

THE CRIME OF GENDER APARTHEID AS CRIME AGAINST HUMANITY

To: The Assembly of States Parties to the International Criminal Court The Hague, The Netherlands

Secretariat of the Assembly of States Parties

International Criminal Court
Oude Waalsdorperweg 10
2597 AK The Hague
The Netherlands

T: +31 70 799 6500

E: asp@icc-cpi.int

Subject: Urgent Request for the Inclusion of Gender Apartheid as a Crime in the Rome Statute

Dear Members of the Assembly of States Parties,

Since 1999, C.I.S.D.A. has worked together with grassroot organizations in Afghanistan who for decades have developed important projects mainly supporting women and children .

In particular, C.I.S.D.A. cooperates with R.A.W.A., a lay and feminist political organization fighting for women's and human rights and for social justice in Afghanistan since 1977. R.A.W.A. has not only humanitarian goals, but it also works with Afghan women to make them aware of their rights and to build their political consciousness towards peace and democracy. They have been forced to work in hiding since the Taliban seized power in 2021.

In Italy CISDA has two fields of activities. It organizes fund raising to support humanitarian projects being developed in Afghanistan and it promotes public events where the voice of Afghan women who continue fighting against fundamentalism can be heard by an international audience.

On behalf of CISDA, we formally urge the Assembly of States Parties to consider the codification of gender apartheid as a crime against humanity under the Rome Statute. This crucial legal development is necessary to address the systematic and institutionalized oppression of individuals based on gender, which remains a pervasive and egregious violation of fundamental human rights.

The Rome Statute currently recognizes apartheid as a crime, but its definition is limited to racial discrimination. However, gender-based oppression has historically functioned in a similarly systematic and institutionalized manner, warranting its own explicit recognition within the framework of international justice.

The absence of gender apartheid as a distinct crime creates a significant legal gap that limits the ability of international institutions to effectively address regimes that systematically oppress individuals

based on gender. Current legal provisions under crimes against humanity, such as persecution or sexual and gender-based crimes, do not fully capture the extent and structure of institutionalized gender-based oppression. Recognizing gender apartheid as a crime would provide a clear legal framework to prosecute those responsible for these violations.

Gender apartheid manifests through deeply entrenched legal and social structures that exclude individuals from fundamental rights, such as education, employment, and political participation, solely based on gender. This is particularly evident in regimes such as the Taliban in Afghanistan, where women and girls are systematically denied their rights. Together with women, LGBTQAI+ individuals can be excluded from fundamental rights and must find equal protection in international law. The inclusion of gender apartheid in the Rome Statute would reinforce global efforts to combat institutionalized gender-based oppression and provide victims with a stronger basis for seeking justice.

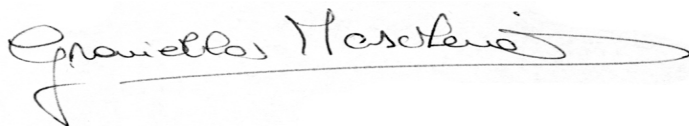
Explicitly recognizing gender apartheid as a crime would serve as a powerful deterrent to regimes and entities that seek to impose gender-based discrimination at an institutional level. It would send a clear message that the international community considers systematic gender oppression as serious as other forms of apartheid. Furthermore, it would enable the International Criminal Court (ICC) to investigate and prosecute perpetrators effectively, closing loopholes that currently allow impunity.

The Rome Statute must evolve to reflect the realities of modern human rights violations. Gender apartheid, as a systematic and institutionalized form of oppression, is no less severe than racial apartheid. Its explicit inclusion would enhance international legal accountability, provide stronger protections for victims, and reinforce the ICC's role in addressing grave human rights abuses. Recognizing gender apartheid as a crime against humanity is not only a legal necessity but also a moral imperative for the global pursuit of justice and equality.

It is of utmost importance that the Assembly of States Parties discuss the urgent need to include this crime in the Rome Statute. In this regard, we are pleased to share a reflection and proposal that CISDA has already submitted to the UN Sixth Committee.

We remain available for further dialogue and collaboration to support this endeavor.

