The International Obligation to Counter Gender Apartheid in Afghanistan

Karima Bennoune*

*Correspondence: karimab@umich.edu

Abstract

The following article was first published in the Columbia Law Journal and is reproduced with permission and an updated introduction.

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.

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.
Introduction (Updated for Feminist Dissent)

Since the publication of “The International Obligation to Counter Gender Apartheid in Afghanistan” in December 2022 by the Columbia Human Rights Law Review, there has been tremendous progress toward recognition of the gender apartheid approach. It has been increasingly used to defend women’s human rights in some of the contexts where they are mostly drastically under assault. This progress is very positive indeed and beyond my wildest dreams when I spent six months writing the paper in 2021-22. Afghan women have also published scholarship on gender apartheid and held many events related to this concept. I am honored that my paper has been translated into Farsi by the Afghanistan Institute for Strategic Studies in October 2023. A game-changing global campaign to end gender apartheid has been launched with the leadership of many prominent Afghan and Iranian women human rights defenders, including Nobel laureate Shirin Ebadi, and former parliamentarian Fawzia Koofi.

A range of governments have now endorsed the concept as well and many have applied it to Afghanistan, including Albania, Ecuador, Mexico, France, Montenegro, the Netherlands, Spain, Canada and the United Arab Emirates. Graca Machel, Nelson Mandela’s widow and anti-apartheid icon said of Taliban rule, in an interview with the Telegraph: “It is a kind of apartheid, which is gender apartheid. I agree with that kind of definition...The same vigour... applied to fight apartheid should be applied in the case of Afghanistan.”

Parts of the UN system have increasingly embraced this framing. The UN Special Rapporteur on Iran Javaid Rehman, and other UN human rights experts, publicly condemned new heightened penalties on Iranian women for refusal to wear the headscarf as gender apartheid in September 2023. “The draft law could be described as a form of gender apartheid, as authorities appear to be governing through systemic discrimination with the intention of suppressing women and girls into total submission,” the experts explained.
The label has also been applied to the situation in Afghanistan by many UN officials and experts, including the Secretary-General, the High Commissioner for Human Rights and the Executive Director of UN Women, who went so far in her intervention in the Security Council debate on Afghanistan, on September 26, 2023, as to call for codification of gender apartheid.\textsuperscript{vii} I was also invited to brief the Council that same day on the imperative of responding positively to the appeals from Afghan women human rights defenders to use the gender apartheid approach in developing more effective, principled and international law-abiding responses to their country situation. Specifically, I called on the Council to consider adopting resolutions labeling the treatment of Afghan women by the Taliban as both gender persecution and an institutionalized framework of gender apartheid, concepts which I define in my article. Such resolutions should require states and the UN to take effective steps to end these grave violations of international law, including by bringing perpetrators to justice. I also recommended that member states should add gender apartheid explicitly to the Crimes against Humanity convention currently under discussion.

In a powerful endorsement of the concept of gender apartheid – which they described as a grave human rights violation – the UN Special Rapporteur on the situation of human rights in Afghanistan and the UN Working Group on Discrimination against Women and Girls also argued for its application to Afghanistan alongside gender persecution. In doing so, they stressed that, "[g]ender apartheid framing emphasizes that exclusion of and discrimination against women..is institutionalized and..a grave and systematic human rights violation that breaches the UN Charter, the principle of equality & non-discrimination & fundamental..norms of international human rights law."\textsuperscript{viii}

When the Special Rapporteur and the Working Group presented this critical joint report to the Human Rights Council on 19 June 2023, not a single state disagreed with their characterization of the situation as such.
Support for framing the country situation in Afghanistan as gender apartheid came from a cross-regional list of states during the interactive dialogue with the Human Rights Council. South Africa, Namibia, Luxembourg, France, Spain, the Netherlands and Montenegro spoke in favor. South Africa was the real hero of the debate echoing the words of Graça Machel when it not only recognized the framing of situation in Afghanistan as gender apartheid, but also called for international action against it akin to that which ended de jure racial apartheid in South Africa. A Human Rights Council resolution on Afghanistan, adopted in October 2023, has “request[ed] the Special Rapporteur to prepare a report on the phenomenon of an institutionalised system of discrimination, segregation, disrespect for human dignity and exclusion of women and girls,” which builds on the earlier report, though the resolution does not use the term “gender apartheid.”ix This study, to be presented in June 2024, can and must play a decisive role in advancing the use of the gender apartheid approach.

