

# FACT SHEET NO. 4: RESPONSES TO ARGUMENTS AGAINST USING THE GENDER APARTHEID APPROACH

Counterargument 1: **Race discrimination and sex discrimination are treated differently by international law, so the apartheid paradigm<sup>1</sup> does not and should not apply.**

Rebuttal: *Sex discrimination is no less central to international law than race discrimination and should be addressed on an equal footing.*

- Foundational instruments of international law, including the U.N. Charter and the International Bill of Human Rights, all **prohibit race and sex discrimination** in unequivocal, co-equal and non-derogable terms.
- Many **human rights instruments specifically guarantee women's equality**, thereby highlighting the importance of ending sex discrimination, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).
- The UN Committee on Economic, Social and Cultural Rights explained 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.”
- The prohibition of discrimination on the basis of race is currently singled out as a jus cogens norm. However, highly regarded international bodies like the Inter-American Court of Human Rights also **recognize the guarantee of equality on all protected bases, including sex and gender, as a jus cogens norm**. The failure of the male-dominated International Law Commission to recognize the prohibition of discrimination against women specifically as a jus cogens norm has been widely criticized by international lawyers for “marginaliz[ing] gender and devalu[ing] the interests and experiences of women [and] girls.”<sup>2</sup>

Counterargument 2: **There is no explicit textual support in international law for the gender apartheid approach.**

Rebuttal: *The building blocks of the gender apartheid approach are contained in international law. Existing standards on apartheid can and should be interpreted in a manner appropriate to the 21st century and applied to gender apartheid.*

- **Interpreting existing apartheid standards to include gender apartheid** requires simply substituting “gender” or “sex” for “race” in relevant definitions of apartheid, an approach that has been supported by a prominent Black South African legal scholar.<sup>3</sup>

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1 This fact sheet is drawn from Karima Bennoune, *The International Obligation to Counter Gender Apartheid in Afghanistan*, 54 Colum. Hum. Rts. L. Rev. 1 (2022); Karima Bennoune, *The Best Way to Mark the Anniversary of Taliban Takeover? Launch a Global Campaign Against Gender Apartheid in Afghanistan*, Just Security; Dari translation available at: <https://www.justsecurity.org/82673/82673-the-best-way-to-mark-the-anniversary-of-taliban-takeover-launch-a-global-campaign-against-gender-apartheid-in-afghanistan-dari/>.

2 Mary H. Hansel, “*Magic*” or *Smoke and Mirrors? The Gendered Illusion of Jus Cogens*, in *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* 471, 490 (Dire Tladi ed., 2021); see also Patricia Sellers, *Jus Cogens: Redux*, 116 AJIL Unbound 281 (2022).

3 Penelope Andrews, *From Cape Town To Kabul: Rethinking Strategies For Pursuing Women's Human Rights* (2012).

- **Doing so mirrors the way that international bodies have interpreted other fundamental norms so as to be more reflective of women’s experience** of violations of international law. These include the recognition of rape as a means of committing genocide in the Akayesu case before the International Criminal Tribunal for Rwanda, and the **CEDAW committee’s recognition** that violence against women is a form of discrimination prohibited by the CEDAW convention notwithstanding that the convention never mentions violence.
- Current International Court of Justice judge Hilary Charlesworth and Professor Christine Chinkin have argued: “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.”
- The Rome Statute of the ICC requires in **Article 21(3) that the ICC’s** application of relevant standards, which would include the Statute’s definition of apartheid, “must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender...”
- **UN experts have been using the concept of gender apartheid** to describe Taliban rule, starting in 1999 with Abdelfatah Amor of Tunisia, then Special Rapporteur on the elimination of intolerance and all forms of discrimination based on religion or belief.<sup>4</sup>
- A 2021 press release on the Taliban’s ban on women and girls in sports issued by UN human rights experts asserted that the response to it should reflect the spirit of international standards prohibiting apartheid in sports. The experts stressed that, “[a]cquiescence to gender apartheid is complicity with gross abuses of human rights.”<sup>5</sup>
- More recently, the **Secretary General, António Guterres** and the **Director General of UN Women** have used the term gender apartheid.<sup>6</sup> Additionally, Richard Bennett, **Special Rapporteur on the situation of human rights in Afghanistan**, argued before the Human Rights Council in March 2023 that “the cumulative effect of the [Taliban] restrictions on women and girls has a devastating long-term impact on the whole population and it is tantamount to gender apartheid.”<sup>7</sup>

### Counterargument 3: **Gender apartheid is a cultural issue, not a political issue like racial apartheid.**

Rebuttal: *As is clear from the ICJ’s jurisprudence on Southern Africa, neither culture nor religion offers an alibi for apartheid. Human rights law makè’s clear that neither cultural nor religious claims excuse discrimination against women.*

- Apologists for racial apartheid in Southern Africa attempted to make **religious justifications for apartheid** which were treated as **irrelevant** by the International Court of Justice and the UN system. The same approach should be applied to attempts to excuse gender apartheid on claimed cultural or religious grounds.

4 Taliban Have Created “Apartheid System” for Women: UN Report, Agence France Presse (Mar. 12, 1999).

5 Press Release, U.N. Off. of the High Comm’r, Afghanistan: UN Experts Deplore Women Sports Ban, Call for Vigorous Response (Sept. 14, 2021).

6 Press Release, Security Council, Progress in Security Council’s Women, Peace, Security Agenda Lacking, as Sexual Violence, Insufficient Protection, Absence in Peace Processes Continues, U.N. Press Release SC/15221 (Mar. 7, 2023); Press Release, UN Sec’y Gen., Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security (Jan. 12, 2023).