Sincerely,



Graziella Mascheroni (President)
CISDA (Italian Committee Supporting Afghan Women)
Internet site : www.cisda.it

THE CRIME OF GENDER APARTHEID AS CRIME AGAINST HUMANITY

Proposal

Gender equality is, first and foremost, a human right. It implies that women, men, boys and girls of all classes and races participate as equals and have equal value.

From a legal standpoint, it is defined as the principle that all people, regardless of their gender, must have the same rights, duties, opportunities, and access to resources.

This principle is enshrined in various international conventions, including:

- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted by the United Nations General Assembly in 1979. CEDAW is considered one of the fundamental treaties for the protection and promotion of women's rights. Article 1 defines "discrimination against women" as any distinction, exclusion, or restriction based on sex that has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, regardless of their marital status, on the basis of equality with men, of human rights and fundamental freedoms in political, economic, social, cultural, civil, or any other field.
- The European Convention of Human Rights signed in Rome in 1950, where article 14 states the prohibition of discrimination based also on sex, "birth or any other condition" and secures the enjoyment of the rights and freedoms set forth in this Convention to every person without distinction.
- The Equal Remuneration Convention (ILO - Convention No. 100), adopted by the International Labour Organization (ILO) in 1951, which requires member states to ensure equal pay for work of equal value, without discrimination based on gender.

International conventions place a clear responsibility on States not only to legislate in favour of gender equality but also to adopt all necessary measures to eliminate de facto discrimination. This includes access to justice, the availability of effective remedies, and the possibility of obtaining adequate reparations and assurances of non-repetition.

Why is the codification of the crime of gender apartheid necessary?

The concept of "gender apartheid" is not yet codified in international law as a crime, and the legal recognition of said crime will address what is a major gap in international law.

The importance of recognizing and defining "gender apartheid" as a specific crime against humanity, distinct from the crime of apartheid enshrined in the Rome Statute, lies in several fundamental considerations related to the protection of human rights, international justice, and the fight against systematic discrimination.

The crime of apartheid, as defined in the Rome Statute of the International Criminal Court (article 7 (1) (j)), focuses on racial discrimination. However, the dynamics of gender-based discrimination have unique characteristics that require specific legal attention. Human rights violations based on gender, such as sexual violence, rape, denial of reproductive rights, and gender segregation, are not always adequately addressed under the simple notion of racial apartheid.

A crime of "gender apartheid" would recognize the extent and severity of gender-based discrimination, specifically addressing the systematic violations affecting girls, women and gender non-conforming individuals, in particular LGBTQIA+ people.

Incorporating "gender apartheid" into the corpus of crimes against humanity would strengthen the international legal framework, enabling more effective investigation and prosecution of crimes based on gender discrimination. It will increase efforts to combat institutionalised regimes of systematic oppression and domination imposed on grounds of gender. Indeed, the legal recognition would recognise the unique type of victimisation and expand opportunities for victims to seek justice and for international institutions to take actions against States, governments or entities that use and perpetuate such systems of oppression. Furthermore, it would create a legal precedent that could be used to build case law and provide means to address new forms of gender discrimination emerging in the contemporary world.

For instance, in Afghanistan, the historical context of gender discrimination and the continuation of oppressive practices under recent regimes illustrate how current actions are part of a prolonged system of gender apartheid.

Proposed definition for the crime of Gender Apartheid as a crime against humanity

"Gender apartheid means any act, policy, practice, or omission that, in a systematic and institutionalized manner, is committed by an individual, a state, organization, entity or group, with the purpose or effect of establishing, maintaining, or perpetuating the domination of one gender over another, through institutionalized segregation, oppression, or discrimination in political, economic, social, cultural, educational, professional or any other area of public and private life".

These acts include, but are not limited to:

- a) The enactment of laws or policies that deny, limit, or reduce the fundamental rights of individuals based on their gender;
- b) The use of physical or psychological violence, arbitrary detention, or any other form of coercion to impose the control of one gender over another;
- c) The systematic segregation and limitation of access to resources, education, employment, or political participation based on gender;
- d) The promotion of ideologies or practices that justify or legitimize the domination and/or oppression of one gender over another".

