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Restoring Meaning, Ensuring Justice: The Definition of Apartheid in the Crimes Against Humanity Treaty

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COVER: PHOTOS

TOP: Women protest against Taliban in the center of Kabul in December 2021. (published with permission)

MIDDLE: Palestinian protesters shout slogans during a demonstration in Jerusalem's Old City on July 20, 2017, against new Israeli security measures at the Al-Aqsa mosque compound, which include metal detectors and cameras, following an attack that killed two Israeli policemen the previous week. (Ahmad Gharabli / AFP via Getty Images)

BOTTOM: Black South African protesters take part in the civil disobedience campaign by occupying places for white people in public transports in Johannesburg, circa July 1952. (International News Photos (INP) / AFP via Getty Images)

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I.
Executive Summary

This Is Not South Africa's Definition: The Draft CAH Treaty's Compromised Apartheid Provision, and the Case for Revision

With the second Preparatory Committee session set for April 2027 and the diplomatic conference opening in 2028, governments are preparing to settle the terms of the draft Crimes Against Humanity (CAH) treaty. In the first round of proposals released in June 2026, several states called for revising the apartheid provision. States' agreements in the sessions ahead will determine how international law defines the crime of apartheid for decades to come. This report is written for that decision.

Three major struggles for justice have surfaced in the debate on the draft CAH treaty's apartheid definition. Half a century after the Apartheid Convention's adoption, no one has been held accountable for the crime of apartheid. Victims in South Africa and Namibia still struggle for recognition, justice, and transformative reparations. In addition, the compounded racist and patriarchal subjugation black[1] women endured has never been legally recognized, despite South African feminists' sustained efforts to raise that history in the Truth and Reconciliation process. In Afghanistan, since their 2021 return, the Taliban has erased women, girls, and LGBTQI+ persons from public life through edict after edict, enforced by imprisonment and violence. Afghan women have led the global campaign to have that system named for what it is, an institutionalized regime of systematic gender oppression and domination, a form of apartheid. Meanwhile, the Palestinian people have sought formal recognition of apartheid under international criminal law for decades. The International Court of Justice's 2024 advisory opinion, which found Israel's practices in breach of the human rights law prohibition on racial segregation and apartheid, stopped short of naming the crime against humanity of apartheid.[2]

The apartheid provision in the Draft Articles on Prevention and Punishment of Crimes against Humanity (CAH treaty) is where those struggles converge. The draft currently defines apartheid as "inhumane acts … committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."[3] That definition comes not from the 1973 Apartheid Convention,[4] the instrument attributable to efforts by Global South and Non-Aligned Movement states who supported the international campaign to eradicate apartheid. It comes from the 1998 Rome Statute of the International Criminal Court (ICC),[5] which rewrote it. The Convention and the Statute are the only places where international law defines

1 The practice of capitalizing the term "black", as a marker of shared identity, history, and respect, has become widespread in the United States and, to a lesser degree, the United Kingdom. It is not the prevailing convention across the Global South, however, including in the South African and Namibian contexts examined here, where the term is more often written in lowercase. Because this report addresses apartheid as a global crime it adopts the lowercase form as the consistent choice across the settings it treats.

2 The Court adjudicates state responsibility, not individual guilt. A state may itself be responsible for conduct defined in a criminal convention. *Bosnia and Herzegovina v. Serbia and Montenegro* (note 65 below), ¶¶ 166, 180–182 (finding that state responsibility for genocide may be established without any individual having been convicted). State responsibility includes the duty to investigate and prosecute the individuals who commit such crimes, a duty the Court has itself enforced. In *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 2012 I.C.J. 422, ¶¶ 88, 117 (July 20), the Court found Senegal in breach of the Convention against Torture for failing to investigate the crimes of Hissène Habré, and it unanimously required Senegal, without further delay, to submit Habré's case to its competent authorities for prosecution if it did not extradite him (¶ 122, operative clause (6)). The Court could accordingly have characterized Israel's practices as apartheid and addressed states' duties respecting the crime without exceeding its function, as members of the bench recognized. *ICJ, Palestine Advisory Opinion* (note 98 below) (Tladi, J., decl.), ¶ 36; *id.* (Brant, J., decl.), ¶ 7.

3 International Law Commission, Draft Articles on Prevention and Punishment of Crimes Against Humanity, U.N. Doc. A/74/10 (2019) (hereinafter draft CAH treaty).

4 International Convention on the Suppression and Punishment of the Crime of Apartheid, November 30, 1973, 1015 UNTS 243 (hereinafter Apartheid Convention).

5 Rome Statute of the International Criminal Court (ICC), July 17, 1998, 2187 UNTS 90 (hereinafter Rome Statute).

the crime.[6] The draft treaty carries forward the Statute's definition, not the Convention's. This is not South Africa's definition.

The changes were not cosmetic. The Statute severed the definition from the colonial context the Apartheid Convention captured in its preamble. It imposed an "institutionalized regime" requirement the Convention never contained. It raised the bar for the acts that qualify. The Convention's enumerated list explicitly recognizes denials of, *inter alia*, education, work, and freedom of movement as inhumane[7] acts of apartheid. The Statute traded that list for an open category subject to a new severity threshold.

The Statute's provision also retained the Convention's "racial group" language, a term whose drafters, like the Genocide Convention's before them, understood as defined by hereditary characteristics. That outdated understanding is now invoked to argue that apartheid requires groups set apart by inherent biological difference and that victims subordinated through racist political, legal, and ideological structures fall outside the definition. The Palestinian people are among those victims. The Statute also confines apartheid to racial oppression, excluding the institutionalized gender oppression and domination the Taliban imposes in Afghanistan and the compounded subjugation black women endured under apartheid in South Africa and Namibia. The CAH treaty reproduces the Rome Statute's text unchanged, restoring nothing of what was lost and omitting the Statute's own safeguard, Article 21(3), which aligns interpretation with international human rights law.

By 1995, when intergovernmental negotiations on the Rome Statute began, human rights law had moved decisively away from treating race and gender as biologically grounded categories.[8] The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and its treaty body had established that race is a social construct rather than a fixed biological classification.[9] The Beijing Conference, convened that same year, anchored gender in social context for the U.N. system as a whole.[10] While the Rome Statute includes persecution's understanding of race as a social construct and

6 Apartheid is also listed among the grave breaches of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 85(4)(c), June 8, 1977, 1125 UNTS 3, which names but does not define the crime, and condemned in ICERD (note 9 below), art. 3, a human rights obligation rather than a criminal definition.