7 U.N. Human Rights Council, 13th Meeting – 52nd Regular Session of the Human Rights Council, at 2:11:03–2:12:04 (Mar. 6, 2023), <https://media.un.org/en/asset/k1j/k1jz92gh9l>.

8 See General Comment No. 28, supra note 246, ¶ 21; Heiner Bielefeldt (Special Rapporteur on freedom of religion or belief), Elimination of All Forms of Religious Intolerance, ¶ 30, U.N. Doc. A/68/290 (Aug. 7, 2013).

- Like racial apartheid, the systematic subordination and **exclusion of women is highly political**, and results from political choices made by governments and de facto rulers to practice or acquiesce to discrimination against women.
- As UN human rights experts and international standards have repeatedly stated, cultural rights **cannot be a justification** for violations of women's human rights.<sup>9</sup> Instead, cultural rights should be respected within the broader universal human rights framework which guarantees women's equality.
- States from all regions have committed in the Vienna Declaration that "[t]he **universal nature** of these [human] rights and freedoms is **beyond question.**"<sup>10</sup>
- Under international law, 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 determining which cultural practices** to discontinue because they no longer comport with our understanding of human dignity.<sup>11</sup>
- It is "**inconceivable**"<sup>12</sup> that many discriminatory practices against women claimed to stem from culture "would be justified if they were predicated upon another protected classification such as race."<sup>13</sup>
- **Cultural relativism is a grave threat to women's human rights**, incompatible with achieving the SDG goal of gender equality by 2030 and has been rejected by international law.
- **Afghanistan is a culturally diverse country.** Afghan women human rights defenders, from all backgrounds including Pashtun, strongly dispute the notion that the Taliban represent Afghan cultural or religious beliefs.

#### Counterargument 4: **Apartheid is a term used for, and limited to, the South African experience in the 20th century.**

Rebuttal: *No, apartheid is a concept with wider relevance.*

- A narrow 20th century view of apartheid does not incorporate today's broad understanding of subjugation and governance based on systematic discrimination. The **definitions of apartheid** in the Rome Statute (adopted in 1998 *after* the end of racial apartheid in South Africa) or by the International Law Commission do not require a link to settler colonialism.
- Any **21st century approach to the concept of apartheid must be appropriate** to an era which has committed to ending discrimination against women by a specific target date: 2030.
- Viewing apartheid restrictively **delegitimizes women's experience** of subordination as not being as severe as other forms and treats women as not having been "born free and equal"<sup>14</sup> in dignity and rights. Human rights advocates have applied the apartheid framework to a myriad of other contexts.<sup>15</sup>

9 Bennoune, *supra* note 1, at 75; Courtney Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter*, 35 Colum. J. Transnat'l. L. 271, 347-48 (1997); Farida Shaheed (Special Rapporteur in the field of cultural rights) ¶ 3, U.N. Doc. A/67/287 (Aug. 10, 2012).

10 Vienna Declaration and Programme of Action, ¶ 5 (Adopted 25 June 1993).

11 Shaheed, *supra* note 9.

12 *Id.*

13 *Id.*

14 G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 1 (Dec. 10, 1948).

15 See, e.g., Hum. Rts. Watch, *Caste Discrimination: A Global Concern*, 6, HRW 13/3(G) (Aug. 29, 2001).



Counterargument 5: **Gender apartheid is not needed because international law explicitly criminalizes gender persecution.**

Rebuttal: *The gender apartheid framework is an important complement to efforts to hold accountable perpetrators of gender persecution. It offers a more complete description of country situations like Taliban-controlled Afghanistan and constrains the policy choices of other actors as well.*

- International law prohibits both racial persecution and racial apartheid. It **should do the same** with regard to gender persecution and gender apartheid.
- New efforts to **prosecute gender persecution** at the International Criminal Court are laudable and an **important complement** to using the gender apartheid framework.
- The persecution approach alone **does not adequately implicate the institutionalized and ideological nature of the abuses** in question or reflect on the responsibilities of other international actors to respond appropriately. As gender persecution experts have noted, **gender apartheid describes the macro framework within which persecution takes place.** All available tools need to be used to tackle these interwoven abuses.
- The **definition of persecution helpfully stresses the severity and the discriminatory motivation** that characterizes Taliban policy toward women. According to Article 7(2)(g) of the Rome Statute, “[p]ersecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” Like any crime against humanity, gender persecution occurs within the context of a widespread or systematic attack against a civilian population when there is a “policy to commit such attack.”<sup>16</sup>
- However, **the definition of apartheid in Article 7(2)(h) much more fully captures situations like Taliban Afghanistan** if one substitutes “gender” for “race” in the following passage: “inhumane acts . . . committed in the context of an institutionalized regime of systematic oppression and domination by one [gender] group over any other [gender] group or groups and committed with the intention of maintaining that regime.” This underscores that **domination of women** is a core element of the group’s ideology and a key prong of its governing platform.
- Hence, the apartheid framework recognizes that **positive change will only be possible with a consistent, concerted, principled international response.** That response is **constrained in a comprehensive manner by the apartheid framework**, which is not the case with persecution.

**For further information, see Fact Sheet No. 1, “What is Gender Apartheid?”, Fact Sheet No. 2, “The Added Value of the Gender Apartheid Approach”, and Fact Sheet No. 3 “Gender Apartheid in Afghanistan.”**

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<sup>16</sup> Rome Statute, Art. 7(2)(a).