Explanation of the Proposal

The definition of gender apartheid in the proposed formula—acts, policies, or practices aimed at perpetuating the domination of one gender over another—is consistent with the legal understanding of apartheid as defined by the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) and expanded upon in the Rome Statute (1998), which includes the crime of apartheid as a crime against humanity. These legal frameworks define apartheid as institutionalized domination and systematic oppression, typically based on race. The proposed gender-based expansion of this principle is justified, as gender discrimination has historically been a pervasive and institutionalized form of oppression.

Key elements in this definition are institutionalized segregation, oppression, and discrimination, which have been core features of historical apartheid regimes. In this context, gender apartheid reflects policies that systematically exclude individuals based on gender from full participation in social, economic, and political life, reinforcing structures of dominance.

The listed acts—such as discriminatory laws, the use of violence to impose control, and systematic segregation in access to resources—correspond to similar practices recognized in racial apartheid systems. Each of these practices can be seen in gender-discriminatory regimes, both historically and presently, such as the Taliban regime in Afghanistan, where women have been denied access to education, employment, and freedom of movement. Said actions, when committed in a systematic and institutionalized manner, bear striking resemblances to the practices of apartheid.

The proposal emphasizes that said acts may be committed not only by State actors but also by non-state actors, such as organized groups, which reflects a growing recognition in international law of the role that non-state actors can play in committing and perpetuating egregious violations of human rights. The inclusion of omissions as a form of criminal conduct—where authorities fail to act to prevent or punish gender-based discrimination or violence—further broadens the scope of accountability. This aligns with the jurisprudence from cases like *Opuz v. Turkey* (2009) and *Talpis v. Italy* (2017), where the European Court of Human Rights found that a State's failure to protect women from domestic violence violated human rights.

The concept of gender apartheid can be situated within the broader framework of intersectionality, which examines how various forms of oppression—such as race, class, and gender—interact and compound each other. Legal scholars such as Catharine MacKinnon have long argued that the oppression of women is systematic and should be understood as a form of political subordination akin to apartheid. In this sense, the proposed formula builds on feminist legal theory, which views gender discrimination as a form of social and legal stratification.

Moreover, the proposal aligns with international legal trends toward broadening the scope of crimes against humanity to include gender-based crimes. For instance, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) have recognized sexual violence as constituting both crimes against humanity and acts of genocide when

systematically used as a tool of oppression. These precedents support the inclusion of systematic gender-based discrimination as a form of apartheid.

1. SUBJECTS OF THE CRIME

• Active Subject

The inclusion of both individuals and collective entities, such as States and organized groups, aligns with developments in international criminal law, which recognises the liability of individuals for crimes against humanity, while also recognizing the role that institutions or entities may play in enabling and enforcing such crimes. This dual recognition allows for accountability across both individual and systematic levels. In gender apartheid, both political regimes and cultural or religious groups can exert significant control over societal norms, and this proposal allows for a nuanced approach to prosecuting crimes committed by such entities.

• Passive Subject

The definition of the passive subject as being any group of people identified by their gender, including women and gender non-conforming individuals, reflects modern understandings of gender as a social construct. This is particularly important as it expands the protections beyond the traditional binary of men and women, addressing discrimination and oppression faced by the LGBTQIA+ community, which has been systematically oppressed in various contexts, from restrictive laws on gender expression to violent attacks.

2. CONDUCT

The conduct refers to deliberate actions, policies, practices, or omissions that institutionalize and perpetuate systematic discrimination and oppression based on gender. The conduct should aim at creating, maintaining, or strengthening a system of domination and/or oppression of one gender over another.

a) Element of the conduct

The conduct should be part of a continuous system of discrimination and/or oppression. Such conduct can manifest through the following acts:

1. Discriminatory Laws and Policies:

- o Laws restricting civil and political rights, such as denying women or other gender groups the right to vote, run for office, or participate in public life. For example, laws that prevent women or gender non-conforming individuals from holding certain positions or entering specific professions.
- o Policies limiting access to education and training, including educational practices that discriminate based on gender, preventing women or gender non-conforming individuals from accessing education or specific fields of study.

- o Laws enforcing dress codes or behaviour norms based on gender, such as requiring women to cover parts of their bodies or prohibiting them from driving or traveling without a male escort.