7 The Apartheid Convention's "inhuman acts" and the Rome Statute's "inhumane acts" reflect two drafting lineages rather than any difference in meaning. The Convention was adopted after the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, November 26, 1968, 754 UNTS 73. The Apartheid Convention's preamble cited that earlier Convention for the proposition that "inhuman acts resulting from the policy of apartheid" are crimes against humanity, and for the humanitarian law usage of "inhuman treatment." The Rome Statute follows the Nuremberg formula of "other inhumane acts," (Charter of the International Military Tribunal, August 8, 1945, art. 6(c), 82 UNTS 279). The term was carried into a predecessor draft of the Rome Statute, (International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, art. 18, in Yearbook of the International Law Commission 1996, vol. 2, pt. 2) and into Statute itself. (Rome Statute art. 7(1)(k)). Article 7(2)(h) defines apartheid as "inhumane acts of a character similar to those referred to in paragraph 1." No tribunal has attached consequence to the distinction between inhuman and inhumane acts. This report quotes each instrument in its own terms and uses "inhumane" in its own voice.

8 See, e.g., UNESCO, Declaration on Race and Racial Prejudice, November 27, 1978, art. 1 (affirming that all human beings belong to a single species and rejecting racial hierarchy).

9 International Convention on the Elimination of All Forms of Racial Discrimination, December 21, 1965, 660 UNTS 195 (hereinafter ICERD); Committee on the Elimination of Racial Discrimination (hereinafter CERD Committee), General Recommendation No. 8, Membership of Racial or Ethnic Groups Based on Self-Identification, U.N. Doc. A/45/18, at 79 (1990); General Recommendation No. 14, Definition of Discrimination (Art. 1, Para. 1), ¶ 1, U.N. Doc. A/48/18, at 114 (1993); General Recommendation No. 29, Descent (Art. 1, Para. 1), pmbl. and ¶ 1, UN Doc. A/57/18, at 111 (2002); General Recommendation No. 35, Combating Racist Hate Speech, ¶ 6, U.N. Doc. CERD/C/GC/35 (September 26, 2013).

10 Beijing Declaration and Platform for Action, Fourth World Conference on Women, U.N. Doc. A/CONF.177/20 (September 15, 1995) (treating gender roles and relations as socially shaped throughout its critical areas of concern).

extends a congruent understanding to gender,[11] the apartheid provision's "racial group" language was retained without examination.

Article 21(3) is one of the Rome Statute's safeguards against its own outdated language. The provision ensures its terms are read consistently with internationally recognized human rights. It could help align the term "racial groups" and "gender groups," if added, with their contemporary understandings. It would also help prosecutors bring the Apartheid Convention's listed violations more squarely within the provision's "inhumane acts" language. This would especially occur where they cumulatively charge persecution, as explained below. The draft CAH treaty omits such a provision. Without it, every compromise the definition maintains may be locked in place.

Ironically, apartheid is now arguably harder to establish as a criminal matter than genocide. The obstacle is not the definition read as Article 21(3) requires but the racial group language read without that safeguard. That misreading revives the language's outdated biological framing to exclude the Palestinian people and other victims. The definition also provides no basis for recognizing gender oppression – neither the institutionalized domination Afghan women, girls, and LGBTQI+ persons endure under the Taliban today nor the compounded oppression black South African and Namibian women experienced under apartheid.

Taken together, these are the marks of a provision that has drifted from its historical underpinnings. When South Africa and the states of the Global South insisted that apartheid be included in the Rome Statute, they sought to shape the provision as the crime was understood by the Apartheid Convention drafters. Gender went unnamed not because it fell outside that understanding but because the gendered workings of apartheid were not yet recognized for what they were. As Part One shows, recognizing gender today returns the crime to an aspect of its own history. The Rome Statute's provision is instead a narrowed version of the Apartheid Convention's definition and further reflects a narrowing of the contemporary understanding of how discrimination works. The draft CAH treaty now repeats these flaws.

Part One of this report discusses the five problems the draft definition reproduces. Namely, the draft omits recognition of the crime's colonial foundations. It conditions the crime of apartheid on an "institutionalized regime" and maintains the outdated "racial groups" language. It sets a new threshold for the inhumane acts that qualify. Finally, the definition contains no recognition of gender oppression. The draft carries each of these defects into a treaty that lacks an interpretive provision akin to Article 21(3), the safeguard that could temper them. Part One traces each problem to its source, following the definition from the Apartheid Convention's negotiations through the Rome Statute's revisions.

Part One also shows the twisted outcomes outdated language can license. The grant by the administration of U.S. President Donald Trump of expedited refugee status to white Afrikaners claiming racial persecution, while nearly all other refugee admissions remained suspended, previews the danger that a

11 The Statute defines gender as referring to "the two sexes, male and female, within the context of society." Rome Statute, art. 7(3). That formulation was a compromise, and its two clauses did different work. The reference to the two sexes preserves a biological framing, while the qualifier situating them within the context of society established that gender is socially constructed. Read together, as the Statute requires, the definition yields a contemporary and inclusive understanding of gender. ICC Office of the Prosecutor, Policy on the Crime of Gender Persecution (December 7, 2022). In the two decades that followed, the social understanding has not merely prevailed over the biological one. It has absorbed it, as international law has come to treat discrimination based on sex as itself socially constructed. That is why the International Law Commission omitted the gender definition from the draft CAH treaty in 2019. Draft CAH treaty (note 3 above), commentary to art. 2, ¶¶ 41–42 (explaining the Commission's decision not to retain the Rome Statute's understanding of gender). That progress settles what the term means. It does not change how the term operates. In the Statute gender is a ground of persecution under article 7(1)(h), a reason victims are targeted, not a category of group membership such as under the crimes of apartheid and genocide. The distinction between grounds and groups runs through this report. See also Lisa Davis and Danny Bradley, "Victory for Women and LGBTIQ Rights under International Criminal Law: Gender in the Draft Crimes Against Humanity Treaty," in *Gender and International Criminal Law*, ed. Indira Rosenthal, Valerie Oosterveld, and Susana SáCouto (Oxford: Oxford University Press, 2022); Lisa Davis, "This Is How We Won a Historic Victory for Women's and LGBTIQ Rights in International Law," *openDemocracy*, June 26, 2019, https://www.opendemocracy.net/en/this-is-how-we-won-a-historic-victory-for-womens-and-lgbtiq-rights-in-international-law/.

biological framing of racial groups can play in policy. Specifically, a hereditary or biological reading of "racial group" can serve the historically dominant as readily as the historically oppressed. Part One also recounts how apartheid in South Africa and Namibia imposed racist and patriarchal domination as one mutually reinforcing system, with its compounded weight falling on black women. That history makes recognizing gender alongside race a restoration of the crime's history. It explains why adding gender is a return to the crime's history rather than a departure from it.