There are now two international legal pathways forward on this front. The first is to interpret existing apartheid law in a gender inclusive way to include gender apartheid. As I note in the article, there is precedent for doing this, for example, in the way in which violence against women entered the human rights framework. The other is to push for explicit codification of gender apartheid. A major international campaign is underway to make sure that this latter development happens, and now has the support of an incredible list of prominent figures from the field of human rights, including Afghans, Iranians and South Africans, two former High Commissioners for Human Rights (Navi Pillay and Mary Robinson), multiple Nobel laureates, no less than two former presidents, the former prosecutor of the International Criminal Court, prominent South African experts like Justice Richard Goldstone and Rachida Manjoo, and members of Feminist Dissent.x Women human rights defenders must work along both of these tracks at the same time. Codification, even in the best-case
scenario, may take some time for both political and legal reasons, and the grave situations where the concept of gender apartheid accurately applies cannot wait for this process to come to fruition.

What has been tried so far since the Taliban returned to power in Afghanistan is not working. If business as usual continues, the situation will simply continue to deteriorate with devastating national, regional and international consequences. Women’s human rights cannot be simply set aside while governments think they are focusing on counterterrorism. To quote Nazifa Haqpal, an Afghan woman former diplomat:

*Any failure to see the links between violations against women and girls in Afghanistan and the dangers the Taliban and its terrorist associates pose to regional and global stability risks ignoring an unprecedented security challenge.* [I]nternational policymakers, thus, must prioritize the protection and advancement of women and girls in Afghanistan in their policies and actions, as a moral obligation – and a security imperative.*

Meanwhile, sadly, the practice of gender apartheid worsens day by day in Afghanistan and Iran. Those who counter gender apartheid continue to face grave danger. For example, I am deeply concerned about the arrest of Afghan WHRD Neda Parwani and her family and the abduction of Afghan WHRD Zholia Parsi and her son. Feminists must push for their immediate releases and those of other anti-apartheid advocates.

As I noted in my Security Council address, many Afghan women also tell me, day after day, how concerned they are over increasing attempts by some international actors to normalize the Taliban despite such repressive policies. The legal progress made on recognizing and countering gender apartheid must be consolidated and accelerated to meet the urgent needs on the ground and as a tool to push back against normalization. To this end, Afghan women human rights defenders undertook a hunger strike in autumn 2023 to galvanize a better international response, including
specifically calling for recognition that gender apartheid is being practiced in their country. Similarly, the heroic Narges Mohammadi joined the call for codification of gender apartheid from within prison the same week she later won the Nobel Prize.

It is time for the international community to hear their voices and take decisive action recognizing that gender apartheid is being practiced and working in support of frontline women human rights defenders to end it. Feminists everywhere should act to support them. In conclusion, I paraphrase the end of my remarks to the Security Council. “As an Afghan WHRD once said to me: “Optimism is key to survival.” The stalwart Afghan women continuing to protest on the streets will not give up, and are risking their lives for the Charter’s promise of equality.” The international community must show as much courage and commitment as they do.

Karima Bennoune, November 2023
The following article was first published in the Columbia Law Journal and is reproduced with permission.

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.

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.
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 Network xv

“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?”

Shaharzad Akbar
Former Chairperson, Afghan Independent Human Rights Commission xvi

Today, the world watches as the Taliban re-imposes gender xvii apartheid in Afghanistan. This Article explains why the international 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, xviii 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. xix 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.xx

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.xxi 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.xxii 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.”xxiii 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.xxiv 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,\textsuperscript{xxv} claims which some have criticized,\textsuperscript{xxvi} 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.\textsuperscript{xxvii} 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.\textsuperscript{xxviii} 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.\textsuperscript{xxix} 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 Shaharzad Akbar, former Director of the Afghan Independent Human Rights Commission, the gender apartheid framework can be a "powerful mobilizing tool."\textsuperscript{xxx}

When Kabul fell to the Taliban on August 15, 2021, much of what remained of twenty years of flawed, incomplete, hard won, and vital progress for Afghan women was lost in a matter of weeks.\textsuperscript{xxxi} In Afghanistan today, the de facto Taliban authorities\textsuperscript{xxxii} practice both gender separation and the exclusion of women with dire human rights consequences.\textsuperscript{xxxiii} Laws protecting women’s rights, enacted due to the risky work of Afghan women law reformers and women human rights defenders (WHRDs)\textsuperscript{xxxiv} in the last twenty years, are reportedly slated for abrogation.\textsuperscript{xxv} Institutions women built to protect their rights are
dismantled. The Ministry of Women’s Affairs became the Ministry of Vice and Virtue. Male aid workers may not enter tents in camps while 80% of the millions of displaced persons are women and girls. Women are sent home from their workplaces, thereby losing income essential for feeding their families in the middle of one of the world’s worst humanitarian crises. Most girls above grade six may not go to school. University education is segregated, if available. Criticizing the Taliban has reportedly become an officially punishable offense. 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. Women engaging in protests, and sometimes members of their families, face arrest, torture and ill-treatment, and incommunicado detention.