The adoption of discriminatory laws and policies serve as clear examples of systematic and institutionalized forms of gender apartheid, aimed at controlling, segregating, and oppressing individuals based on gender. These laws and policies often reflect deep-seated societal norms and values, further entrenching gender inequalities in both public and private life. In particular,

2. Discriminatory Economic and Labour Practices:

- o Practices limiting access to employment and economic resources, such as wage gaps between genders for equal work or the systematic exclusion of women or gender non-conforming individuals from specific industries.
- o Laws and practices preventing women or other gender groups from owning, inheriting, or controlling property and economic resources.
- o Gender-based labour segregation, which relegates a gender to lower-paying or less-respected jobs.

3. Social and Cultural Control:

- o Enforcement of traditional gender roles, promoting norms that confine women or other gender groups to domestic roles, limiting their autonomy and self-determination. This could include social pressure for forced marriage or motherhood.
- o Gender-based violence as a tool of control, such as tolerance or promotion of domestic violence, female genital mutilation, or violent "correction" of gender non-conforming individuals.

Gender-based violence is a powerful tool used to enforce gender hierarchies and control women and gender non-conforming individuals. This violence can take many forms, including domestic violence, sexual assault, female genital mutilation (FGM), and so-called "corrective" violence against those who do not conform to traditional gender roles. In many cases, these acts of violence are tolerated, normalized, or even promoted within society, further entrenching the subordination of one gender over another. This type of violence is not just an expression of individual aggression but is often condoned by societal norms or practices that view women and gender minorities as inferior or in need of control. It represents a severe form of gender apartheid, where violence is systematically used to enforce gender subordination and deny individuals their right to safety, autonomy, and equality.

4. Systemic Exclusion from Rights and Services:

- o Denial of access to essential healthcare services, including reproductive health, sexually transmitted disease prevention, and mental health services.

- o Exclusion from justice systems that deny women or gender non-conforming individuals the opportunity to seek legal redress for crimes or rights violations, such as courts not recognizing their testimony or applying stricter proof standards for gender-based crimes.
- o Deprivation of personal freedom, including restrictions on movement, political organization, and participation in protests.

Systemic exclusion from essential rights and services is a key pillar of gender apartheid, where individuals—particularly women and gender non-conforming persons—are deliberately denied access to critical services and legal protections. These exclusions reinforce and sustain gender inequality by making it difficult or impossible for marginalized groups to live freely, access healthcare, seek justice, and participate fully in society. The following examples show three crucial areas where systemic exclusion manifests, namely healthcare, justice systems, and personal freedom.

5. Propaganda and Hate Speech:

- o Promotion of ideologies that assert gender inferiority through media, propaganda, or political rhetoric, justifying discrimination, domination and /or oppression and spreading harmful stereotypes.
- o Normalization of gender discrimination, domination and/or oppression through education, popular culture, or official statements from political or religious leaders.

Propaganda and hate speech are powerful tools used to sustain gender apartheid by promoting ideologies that justify the subordination of one gender to another. Through the deliberate dissemination of harmful stereotypes, these tactics reinforce societal norms that legitimize gender-based discrimination and oppression. Such ideologies are often embedded in media, political rhetoric, education systems, and popular culture, fostering an environment where inequality is normalized and even celebrated. Propaganda and hate speech maintain gender apartheid through the promotion of gender inferiority and the normalization of gender discrimination.

b) Forms of conduct

- Direct imposition: the conduct may be directly imposed through legal or physical threat or force, such as enforcing discriminatory laws or using violence to uphold gender norms.
- Institutional support or tolerance: the lack of action to repress discriminatory practices or policies may also integrate the conduct when a state, government or institution indirectly support gender discrimination, domination and/or oppression.
- Systemic control: the conduct can be part of a systemic control framework that includes not only laws and policies but also selective enforcement, media control, and education to maintain gender superiority, domination and/or oppression.

c) Impact of the conduct

The goal of gender apartheid is to maintain and reinforce a gender hierarchy that perpetuates inequality and oppression so that individuals of a certain gender remain disadvantaged in all aspects of social, political, and economic life. The effects of the acts include:

- Creation of a system of chronic structural inequality, causing psychological, physical, economic, and social harm to the oppressed group.
- Perpetuation of gender stereotypes, which justify subordination and discrimination, causing a long-term cycle of disempowerment and exclusion.