A crime's reach is fixed by the text that codifies it and the decisions that apply that text. Because no court has yet completed an apartheid prosecution,[12] the crime has produced no jurisprudence of its own. The bodies that have assessed it, the U.N. accountability mechanisms and the International Court of Justice, have referenced the genocide tribunals' doctrine on "racial groups." Part One, Section 5 traces that across two decades and arrives at current implications, as apartheid is reportedly included in the arrest warrant applications at the International Criminal Court for Israeli Finance Minister Bezalel Smotrich and National Security Minister Itamar Ben-Gvir.

Part Two evaluates four proposed apartheid formulations against five criteria that draw on the crime's history and contemporary law to rectify five problems in the draft definition. Each proposal advances something the draft now lacks, and each falls short in some way. None address the "institutionalized regime" language, so this report discusses solutions to the draft provision's other weaknesses.

The first proposal adds gender groups by creating a second, standalone crime of gender apartheid, and the second adds them to the existing definition in a phrase that separates gender group oppression from racial group analysis. They would each recognize gender oppression but would fracture the crime in a way international criminal law has never accepted, obscuring compounded discrimination based on race and gender and inviting divergent jurisprudence over nearly identical elements. Both also preserve the fixed-group architecture that has been invoked to argue for excluding victims from recognition. The third proposal replaces "groups" with "grounds" and unites the two grounds of race and gender in one crime. Doing so aligns the definition with ICERD. It would encourage courts to recognize intersectional oppression based on both race and gender and to analyze the apartheid regime's discriminatory intent, rather than to examine whether its victims possess the biological criteria of membership in a fixed group. It satisfies every criterion except the restoration of the crime's colonial roots.

The fourth proposal is compound. It completes the set by adding "colonial discrimination"[13] alongside the third proposal's race and gender grounds, by recognizing colonialism's harms in the treaty's preamble, or by doing both. The ground would keep the definition open to forms of discrimination characteristic of colonial contexts without requiring proof of a colonial history in any given case. Discrimination associated with colonialism is condemned across international instruments, from ICERD's preamble to the Durban Declaration. However, no instrument defines colonial discrimination as an element of a crime, and colonialism itself has yet to be codified as a crime in binding international law.[14] An operative ground would therefore ask courts to

12 But see *S v. Mfalapitsa (South Africa High Court, Gauteng Division, Johannesburg, April 14, 2025) (confirming, in the COSAS Four matter, the first charges anywhere of apartheid as a crime against humanity, brought against two apartheid-era Security Branch officers, and holding the crime prosecutable in South African courts under customary international law without prescription; the trial remains pending).*

13 The term allows examination of other forms of discrimination through which colonial regimes sort and stigmatize people in relation to their goal of colonial domination.

14 See, e.g., ICERD (note 9 above), pmbl. (condemning colonialism and all practices of segregation and discrimination associated therewith); Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV), December 14, 1960; Durban Declaration and Programme of Action, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, ¶ 14, U.N. Doc. A/CONF.189/12 (September 8, 2001) (recognizing that colonialism has led to racism and racial discrimination); African Charter on Human and Peoples' Rights, pmbl., June 27, 1981, 1520 UNTS 217 (undertaking to eliminate colonialism from Africa).

give content to a term the law has not yet supplied, though it would reattach apartheid to its roots. Preambular recognition may be more effective and avoid the definitional problem. Because a preamble informs the interpretation of the entire treaty without creating elements courts must define, it would bear on every crime against humanity, not on apartheid alone. Thus, preambular recognition would be a substantive advance.

The Article 21(3) provision must return as well. The American Branch of the International Law Association (ABILA) has proposed the inclusion of an interpretive clause, but in its current form it lists international human rights law, international humanitarian law, and international criminal law as interpretive sources of equal standing. In a criminal instrument that equality is illusory. The principle of legality binds courts to the narrowest supportable construction because criminal statutes must be construed strictly. An unranked list could give the restrictive, hereditary readings of "racial group" and "gender group" the force of the treaty's own text if those terms are in the treaty. This would be a result potentially more dangerous than adopting no clause at all. The clause should either add a rule of priority, directing that where these bodies of law diverge, the human rights reading governs, or it should simply restore the language of Article 21(3) itself.

Twenty-five years after the Apartheid Convention codified apartheid as a crime against humanity, the Rome Statute revised the definition. A generation on, the draft CAH treaty negotiations are the first multilateral opportunity to revise it once more. This time the revision must restore the definition's recognition of apartheid's colonialist foundations, modernize its treatment of race, recognize gender and intersectional oppression, adopt the interpretive safeguard that anchors the crime to human rights law, and ensure recognition for all of apartheid's victims. The recommendations that close this report set out specific changes that states should make to the draft CAH treaty.

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II.

Part One: How the Draft CAH Treaty Reproduces a Compromised Definition of Apartheid

1. *From the Apartheid Convention to the Rome Statute:* What Rome Changed and What It Kept

In November 1973, the U.N. General Assembly adopted the Apartheid Convention by 91 votes to four.[15] Voting against were Portugal, South Africa, the United Kingdom, and the United States, precisely the states most closely aligned with, or most reluctant to condemn, the southern African colonial and apartheid order. Newly independent states of the Global South, working through the Non-Aligned Movement, led the drafting. These states understood apartheid not as an isolated phenomenon but as part of a broader system of colonial domination and racist hierarchy. The treaty made this explicit. It called for an end "to colonialism and all practices of segregation and discrimination associated therewith" in its preamble.[16] For the drafters, apartheid was a system of racist domination constituted and enforced through economic exclusion, political repression, movement restrictions, labor controls, educational segregation, violence, and systematic dehumanization. The Convention's definition named those dimensions directly. In addition to physical violence, acts such as denying rights to work, education, free movement, and freedom of opinion, expression, peaceful assembly, and association can constitute apartheid under the Convention.[17] It did not require these acts be proven to be "of similar character" to other crimes against humanity. And it did not require proof of an "institutionalized regime" as a separate element.