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.

Writing in the tradition of feminist international law, this article draws from the academic literature and international norms 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. Feminist international law has 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. 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. 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 mechanisms to counter sex discrimination, and (4) engaging in feminist transformation of international law. 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 device 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 practice and likewise changed international law.

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. 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”\textsuperscript{iii}:

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.”\textsuperscript{lv} 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.”\textsuperscript{lv} 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.\textsuperscript{lv}

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,”\textsuperscript{lvii} 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.\textsuperscript{lviii}

To enforce these restrictions, “pass laws” required nonwhites to carry documents authorizing their presence in white areas.\textsuperscript{lix} 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.\textsuperscript{lx}

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),\textsuperscript{lxiii} 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.\textsuperscript{lxiii} 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...”\textsuperscript{lxiii}

International political will and local political struggle were essential catalysts for change. Newly decolonized states played a leadership role, seeing the issue as a vital part of a larger struggle for the completion of decolonization 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.\textsuperscript{lxiv} Highly publicized South African atrocities, such as repression of the 1976 Soweto Uprising, galvanized international opinion and action.\textsuperscript{lxv} 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, \textit{inter alia}, helped break the deadlock on sanctions.\textsuperscript{lxvi} As academics David Walsh and J.E. Spence conclude in a review of the relevant external factors:

\begin{quote}
\textit{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.}\textsuperscript{lxvii}
\end{quote}
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. South African expert John Dugard described it as “the ultimate step in the condemnation of apartheid.” 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.” 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.” 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. 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.
Recognizing apartheid as a violation of the U.N. Charter, and therefore unlawful, the Convention criminalizes it. 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 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.” 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. 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, and by giving states parties heightened obligations to implement relevant U.N. resolutions.

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.” This was in part because South Africa opted instead for a Truth and Reconciliation Commission as part of its democratic transition. The Convention nonetheless provided a critical advocacy tool for opponents of apartheid; it was used as a standard for judging national responses and regularly cited in U.N. debates, and it codified the view of the apartheid regime as an illegal situation to be ended rather than an acceptable object of incrementalist “constructive engagement.”
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.” In 1977, Additional Protocol I of the Geneva Conventions of 1949 denoted apartheid a “grave breach, “without any geographical limitation.” 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.

Specific standards on apartheid in particular fields were also adopted, such as the 1985 International Convention against Apartheid in Sports. 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.” Sports contact with countries practicing apartheid “condones and strengthens apartheid,” and so is a violation of the Olympic Principles pertaining to international athletics. Other states cannot be complicit.

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. 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. 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, the highest-level norms in the field of international law which override contradictory norms and instruments. 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”\textsuperscript{xcvii}: 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.\textsuperscript{xcviii} It codifies the subordination of women in violation of “fundamental principles recognized under international law,”\textsuperscript{xcix} as the U.N. Committee on Economic, Social and Cultural Rights characterizes the equal right of men and women to enjoy all human rights.\textsuperscript{c} 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.\textsuperscript{ci} 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 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.\textsuperscript{cii}
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.”

Experts have emphasized the “pervasiveness” of racial apartheid and the way it functioned as a “system of gross human rights violations.” 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.

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. 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. 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 the country brought about in accordance with international law, 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. 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,

*gender 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.*

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 of advancing such analysis. 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. 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.” 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.”
The 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, openly and publicly, of an apartheid policy of this nature is abnormal, from the standpoint of human rights.\textsuperscript{cxv}

His words are striking against the backdrop of the more general assertions that U.N. mechanisms make today.\textsuperscript{cxvi} 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.”\textsuperscript{cxvii}

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 justifications\textsuperscript{cxviii} 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.\textsuperscript{cxix}

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,\textsuperscript{cxxi} (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 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. 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 Arabia 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. During a hellish rocket war, the Taliban conquered Kabul in August 1996 and came to control the majority of the country.

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. They eviscerated what remained of women’s human rights after seventeen years of war. 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 of virtual house arrest. Under Taliban rule women were stripped of all human rights[—]their work, visibility, opportunity for education, voice, healthcare, and mobility.”

Specific Taliban decrees banned women from working, expelled women and girls from schools and universities, 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 widows), 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.” These policies had stark consequences, leading to one of the highest maternal mortality rates in the world and “de facto sentencing widows and their children to starvation.” The windows of women’s homes were blackened so they could not be seen. Violations of the rules would be met with beatings, floggings, executions, and even stoning.