The conduct of gender apartheid has profound and far-reaching consequences on society, with its ultimate aim being the reinforcement and maintenance of a rigid gender hierarchy. This system ensures that certain genders, typically women and gender non-conforming individuals, remain disadvantaged in all areas of life—socially, politically, and economically. The impacts of this conduct are devastating, entrenching inequality and perpetuating cycles of oppression and disempowerment. In particular:

1. Chronic Structural Inequality

Gender apartheid creates a system of chronic structural inequality that manifests in various forms of harm—psychological, physical, economic, and social. This structural inequality is woven into the fabric of society, ensuring that women and gender minorities face systemic barriers to opportunities and resources, while the dominant gender group (typically men) benefits from sustained privilege and power.

- **Psychological Harm:** The constant reinforcement of inferiority and subordination causes long-term psychological damage.
- **Physical Harm:** Gender apartheid also directly results in physical harm, particularly through the use of violence to enforce gender norms and maintain control. This can include domestic violence, honour killings, forced marriages, female genital mutilation, and physical punishment for gender non-conformity.
- **Economic Harm:** Economic disempowerment is a critical component of gender apartheid, where women and gender minorities are systematically denied access to education, employment, and economic resources.
- **Social Harm:** Gender apartheid fosters exclusion from public life, with women and gender minorities often barred from political participation, decision-making roles, and leadership positions. This exclusion leads to the marginalization of entire groups from societal progress and development.

2. Long-Term Cycle of Disempowerment and Exclusion

The conduct of gender apartheid establishes a long-term cycle of disempowerment and exclusion, in which marginalized genders are systematically denied opportunities to escape oppression. Each

generation inherits and perpetuates the inequality and stereotypes of the previous one, reinforcing the idea that the current gender hierarchy is natural or unchangeable.

- **Intergenerational Impact:** Gender apartheid affects not only those living under it but also future generations.
- **Social and Economic Development:** The long-term exclusion of women and gender minorities from critical roles in society also impedes overall social and economic development.. Studies have shown that increasing gender equality leads to greater economic prosperity, as more individuals are able to participate fully in the workforce and contribute to societal advancement.

3. SUBJECTIVE ELEMENT: INTENT AND AWARENESS

a) Mens Rea (Intent)

The subjective element of the crime of gender apartheid goes beyond mere intent to discriminate. It involves an awareness and acceptance of the gravity and systematic nature of the discrimination, with the intention to maintain or strengthen the subordination of a group of people based on their gender. This means a conscious will to dominate, control, or subjugate a specific group based on gender. Typically, this involves maintaining a social and political structure that perpetuates the superiority of one gender—often male over female—through laws, policies, or practices that place one gender in a subordinated or marginalized position, depriving them of fundamental rights and opportunities.

Perpetrators must be aware that their actions or policies will result in discrimination, domination or oppression, and suffering of a group of people based on gender. Even if it is not the primary intent, the perpetrators must accept the resulting discrimination and inequality as inevitable or acceptable.

Therefore, mens rea, or subjective element, involves a specific awareness and acceptance of the gravity and systemic nature of the discrimination, with the intention to maintain or reinforce the subordination of a gender-based group.

b) Proof of the Subjective Element

To establish the subjective element in a judicial context, various forms of evidence can be used, including:

- **Official documentation:** Laws, regulations, decrees, and official policies that explicitly or implicitly demonstrate the intention to perpetuate gender discrimination. These documents can serve as direct evidence of the intent to create and/or maintain a discriminatory system.
- **Public statements:** Speeches, declarations, or other communicative acts by the perpetrators that express the intention to sustain a system of gender supremacy. These statements can highlight the perpetrator's awareness of the effects of their actions and their deliberate intent to continue such practices.

- Institutional practices: Evidence that state institutions or other organizations consistently implement discriminatory practices against a specific gender group. This can include records of how policies are applied in practice, demonstrating a systematic approach to gender-based exclusion and inequality.

This proposal is submitted by C.I.S.D.A. (Italian Committee Sustaining Afgani Women) and it has been drafted with the help of the legal experts :

Ms Laura Guercio, Lawyer and Professor, currently SG Universities Network for Children in Armed Conflict, Member of the Council of the European Law Institute, OSCE Expert