A quarter-century later at Rome, that definition was revised under different conditions for inclusion in the founding statute of the International Criminal Court. Apartheid appeared in the Preparatory Committee's draft Statute only as a bracketed option within the war crimes provisions, aligning with the grave breach framing recognized in Additional Protocol I to the Geneva Conventions.[18] It was initially excluded from the enumerated crimes against humanity. South Africa and the other Southern African Development Community (SADC) states had to win apartheid's inclusion as a crime against humanity before any question of definition could arise.[19] That effort drew initial reluctance from some delegates and support among Global South delegates. Some argued that a separate provision was superfluous since any widespread or systematic policy of apartheid would already fall within persecution on racial grounds.[20] Others answered that apartheid would in any event be captured as an "other inhumane act," so naming it directly cost nothing and clarified a great deal.[21]

15 U.N. General Assembly, Resolution 3068 (XXVIII), November 30, 1973, GAOR, 28th Session, Supplement No. 30, U.N. Doc. A/9030 (1973), 75 (adopted by 91 votes to 4, with 26 abstentions; Portugal, South Africa, the United Kingdom, and the United States voting against).

16 Apartheid Convention, pmbl. ¶ 3.

17 Apartheid Convention, art. II(c).

18 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, U.N. Doc. A/CONF.183/2/Add.1, at 20, 26 (April 14, 1998); Protocol I (note 6 above), art. 85(4)(c).

19 Carola Lingaas, "The Crime Against Humanity of Apartheid in a Post-Apartheid World," *Oslo Law Review 2 (2015): 92–93 (hereinafter Lingaas, "Crime Against Humanity of Apartheid"); Herman von Hebel and Darryl Robinson, "Crimes Within the Jurisdiction of the Court," in The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results, ed. Roy S. Lee (The Hague: Kluwer Law International, 1999), 102.*

20 Lingaas, "Crime Against Humanity of Apartheid," 92–93; see Rome Statute, art. 7(1)(h).

21 Lingaas, "Crime Against Humanity of Apartheid," 92–93; see Rome Statute, art. 7(1)(k) (listing among the enumerated crimes against humanity "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health").

At the eleventh hour, delegates accepted the proposal to make apartheid a distinct crime against humanity.[22]

The debate then shifted to the precise formulation, resolved through informal consultations alongside delegations such as that of the United States, which in practice had more leverage than those originally recommending its inclusion as a crime. While the Drafting Committee finalizing the text included some Global South states, it also included powerful states with histories of colonialism or records of failure to meaningfully pressure South Africa's apartheid regime. France, Germany, Switzerland, the United Kingdom, and the United States sat on the committee alongside South Africa and others – a composition that shaped the dynamics under which the definition was changed.[23] The U.S. delegation, for example, sought to narrow the provision in order to limit the ICC's potential jurisdiction over crimes committed by its own nationals, including the practices of white supremacist organizations operating within its borders.[24] The introduction of the "institutionalized regime" requirement reflected, at least in part, those concerns.

Two structural changes emerged whose full implications were not apparent in 1998. First, the Apartheid Convention's colonial framing was removed, and with it the historical and analytical backdrop through which the crime's core components had been understood. Second, the Convention's enumerated list of inhumane acts, which included legislative and administrative measures (such as denying a group's rights to work, education, and freedom of movement, opinion, peaceful assembly and association), was replaced with a requirement that qualifying acts be of a character similar to the other crimes against humanity. Under the Rome Statute, such deprivations must be comparable to listed crimes against humanity. Thus, the "similar character" list is weighted toward acts such as murder, torture, and sexual violence. The persecution charge can satisfy that threshold, especially when read through Article 21(3). Thus, while prosecutors can utilize that cumulative charge, it would be more ideal if they could charge apartheid alone to reach all conduct the Apartheid Convention intended.

Why did South Africa accept a definition that departed so significantly from the Convention that its liberation movement had championed? The record does not answer with certainty, but the political logic of the negotiations suggests explanations that deserve a sympathetic reading. South Africa's negotiators had to fight simply to have apartheid included, and that fight may have left little room to contest the terms of a definition whose structural implications were not yet visible. Their understanding of the crime was also shaped by the South African experience itself, in which an institutionalized regime requirement would never have posed a practical obstacle since the system was embodied in the machinery of the state. And they could reasonably have relied on Article 21(3) to soften any restrictive effects over time. What no negotiator could have anticipated was that a future treaty would reproduce the Rome Statute's definition a quarter-century later while stripping out Article 21(3), the safeguard that helped make those compromises workable. The draft CAH treaty does precisely that.

The stakes are raised by the standing the new treaty will carry. Its institutional shape is not yet settled. It may establish its own treaty body; it may rely on

22 Lingaas, "Crime Against Humanity of Apartheid," 92–93; von Hebel and Robinson, "Crimes Within the Jurisdiction of the Court" (note 19 above), 102. By resolving these debates in favor of inclusion, the international community confirmed that persecution and apartheid are distinct crimes against humanity.

23 Cameroon, China, Dominican Republic, France, Germany, Ghana, India, Jamaica, Lebanon, Mexico, Morocco, Philippines, Poland, Republic of Korea, Russian Federation, Slovenia, South Africa, Spain, Sudan, Switzerland, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, and Venezuela were members of the Drafting Committee, with M. Cherif Bassiouni of Egypt as its Chair. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, vol. I, U.N. Doc. A/CONF.183/13 (Vol. I) (1998), Final Act ¶ 19, at 69.

24 Timothy L. H. McCormack, "Crimes Against Humanity," in *The Permanent International Criminal Court: Legal and Policy Issues*, ed. Dominic McGoldrick, Peter Rowe, and Eric Donnelly (Oxford: Hart Publishing, 2004), 200–201 (hereinafter McCormack, "Crimes Against Humanity").

existing courts, including the International Court of Justice for interstate disputes; or it may enter the domestic penal codes of states that enact its crimes into national law, as the draft articles currently contemplate.[25] In each of these futures the definition does the same work. As the most authoritative codification of the crime since the Rome Statute, and as a product of the International Law Commission and a diplomatic conference, it would be treated as strong evidence of the customary definition of apartheid. It would thus inform how courts read the crime whether or not the governments in which they operate ratify the treaty.