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 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.\textsuperscript{cxxxv}

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.\textsuperscript{cxxxvi} 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.”\textsuperscript{cxxxvii} 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”\textsuperscript{cxxxviii} 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.\textsuperscript{cxxxix}

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 by all women\textsuperscript{cxli} and serious threats to women’s rights persisted.\textsuperscript{cxli} During the Trump administration, the Taliban successfully used negotiating for peace as a weapon of war, and were rewarded with the Doha Agreement.\textsuperscript{cxlii} International actors were willing to set aside women’s rights, while mouthing platitudes about empowerment.\textsuperscript{cxliii} 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.\textsuperscript{cxliv} 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. This kind of withdrawal was based on bipartisan policy in the United States, carried forward by the Biden administration. 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” 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.

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?” 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.” 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.”

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. 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. “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.”

In keeping with this analysis, Taliban 2.0 inaugurated an all-male interim administration, featuring few members from minorities and possessing little governing expertise. Women have again been barred from employment and girls excluded from school after sixth grade. 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. 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.”

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

Additionally, Taliban spokesmen have suggested plans to dismantle the entire legal structure of women’s rights, including by abrogating the 2004 constitution and the 2009 Elimination of Violence against Women Law, as well as a ban on women and girls playing sports. Measures such as a tepid December 3, 2021 decree on women’s right to consent to
marriage,\textsuperscript{clxiii} 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.\textsuperscript{clxiv} Women and girls are being subjected to forced marriages with Taliban fighters notwithstanding this decree.\textsuperscript{clxv} 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.\textsuperscript{clxvi}

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 carry on their work.\textsuperscript{clxvii} Many of them are trying to do just that despite massive logistical obstacles.\textsuperscript{clxviii}

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.\textsuperscript{clxix} 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.\textsuperscript{clxx} 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.’”\textsuperscript{\textsuperscript{clxvii}}
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. This aspect of the current crisis also has disproportionate impacts on women due to the apartheid restrictions. When women suffer, such as by being denied employment during an economic catastrophe, their families suffer too. The spillover effects of gender apartheid on families and the population at large are far-reaching, as in the case of racial apartheid.

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. 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.” 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. Quoting an Afghan female journalist, Amnesty International characterized the situation of women under Taliban rule as “Death in Slow Motion.” 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” 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.” 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.”

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.

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

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.

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. Given this contradictory reality, the dissenter’s insight informs this Article’s 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.” 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. 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 Taliban. Words are not enough. We need actual action to support Afghans.”

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.” 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.”\textsuperscript{clxxxix} 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,”\textsuperscript{cxc} 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?”\textsuperscript{cxi}

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.”\textsuperscript{cxcii} “How can an all-male delegation ask the Taliban, ‘where are the women?’”\textsuperscript{cxciii} Many of the WHRDs suggested a more aggressive, principled approach. “Send a delegation of five women. That will shame the Taliban.”\textsuperscript{cxciv} 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.”\textsuperscript{cxcv}

**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.\textsuperscript{cxcvi} 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. 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). 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. 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 participation of women in those negotiations, and ultimately to hastily abandon a civilian population to their rule.

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,” 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.” Policies such as these can potentially rise to the level of complicity with apartheid or the aiding and abetting of its commission.

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.\textsuperscript{cciv}

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.\textsuperscript{ccv} Some of these monogender dialogues have actually been about women’s rights.\textsuperscript{ccvi} Shaharzad Akbar acerbically labelled this “the new requirement of discussing anything in Afghanistan: having only men in the room.”\textsuperscript{ccvii} 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.\textsuperscript{ccviii} Such responses may “aid[], abet[], [or] encourag[e]” the international crime of apartheid in violation of Article III of the Apartheid Convention.\textsuperscript{ccix}

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.\textsuperscript{ccx} At least these Talibs were required to meet representatives of Afghan civil society, 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.\textsuperscript{ccxi}
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. 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.” 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.

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
Feminist Dissent

it to reference racial apartheid in Southern Africa. 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.”

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 2013 and 2020—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).

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. 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. However, the U.N. system still mostly 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. 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 is ultimately established by invaders from afar. Indigenous culture is also replaced by the settlers’ culture . . .” 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. 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.”
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. 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.

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 commitment to it. 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. 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. 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.\textsuperscript{ccxxx}\textsuperscript{i} The rationale for this charge includes that the defendant “targeted women and young girls on the basis of gender, imposing restrictions on them motivated by discriminatory opinions regarding gender roles.”\textsuperscript{ccxxxii} 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.\textsuperscript{ccxxxiii}

Though “underutilized,”\textsuperscript{ccxxxiv} 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.\textsuperscript{ccxxxv} 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 intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”\textsuperscript{ccxxxvi} 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.” 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.”

