc/PPY5-VUVS>] (detailing use of the term by WHRDs, the Special Rapporteur on the situation of human rights in Afghanistan, and representatives of Canada and the United Arab Emirates).

370. MANDELA, *supra* note 41, at 139.