Domestic incorporation raises the stakes. National legislatures and courts are the least likely to have the international law grounding needed to read the definition against its human rights context. A flaw embedded in treaty text travels into every penal code that adopts it. The principle of legality then locks the flaw in place since courts must construe the enacted text strictly as written. Section 8 traces that dynamic in full. Once the omissions are fixed in a legal instrument of that standing, they become difficult to dislodge.

South Africa and the Global South coalition that led codification of the crime of apartheid accepted what was achievable in 1998. What is achievable in this era is different, and what is necessary is clearer. The following sections examine each of the draft apartheid definition's shortcomings. Section 2 addresses the erasure of apartheid's colonial context. To restore what was lost, it discusses either introducing a ground to capture discrimination driving colonial contexts or preambular recognition. Section 3 examines how the institutionalized regime requirement narrowed the crime's reach. Section 4 addresses the outdated racial groups language and the interpretive risks it promotes, illustrated by the Trump administration's Afrikaner refugee policy. Section 5 traces how international courts and experts have read that language, and how genocide's group model took hold, leaving apartheid harder to prove than the more demanding crime. Section 6 examines the elevated inhumane acts threshold and provides a pathway to recover the Convention's breadth. Section 7 explains how gender belongs in the definition and why the definition should include it as a ground rather than a group. Section 8 addresses the treaty's missing interpretive safeguard, an equivalent of Rome Statute Article 21(3), and evaluates an application and interpretation clause proposed to supply it. Part Two distills these findings into five criteria and applies them to the four apartheid definitions states are considering.

2. *Colonial Context as Interpretive Framework:* What the Rome Statute Erased and Why It Matters

Apartheid operated historically as an instrument of colonial domination, the mechanism through which that domination was organized and enforced in southern Africa. Rather than a series of discriminatory acts, apartheid is a system in which law, administration, and everyday governance are used to maintain one group's control over another. The Apartheid Convention's inclusion of colonial context supplied the lens through which the crime's core components – the purpose of domination, the systematic character of the oppression, and the range of inhumane acts – took their meaning. The removal of apartheid's connection to colonialism in the Rome Statute set aside the framework within which elements of the crime had been understood under the Convention.

That connection lived in the Convention's preamble. The Rome Statute's drafters left the Statute's preamble silent on the colonial history from which apartheid emerged, and in which crimes against humanity also occurred. Reasons for omitting colonialism do not appear in the *travaux préparatoires*.

25 Draft CAH treaty (note 3 above), art. 6(1)–(2) (requiring each State to "take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law").

Drafters may simply have overlooked it. Any suggestion that preambular recognition would have limited the Statute's universality or confined the crime to colonial contexts fails. It would have done neither. It never confined the Apartheid Convention. States understood the Convention's prohibition to reach systematic racist oppression and domination wherever it arose, colonial in origin or not. The Convention's colonial references were not limits on the crime's scope, and they were not relics. They were interpretive tools, anchoring the crime's elements in concrete, historically legible structures. They still do that interpretive work today, illuminating modern apartheid even where it does not arise from a colonial context. Omitting the recognition made the Statute no more universal than the Convention already was. It only cost the crime its anchor. The draft CAH treaty repeats that omission.

Including the term "colonial" would acknowledge the enduring harms that continue to shape contemporary forms of structural discrimination underlying discriminatory crimes. This understanding is reflected in regional and international jurisprudence and principles. The Special Jurisdiction for Peace in Colombia, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have recognized that discrimination against Afro-descendant and Indigenous peoples and communities is historically rooted in colonial structures.[26] Similarly, the African Charter on Human and Peoples' Rights acknowledges the structural and historical dimensions of discrimination including its roots in colonialism.[27] The European Parliament has recognized that racism in Europe is shaped by the legacies of colonialism and slavery.[28] More recently, the ICC Prosecutor's policies have recognized that racial, ethnic, and gender discrimination can be shaped by legacies of colonialism and slavery.[29]

Colonial and apartheid systems organized racial and gender hierarchies together, an intersection central to Section 7, which discusses bringing gender into the definition. Recognizing and codifying these connections creates an opportunity to bridge conversations that have often developed in parallel, including efforts to address the legacies of colonialism and movements for gender equality. It aligns with international commitments such as the Durban Declaration and the Apartheid Convention's preamble by acknowledging how colonial legacies continue to shape discriminatory systems today.[30] This grounding can support the aims of African governments, for whom the colonial history is recent. It can also support the goals of European and other governments that have championed gender equality while confronting the colonial histories that continue to underlie global inequalities.

26 See, e.g., Jurisdicción Especial para la Paz, Sala de Reconocimiento de Verdad, de Responsabilidad, y de Determinación de los Hechos y Conductas, Auto No. 03, Caso 02, ¶¶ 3198 ,1481 ,1477 ,1429 ,1428 ,911 ,414 ,413 (July 5, 2023) (finding persecution based on race, gender, and ethnicity for crimes committed against Indigenous and Afro-descendant peoples, and recognizing the discrimination against those peoples as grounded in legacies of slavery and colonialism); Inter-American Commission on Human Rights, Press Release No. 216/20, "IACHR Calls on the States of the Region to Eliminate All Forms of Racial Discrimination, Promote Cultural Change and Adopt Comprehensive Reparation Measures for People of Afro-Descendant," September 12, 2020 (reaffirming that ethnic-racial discrimination in the Americas cannot be understood apart from "colonial domination and slavery" and the structural racism they produced); see also, *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-American Court of Human Rights (Ser. C) No. 270, ¶¶ 87, 315–317 (November 20, 2013) (recognizing the structural deprivation and acute vulnerability of the region's predominantly Afro-descendant communities); Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-American Court of Human Rights (Ser. C) No. 146, ¶ 73(1) (March 29, 2006) (finding that the Chaco lands were sold through the London Stock Exchange in the late nineteenth century while their indigenous inhabitants were kept in ignorance).*

27 African Charter on Human and Peoples' Rights (note 14 above), pmbl. (pledging to eliminate colonialism, neo-colonialism, and apartheid and situating rights in the historical traditions and struggles of African peoples).

28 E.g., European Parliament, Resolution of June 19, 2020, on the Anti-Racism Protests Following the Death of George Floyd, P9_TA(2020)0173 (recognizing that racism and discrimination in Europe are rooted in the legacies of colonialism and the transatlantic slave trade).

29 ICC Office of the Prosecutor, Policy on Slavery Crimes, ¶¶ 94, 96 (December 2024) ("the Office will investigate slavery crimes using anti-colonial, anti-racist … approaches"); ICC Office of the Prosecutor, Policy on the Crime of Gender Persecution (note 11 above), ¶ 91 ("discriminatory gender, ethnic and racial constructs and criteria shaped by colonialism and slavery").