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. As is the case with human rights treaties, the ILO conventions require governments to pursue policies committed to equality in the field of employment. 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.

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.\textsuperscript{cxciii} The General Assembly became comfortable with not just condemning violations, but also calling for the application of sanctions in response to apartheid.\textsuperscript{cxciii} 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).\textsuperscript{cxciii} 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 rights revolution pushed the private sphere onto the international stage.\textsuperscript{ccxiv} 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.\textsuperscript{ccxiv}

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,\textsuperscript{ccxlv} 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.\textsuperscript{ccxlvii} 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” 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 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. This framing puts pressure on governments, international organizations, and transnational corporations 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. 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.
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 . . . ”cclii

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. ccliii 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. 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 applicability “apparent.” Other experts have also accepted this approach, as noted above. 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. 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…”

Building on this foundation, every substantive text in the International Bill of Human Rights guarantees sex equality. 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. ICCPR Article 2 states that all 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." 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.” 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. ICESCR Articles 2 and 3 afford virtually identical guarantees. Every one of these standards is binding on Afghanistan and any entity that governs it.

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. 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 reserved 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
obligation... cclxviii

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, cclxix the rights to education, employment, health,
and equality before the law; and the right “to participate in recreational
activities, sports and all aspects of cultural life”; cclxx 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 women... cclxxi

WHRDs around the world view this transformative norm as essential. cclxxii 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. cclxxiii As the
authoritative commentary on the CEDAW Convention stresses, the CEDAW Committee, the treaty body monitoring implementation of the CEDAW Convention, “has underscored State parties’ obligation to address cultural obstacles to equality rather than relying on culture as an excuse for lack of progress.”cclxxiv Even culture (which is read to include religion since the CEDAW Convention makes no specific reference to it)cdxxiv 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.”cclxxvi

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. 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 . . . .” 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.”
ICERD was adopted in 1966 and entered into force in 1969—a full decade before the CEDAW Convention, which was adopted in 1979 and became effective in 1981. 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.

There are some important differences in the treaty frameworks, for example, in the ways in which reservations are handled 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.

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. 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.” 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. Such approaches can also draw from the equal footing of race and sex discrimination in the 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). 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. 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, 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.” As 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...” 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. 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. 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. An important line of feminist
scholarship rejects a relative normativity approach to different bases of discrimination that suggests that racial discrimination is more egregious than sex discrimination, and questions the basis for this hierarchy.\textsuperscript{ccxcv}

The increasingly dominant understanding of the intersectionality of bases of marginalization\textsuperscript{ccxcvi} 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,”\textsuperscript{ccxcvii} confronting nonwhite women with multiple layers of disadvantage.\textsuperscript{ccxcviii} 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.\textsuperscript{ccxcix} Rather than being understood through the prism of an “oppression Olympics,”\textsuperscript{ccci} multiple forms of discrimination can more usefully be described as interlocking in international human rights law,\textsuperscript{cccc} 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.\textsuperscript{ccci} 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.” 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 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.” 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 Apartheid

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

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 protests—are compelling but do not receive nearly enough airtime. 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.” 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.” 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.\textsuperscript{cccxiii}

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.”\textsuperscript{cccxiv} 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.”\textsuperscript{cccxv}

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

\begin{quote}
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.\textsuperscript{cccxvi}
\end{quote}

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.”\textsuperscript{cccxvii} Some viewed Taliban policies as entirely alien: “This is not the culture of Afghanistan. This is the
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 issues, partly political.” 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.” 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, which views rights as culturally dependent rather than universal, and its more polite cousin, cultural sensitivity, 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. However, many 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.”

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
Many abuses considered entirely repugnant today, such as slavery and systematic racial discrimination, were justified by recourse to “traditional values.” 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 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. 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. 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.

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. 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. 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.\textsuperscript{cccxxxii}

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.”\textsuperscript{cccxxxii} 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 shows.\textsuperscript{cccxxxiv} As Fatiha Agag-Boudjahlat asks, “why should some women accept what others refuse for themselves and their daughters?”\textsuperscript{cccxxxv} 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.\textsuperscript{cccxxxvi}

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.\textsuperscript{cccxxxvii} 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 . . . .”\textsuperscript{cccxxxviii} 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.”\textsuperscript{cccxxxix} His successor, Ahmed Shaheed (a practicing Muslim from Maldives) also followed the same approach.\textsuperscript{cccxol}

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. 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.” Hence, “restrictions may be imposed on religious law and practice if they are necessary to protect women’s human rights and fundamental freedoms.”