30 Durban Declaration and Programme of Action (note 14 above), ¶ 14. The Durban Declaration further recognizes that racial discrimination can intersect with gender, producing distinct harms for women and girls. The Committee on the Elimination of Racial Discrimination has similarly recognized that forms of racial discrimination have roots in colonialism and has acknowledged its gendered dimensions. See CERD Committee, General Recommendation No. 34, Racial Discrimination Against People of African Descent, ¶ 6, U.N. Doc. CERD/C/GC/34 (2011); CERD Committee, General Recommendation No. 25, Gender-Related Dimensions of Racial Discrimination, U.N. Doc. A/55/18, annex V, at 152 (2000).

The cost of omitting colonialism is most visible in the treatment of the inhumane acts that make up apartheid. The Convention's drafters recognized that apartheid operates not only through violence but also through the sustained denial of fundamental human rights embedded in ordinary legal and administrative structures. Its Article II included discriminatory deprivations of labor rights and education access, denial of the right to leave and return, and expropriation of property among the qualifying acts. The Rome Statute replaced that list with the similar character requirement explained in further detail in Section 6, *Higher Threshold for Inhumane Acts*. The two changes compound each other. Colonial governance is where the historical record most clearly demonstrates that bureaucratic, legally mediated control can be domination as severe as overt violence. Without that interpretive anchor, the similar character requirement is more easily read to favor conduct that mirrors murder, torture, and sexual violence. This leaves the administrative mechanisms through which apartheid is organized, the denials of education, work, and movement among them, harder to bring within the definition's reach.

An equally consequential error would be to make colonial context a required element of apartheid, without which the crime could not be charged. This would introduce a threshold absent from the Convention and would be difficult to reconcile with the prohibition's development. States have condemned apartheid as a form of institutionalized racist oppression and domination prohibited everywhere. Decades of General Assembly and Security Council practice,[31] the International Law Commission's identification of the prohibition of apartheid as a peremptory norm,[32] and its invocation by 24 states before the International Court of Justice[33] reflect a broadly shared conviction on that point. Limiting apartheid to colonial contexts would exclude contemporary systems that do not fit a colonial mold and would mark a regression from the universality the international community deliberately established.

For the Palestinian people, a colonial threshold could harm more than it could help. Framing apartheid as a colonial crime may appear to strengthen the Palestinian claim, given the settler colonialism underlying Israel's occupation, of which apartheid is a feature, but in practice, it would make recognition contingent on first establishing colonialism as a legal threshold, a contested and politically charged question, before the elements of apartheid could be assessed. States or tribunals that reject the colonial characterization could rely on that threshold to deny recognition regardless of whether an institutionalized regime of systematic oppression and domination is otherwise established. Prosecuting the crime is more straightforward when apartheid is recognized as a universal crime provable on its own elements, with colonialism available as supporting evidence rather than as a prerequisite.

The answer is not to make colonialism a threshold but to restore its recognition and its interpretive framework. Colonialism should be reflected in the CAH treaty because it is a documented source of the very conduct the treaty addresses. That recognition is not confined to apartheid. Enforced disappearance, extermination, enslavement, sexual violence, deportation, and persecution, for example, were organized and sustained through systems of colonial domination across continents and generations.[34] The history that gives apartheid's elements their meaning informs the entire treaty. Reflecting that history does not narrow the crimes or tie them to a colonial

31 Miles Jackson, "The Definition of Apartheid in Customary International Law and the International Convention on the Elimination of All Forms of Racial Discrimination," International and Comparative Law Quarterly 71 (2022): 831 (surveying decades of General Assembly and Security Council resolutions condemning apartheid as unlawful and demonstrating the breadth of state practice underlying the customary prohibition).

32 International Law Commission, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens), Conclusion 23 and annex (e), in Report of the International Law Commission on the Work of Its Seventy-Third Session, U.N. GAOR, 77th Sess., Supp. No. 10, U.N. Doc. A/77/10, at 16, 89 (2022).

33 See sources cited in note 181 below (collecting and surveying the written submissions in the 2024 advisory proceedings that invoked the prohibition of apartheid).

34 See sources cited in notes 29 and 30 above and notes 36 and 37 below (documenting the organization and legitimation of these crimes through colonial systems of domination).

setting. It equips courts to recognize structures through which systematic domination has operated, wherever it arises. Whether the treaty should include that recognition through an operative ground in the apartheid definition, or through preambular language, is the question Part Two takes up as the fourth definition proposed.

Where the goal is to criminalize colonialism as such, separate codification will be required, and the political ground is being prepared for this. In December 2024 the General Assembly adopted a resolution reaffirming its long-held commitment to eradicate colonialism in all its forms.[35] In March 2026 it recognized the transatlantic slave trade as the gravest crime against humanity, explicitly linking slavery and colonialism.[36] Within the treaty negotiations, African states and others have proposed adding colonialism as a standalone crime. In February 2026 the Assembly of the African Union, representing 55 states whose support is essential to the treaty's success, adopted a decision recognizing slavery, deportation, and colonialism as crimes against humanity.[37] The international community is treating colonial crimes as an active subject of legal development, and the treaty negotiations are taking place against that backdrop.

3. *The Institutionalized Regime:* A Threshold the Apartheid Convention Never Required and Whom It Shelters

The Rome Statute added an "institutionalized regime" to apartheid´s definition, an element the Apartheid Convention never required. The Convention asks a single question, whether the acts were committed, in the words of Article II, "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." It does not require a separate showing that such a system already exists as an independent legal element. This logic is sound. Proof of purpose is proof of system. A perpetrator acting to maintain racist domination must be operating within a structure of control since one cannot maintain what does not exist. A perpetrator acting to establish such domination is building that structure. Laws, policies, and patterns of conduct establish the systematic character of the oppression, and the accused's own conduct within that system demonstrates the required purpose.

The Rome Statute, on the other hand, asks whether inhumane acts were committed "in the context of an institutionalized regime of systematic oppression and domination *and* with the intention of maintaining that regime." While "in the context of" on its face could capture acts both "establishing" and "maintaining," this could also be interpreted as asking two questions in sequence. Does an institutionalized regime of systematic oppression and domination exist? And did the accused intend to maintain it? This reading would require that the regime be proven as a preexisting condition before a court examines why the accused acted. The evidence needed would likely be the same as that required under the Convention. The purpose inquiry, however (the question of why the accused acted), must first clear a classification gate in the Rome Statute, namely whether the surrounding context sufficiently qualifies as a preexisting institutionalized regime.

South Africa and its supporters did not appear to object at Rome to the requirement that apartheid involve an "institutionalized regime." This is likely because their understanding of the crime was shaped by the South African

35 U.N. General Assembly, Resolution 79/115, Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples: Eradicating Colonialism in All Its Forms and Manifestations, December 4, 2024.

36 Declaration of the Trafficking of Enslaved Africans and Racialized Chattel Enslavement of Africans as the Gravest Crime Against Humanity, U.N. GAOR, 80th Sess., 75th plen. mtg., U.N. Doc. A/80/L.48, ¶¶ 2, 5 and pmbl. ¶¶ 7, 14 (March 25, 2026).

37 Assembly of the African Union, Decision on the Qualification of Slavery, Deportation and Colonization as Crimes Against Humanity and Genocide Against the Peoples of Africa, 39th Ordinary Session, Assembly/AU/Dec.953(XXXIX), ¶ 6 (February 14–15, 2026); see also Assembly of the African Union, 38th Ordinary Session, Assembly/AU/Dec.934(XXXVIII) (February 16, 2025) (first classifying slavery, deportation, and colonization as crimes against humanity and genocide against the peoples of Africa).

experience, recognized as among the most formally institutionalized racist orders. Apartheid-era statutes and practices arbitrarily classified individuals and distributed privilege or oppression by race. They demolished residential areas, imposed forced removals, restricted movement, removed labor protections, mandated segregation in public life, and structured educational and economic inequality in law. The reach of the legislation extended into nearly every domain of life, from land ownership and marriage to labor, movement, and political expression, across over a hundred statutes enacted over decades.[38] In any prosecution of South African apartheid, establishing an institutionalized regime would be straightforward because the system was embodied in the machinery of the state. Delegations may not have anticipated that the same requirement could raise the bar in the other contexts the provision was meant to address. These include systems of racist oppression that are less formalized, dispersed across many legal and administrative practices, or not organized within a single coherent body of law.

The origin of the change was political. As noted above, the U.S. delegation pressed for a narrowing of the apartheid text with its own citizens' exposure in view, including white supremacist organizations operating within its borders.[39] Its impacts are visible if one considers how this change could operate in practice.

Consider first a nonstate actor. While the legacy of its racist policies and practices endures, the United States today has no formal, legally institutionalized regime of racial domination comparable to apartheid South Africa. It has no pass laws,[40] no Group Areas Act,[41] no legislative architecture of racial separation backed by direct state power. A white supremacist organization, however extreme its ideology and however violent its conduct, may not itself constitute an institutionalized regime and may not operate within one in a formal sense. On a formal reading, an institutionalized regime presupposes governing authority and control embedded in institutions, which such organizations lack. Under the Rome Statute's structure, a court may not find the institutional threshold satisfied no matter how clear the perpetrator's purpose of establishing or maintaining racist domination. Contrast that with the Convention's structure, where the purpose inquiry proceeds on the evidence. Rather than ask whether domination was already embedded in governance, a court can simply weigh whether the acts were committed to establish or maintain it.

Consider next the broader architecture that has replaced formal segregation in the United States in the decades since the civil rights era, a system of facially race-neutral laws whose cumulative effect maintains racial hierarchy without acknowledging race. In 2013, *Shelby County v. Holder* disabled the Voting Rights Act's preclearance mechanism, which had required states with documented histories of denying voting rights based on race to obtain federal approval before changing their voting laws.[42] States responded with a wave

38 See South African History Online, "Apartheid Legislation 1850s–1970s," https://www.sahistory.org.za/article/apartheid-legislation-1850s-1970s (cataloguing the apartheid statutes); Suppression of Communism Act 44 of 1950 (South Africa); Terrorism Act 83 of 1967 (South Africa) (authorizing detention without trial). See also South African History Online, "Dorothy Nomzansi Nyembe," https://sahistory.org.za/people/dorothy-nomzansi-nyembe (detained in 1968 and sentenced in 1969 to fifteen years' imprisonment, making her South Africa's longest-serving woman political prisoner); Monica McCausland, "An Analysis of the Imprisonment and Detainment Treatment of Winnie Madikizela-Mandela," South African History Online, https://sahistory.org.za/archive/analysis-imprisonment-and-detainment-treatment-winnie-madikizela-mandela-monica-mccausland (detained under the Terrorism Act in 1969 and held for 491 days, seventeen months of them in solitary confinement); Ruth First, *117 Days: An Account of Confinement and Interrogation under the South African Ninety-Day Detention Law (London: Penguin, 1965).*

39 McCormack, "Crimes Against Humanity" (note 24 above), 200–201. Such organizations have in certain times and places enjoyed state support and impunity. An example of evidence of modern-era state enforcement of racist oppression is the presence of white supremacist organizations within U.S. police forces, a long-running problem that has continued in recent years. See generally Mike German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement (New York: Brennan Center for Justice, 2020) (documenting explicit racist and white supremacist affiliations within U.S. law enforcement, the FBI's own 2006 warning of white supremacist infiltration of police agencies, and the insufficiency of the governmental response).*

40 Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952 (South Africa).

41 Group Areas Act 41 of 1950 (South Africa).

42 *Shelby County v. Holder, 570 U.S. 529 (2013).*

of measures, from strict identification requirements to polling closures and registration restrictions, whose racially disparate effects are documented but largely unreachable in the courts under prevailing intent standards.[43] Combined with felony disenfranchisement, exclusionary zoning, property-tax school funding, and related mechanisms, the result is what Michelle Alexander has characterized as a system of racial control that replicates the functional outcomes of formal segregation through formally neutral means.[44] Under the Apartheid Convention's purpose-based standard, a prosecutor could ask whether this combination of laws and practices serves the purpose of maintaining racist domination and systematic oppression. Cumulative effect, disparate impact, historical continuity, and legislative history would all bear on the answer alongside other proof of intent. The same inquiry could reach the conduct of white supremacist organizations in the United States, asking whether their acts are committed for that purpose and therefore constitute acts of apartheid. Under the Rome Statute, the defense holds a powerful structural argument. There is no formal racial classification, no unified statutory code, and each policy has its own race-neutral justification. Were the United States a state party to the Rome Statute, the "institutionalized regime" threshold would likely foreclose an apartheid charge for such conduct before any inquiry into its purpose began.