Likewise, the CEDAW Committee,

[when 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.

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.

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. 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. 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. In the context of Taliban rule, the issue is a particularly harsh form of Islamist cultural politics, not Muslim culture per se. 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.” 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 reaffirm universality. 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.

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."

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

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

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. 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.
building blocks are contained in existing law, merely needing recognition and sufficient interpretive ambition. 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. 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 girls 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 Sports and the Convention on Apartheid in Sports should be applied to the Taliban’s ban on women and girls in athletics.

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.” 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. 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
Feminist Dissent

is not specifically enumerated in the text of the 1948 convention, nor are women a specified protected category.\textsuperscript{ccclxv}

While the re-interpretation here admittedly requires a bigger change in existing definitions than either of these examples, it can 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.\textsuperscript{ccclxv}

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.\textsuperscript{ccclxvi} 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…”\textsuperscript{ccclxvii}

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 existence\textsuperscript{ccclxviii} or to the CEDAW Convention, or as a stand-alone.\textsuperscript{ccclxix} This would take political will and the expending of political 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.”\textsuperscript{ccclxx} 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”**

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. 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. 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 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.”

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. 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 hegemons. 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.” 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.

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. 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.”

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. 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. In its 2021 resolution on Afghanistan, the Council reaffirmed 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 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. 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.”\textsuperscript{\textit{cccclxxxii}} 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.\textsuperscript{\textit{cccclxxxiii}} 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.”\textsuperscript{\textit{cccclxxxiv}}

Karima Bennoune is the Lewis M. Simes Professor of Law at the University of Michigan Law School in the United States. She served as the UN Special Rapporteur in the field of cultural rights from 2015-2021. Since 2018, she has been a member of the Board of Editors of the \textit{American Journal of International Law} (AJIL). Her book \textit{Your Fatwa Does Not Apply Here: Untold Stories from the Fight Against Muslim Fundamentalism}, published by W.W. Norton & Company in August 2013, addresses the work of people of Muslim heritage against extremism and terrorism. She has been on three missions to Afghanistan, visiting different regions of the country: in 1995, 2005 and 2011, and has worked closely with Afghan women human rights defenders for many years, including during the 2021 evacuations.

\textsuperscript{i} See, e.g., Recognition of Gender Apartheid in Afghanistan Justified - PeaceRep; and SPIA_NaheedRangita_PolicyBrief_07.pdf (princeton.edu).
\textsuperscript{ii} Translation of the book on “Gender Apartheid in Afghanistan” (aissonline.org).
\textsuperscript{iii} See End Gender Apartheid.
\textsuperscript{iv} Taliban repression of Afghan women is form of apartheid, says Nelson Mandela widow (telegraph.co.uk).
\textsuperscript{v} Iran’s proposed hijab law could amount to “gender apartheid”: UN experts | OHCHR.
\textsuperscript{vi} Id.
Feminist Dissent

vi For more information, see the gender apartheid tracker at: https://www.x.com/karimabennoune/status/1651277250438864896?s=20.

vii See End Gender Apartheid — Legal Brief.

viii The Taliban’s Gender Apartheid Policies Support Radicalization (justsecurity.org).


x Human Rights Council Adopts 16 Texts, Establishes a Fact-Finding Mission for Sudan and a Working Group on the Rights of Peasants | OHCHR

xi The Taliban’s Gender Apartheid Policies Support Radicalization (justsecurity.org).


xiii Afghan Women On Hunger Strike In Germany To Protest ‘Gender Apartheid’ (rferl.org)

xiv See End Gender Apartheid — Legal Brief.

xv Taliban must immediately release women human rights defenders, say UN experts | OHCHR.


xvii. 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, 5. Executive Document 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 preamble and article 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, 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 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), Report on the Law of Inclusion, U.N. Doc.

xviii. See infra notes 95–103 and accompanying text.


xxi. Hardliners Get Key Posts in New Taliban Government,


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


xxiv. For photos of these all-XY gatherings, involving more than 12 governments, as well as U.N. agencies and reputable aid organizations, see Heather Barr (@heatherbar1), Twitter (Oct. 5, 2021, 11:21 PM), https://twitter.com/heatherbar1/status/1445635293873205254?s=20 [https://perma.cc/H4UU-3LWA].


xxviii. 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 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.


xxx. Id. at 40 ¶ 4. The Draft Articles were adopted after first and second readings from 1955–96 and 1998–2001.


xxxiv. 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. Office of the High Commissioner for Human Rights, Commentary to the Declaration on the Right and
Feminist Dissent


xxviii. “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/CBS6-3V7G]. 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.


xlv. 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 Human Rights Quarterly, 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 article 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. Document 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. Document 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 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 American Journal of International Law 259 (2022).


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.

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.


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


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


Id.; Landis, supra note 43.

See discussion infra notes 245–250 and accompanying text.


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., Security Council Resolution 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).


Id. at 86–92.


Welsh & Spence, supra note 50, at 190.


For diverse views of this development, see Alex Boraine, Inside South Africa’s Truth and Reconciliation Commission (Sept. 27, 2021), https://www.justsecurity.org/78360/the-relay-race-of-defining-crimes-against-humanity-from-the-

Bassuoni, 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) (South Africa) (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).


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

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 Contemporary 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.

International Convention Against Apartheid in Sports, supra note 74, at pmbl.

“Apartheid Convention, supra note 54, “preamble”.

Id. art. II.

See discussion infra notes 111–163 and accompanying text.

Dugard, supra note 48, at 1; R.S. Clark, “The Crime of Apartheid,” in International Criminal Law: 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-95LV] (“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.”).

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

Stalls Pipeline," tried. Local human rights advocacy is important but insufficient. The one realistic possibility on the political horizon is a

U.N. Document


c.  See review of these norms infra notes 243–51.

ci.  See infra notes 240-290 and accompanying text.


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


cvi.  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. Damschrodt, "Enforcing International Law Through Non-Forcible Measures," in 269 Collected Courses Of The Hague Academy Of International Law 9 (1997); David C. Baluarte & Christian M. Devos, Open Society Foundation, From Judgment To Justice: Implementing International And Regional Human Rights Decisions (2010).

cvii.  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.


cxxxviii. 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/IDS_B_42_1_10_1111-1.1759-5436.2011.00195.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 Shaharzad 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).

Shaharzad 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 Shaharzad Akbar, supra note 2.
Feminist Dissent


cxlv. 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 Humanitarian Law: States’ Obligations When Withdrawing From Armed Conflict, 101 International Review Red Cross 923, 947 (2020).

cxlvi. Azizi, supra note 128.


cxlix. Bennoune, supra note 128, at 259.


clii. Id.

clv. Id.


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

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

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

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.


cxvi. 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.

cxvii. Zoom Interview with Kubra Balooch, supra note 144.


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

cxx. Hakim, supra note 25; 780,000 Afghan Children Without Shelter: Save The Children, TOLONews (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.

cxxi. Afghanistan Facing Famine, HUMAN RIGHTS. WATCH (Nov. 11, 2021), https://www.hrw.org/news/2021/11/11/afghanistan-facing-famine [https://perma.cc/3AQ-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.

cxxii. Zoom Interview with Kubra Balooch, supra note 144.

Feminist Dissent

cxcvii. AMNESTY INT’L, supra note 7.
cxcix. Id.
cl. Zoom Interview with Zarqa Yaftali, Executive Director, Women and Children Legal Research Foundation (Oct. 16, 2021).
ccli. Telephone Interview with Palwasha Hassan, Director, Afghan Women’s Education Center (Oct. 9, 2021).
cl. Id.
clii. “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.
cliii. Zoom Interview with Kubra Balooch, supra note 144.
cliiii. Zoom Interview with Zarqa Yaftali, supra note 166.
clv. Signal Interview with Zahra Sepehr, supra note 137.
clvi. Telephone Interview with Yalda Royan, supra note 164.
clvii. Zoom Interview with Zarqa Yaftali, supra note 166.
clviii. Id.
clix. Telephone Interview with Yalda Royan, supra note 164.
clx. Zoom Interview with Mobina Sai, Northern Regional Director, Nai Supporting Open Media in Afghanistan (Oct. 16, 2021).
clxi. Zoom Interview with Zarqa Yaftali, supra note 166.
clxii. Id.
clxiii. Telephone Interview with Mary Akrami, supra note 172.
clxv. Butcher, supra note 60, at 429, citing Namibia Opinion, supra note 42, para. 126.


ccxvii. Zoom Interview with Zubaida Akbar, supra note 131.


ccxviii. See supra text accompanying notes 60-64.


ccxx. 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 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://spcomreports.ohchr.org/TMResults Base/DownloadPublicCommunicationFile?gId=26763 [https://perma.cc/5SJL-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.

ccxxi. 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.

ccxxii. Löwstedt, supra note 90, at 89.


ccxxv. Löwstedt, supra note 90, at 82.

ccxxvi. Rashid, supra note 109, at 17–30. See infra text at notes 295-305.


ccxxviii. For example, from 1946 until the 2021 election of Hilary Charlesworth, only 3.7% of ICJ judges were female. Fionnuala Ni 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/RK78-SSGX].


ccxxxi. 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.

ccxxxii. Id. at 16, 22. For updates, see “Afghanistan,” International Criminal Court, https://www.icc-cpi.int/afghanistan [https://perma.cc/NKSH-TUY2] (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.

ccxxxiii. FIDH, supra note 217, at 16.

ccxxxiv. “Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, Following the Application for an Expedited Order Under Article 18(2) Seeking Authorisation to Resume Investigations in the Situation in

cxxxxv. Rome Statute, supra note 79, art. 7(2)(g).
cxxxxvi. Id. art. 7(2)(a).
cxxxxvii. Id. art. 7(2)(h).
cxxxxviii. See supra text accompanying notes 95-101.


Feminist Dissent

After the twentieth member state had ratified it, the Convention entered into force—faster than any previous human rights convention had. Ratification of 18 International Human Rights Treaties, U.N. Office of the High Commissioner for Human Rights, https://indicadores.ohchr.org/ [https://perma.cc/2FJC-BD3N]. 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.

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/579R-BP2P]. 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.

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 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), Report 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.
European Commission may take action to combat “discrimination based on sex, racial or ethnic origin, religion or belief,” A/74/10 (2019) at 146–147. This approach has been strongly criticized by Patricia Sellers, the former Special Advisor on Ntaganda case. Sellers stressed the way in which the International Law Commission’s approach perpetuated unacceptable gender to the former Prosecutor of the International Criminal Court, who cited the distinct approach of the ICC in the Human Rights Treaty Bodies,” 18 December 13, 2007, 2016 O.J. (C 202) 47.

Dimensions of Racial Discrimination

See Mayer, supra note 103, at 245–248.

cclxxxvii. International Law Commission, Report on the Work of Its Seventy-First Session, U.N. Document 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 gender bias in international law. Patricia Sellers, Jus Cogens: Redux, 116 American Journal of Internationa Law, 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 peremptory norms persists. . . . Apparently, freedom from gender discrimination would disrupt and dislodge the gender hierarchies still embedded in jus cogens.”)

cccx. Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-American Court of Human Rights (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 2013, https://www.unodc.org/res/jji/import/guide/judicial_decision_making_gender_protocol/judicial_decision_making_gender_protocol.pdf [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 Texas Journal of Women & Law 227 (2008).


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

ccxciv. 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.


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

c. This term was reportedly first used in Angela Y. Davis & Elizabeth Martinez, “Coalition Building Among People of Color,” UC Santa Cruz Centre of Cultural Studies (May 12, 1993), https://culturalstudies.ucsc.edu/inscriptions/volume-7/angela-y-davis-elizabeth-martinez/ [https://perma.cc/D9HS-7LPN] (“[T]he general idea is no competition of hierarchies should prevail.”).


cccci. 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/1472512731395973147?s=20 [https://perma.cc/R5U3-9P55]. These comments have been widely derided by Afghan human rights defenders on social media.


ccciv. Welsh & Spence, supra note 50, at 190.


cccvi. Afkhani, supra note 98, at 18.


cccx. Telephone Interview with Palwasha Hassan, supra note 167.

ccccx. Id.


cccxiii. Telephone Interview with Zarqa Yafatali, supra note 166.

cccxiv. Telephone Interview with Mary Akrami, supra note 172.

cccxv. Telephone Interview with Yalda Royan, supra note 164.

cccxvi. Telephone Interview with Zarqa Yafatali, supra note 166.

cccxvii. Telephone Interview with Razia Sayad, supra note 146.

cccxviii. Id.

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,” Open Democracy (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-Boudjahlait, Le grand Détournement: Féminisme, Tolérance, Racisme, Culture (2017).

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:

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.


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


Id.


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 Pensee Islamique Moderne (2018); Elham Manea, Women and Shari’a Law (2016); and Wassyla Tamzali, Une Femme en Colere (2009).

See Agag-Boudjahlait, supra note 308, at 86 (translated by the author).


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), Report 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.”). General Comment No. 28, supra note 246, ¶ 21.


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


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).


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

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.


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.


ccclxiii. 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.


ccclxvi. 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-ZWFO]. 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.

ccclxvii. Carpenter, supra note 352.


ccclxix. In contradistinction to other strategies explored here, such a bold step would bring into play Bunch’s third mechanism 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.

ccclxx. Zoom Interview with Zubaida Akbar, supra note 131.

ccclxxi. Mandela, supra note 41, at 139.

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

ccclxxiii. On complicity, see Ratner, supra note 9.


ccclxxvi. Gutéres, supra note 289.


Bennoune, supra note 108, at 264.

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 (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).

Mandela, supra note 41, at 139.