The same threshold could be argued to shelter corporate and private actors who contribute to racial domination without themselves constituting a regime. Mining companies whose labor practices sustain a racially stratified and exploited workforce, real estate interests that enforce residential segregation through private contract, and financial institutions whose lending practices perpetuate racial wealth gaps with roots in formal apartheid all could benefit from the requirement of an institutionalized regime. Under the Convention's formulation, conduct committed for the purpose of maintaining racial domination and systematic oppression could implicate each of them, because the systematic character of the oppression is established through the purpose inquiry itself. Under the Rome Statute's formulation, none necessarily constitutes an institutionalized regime, and proving a contribution to one may require the separate institutional showing the revision introduced.

The Global South coalition that created the Apartheid Convention never intended this result. The Convention was designed to reach the architects and enforcers of institutionalized racist oppression regardless of how formally organized the system was at any given moment. Its "establishing and maintaining" language was deliberately forward-looking. Apartheid systems are built over time, through acts of construction and perpetuation that are continuous rather than instant. Liability was meant to attach from the inception of the project, not only once it reached full institutional form. The Rome Statute may be read to have converted that purpose-based framework into a retrospective, institutional one, in which a regime must be proven before a perpetrator's contribution to building it can be assessed. The element stands as a marker of the influence powerful states exerted over the interests of the coalition that achieved codification of the crime. The CAH treaty offers the first opportunity in a generation to correct it.

43 Brennan Center for Justice, "States Have Added Nearly 100 Restrictive Laws Since SCOTUS Gutted the Voting Rights Act 10 Years Ago," June 23, 2023, https://www.brennancenter.org/our-work/analysis-opinion/states-have-added-nearly-100-restrictive-laws-scotus-gutted-voting-rights.

44 Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness (New York: The New Press, 2010), 2, 180–192.*

4. *Who Counts as a Victim?:* The "Racial Groups" Inheritance and the Afrikaner "Refugee" Policy That Exposes Its Danger

The Genocide Convention[45] of 1948 was drafted when race was widely understood as an inherited, biological category, and its language, particularly the term "racial group," reflects that understanding.[46] The understanding of race as a social construct had not yet taken hold in international law, and when the Apartheid Convention borrowed the term in the early 1970s, it took the term's context with it.[47] Understanding apartheid as the kind of systematic racial oppression that, left unchecked, has genocidal potential, the drafters deliberately built the new crime on genocide's architecture.[48] What they borrowed was not only a term but a theory of what makes a group a group. Apartheid and genocide examine a *protected* group (such as a racial group), which is defined by the victim's own characteristics, so membership turns on who the victim is. Under persecution, by contrast, *any* identifiable group may be *targeted* on protected grounds (such as racial grounds).[49] Persecution thus examines any *targeted* group, which is defined by the perpetrator's conduct. Group membership turns on *grounds* which centers perpetrator intent, meaning whom the perpetrator singled out for discrimination. "Racial grounds" was included under persecution, first in the Nuremberg Charter, then in the statutes of the ad hoc tribunals, and again in the Rome Statute. "Racial groups" under apartheid or genocide was included in the Genocide Convention in 1948, the Apartheid Convention in 1973, and the Rome Statute in 1998. Unlike the two prior conventions, the Rome Statute's negotiating history is silent on the term's meaning.

By 1998, the hereditary understanding of "racial groups" had parted ways with human rights law, which had come to treat race as a social and contextual construct.[50] The criminal law term, however, largely kept the biological framing it inherited. As explained below, the Rome Statute contains a safeguard against that framing. Its Article 21(3) directs courts to read its terms consistently with internationally recognized human rights. The draft CAH treaty omits that instruction. This section provides an example of the dangers the biological interpretation poses, focusing on its instrumentalization to invert oppressor and oppressed in United States' refugee policy. Section 5 then traces the jurisprudence that has maintained hereditary understandings of racial groups under international criminal law.

In February 2025, the United States issued Executive Order 14,204 directing the Secretaries of State and Homeland Security to prioritize admitting and resettling Afrikaners through the refugee program while other admissions remained suspended.[51] The order claimed post-apartheid South Africa's equity legislation was designed to dismantle equal opportunity and described it as fueling violence against "racially disfavored landowners." By June 2026, Afrikaners accounted for 99.9% of all refugee admissions to the United

45 Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 UNTS 277.

46 See William A. Schabas, *Genocide in International Law: The Crime of Crimes, 2nd ed. (Cambridge: Cambridge University Press, 2009), 117–171 (analyzing the Genocide Convention's protected groups and the drafting history that produced them).*

47 See Lisa Davis and Kirby Anwar, "Recognizing All Victims of Racial and Gender Apartheid in the Draft Crimes Against Humanity Treaty," *Howard Human and Civil Rights Law Review 9 (2025): 15–27, 43–48 (tracing how the Genocide Convention's protected-group categories carried a biological, hereditary conception of race into international criminal law, and how that conception passed into the crime of apartheid) (hereinafter Davis and Anwar, "Recognizing All Victims").*

48 E.g., Report of the Ad Hoc Working Group of Experts, Study Concerning the Question of Apartheid from the Point of View of International Penal Law, ¶ 72, U.N. Doc. E/CN.4/1075 (February 15, 1972) (concluding that the rules of international penal law applicable to apartheid are those applicable to genocide); Report of the Ad Hoc Working Group of Experts, ¶¶ 950, 1022, 1137, and 1151, U.N. Doc. E/CN.4/950 (October 27, 1967); see also Lingaas, "Crime Against Humanity of Apartheid," 99 ("The Apartheid Convention was, as a matter of fact, modeled after the Genocide Convention."); Carola Lingaas, *The Concept of Race in International Criminal Law (Abingdon: Routledge, 2020), 174 ("[M]ost scholars refer directly to the corresponding scholarship or jurisprudence on the crime of genocide."); Davis and Anwar, "Recognizing All Victims" (note 47 above), 15–27.*

49 Article 7(1)(h) states "Persecution against any identifiable group or collectivity…."

50 See sources cited in note 9 above (collecting the CERD Committee's interpretations treating racial identification as social and contextual); ICC Office of the Prosecutor, Policy on the Crime of Gender Persecution (note 11 above), 3 ("Just as social constructs and criteria are used to define the understanding of race, ethnicity or culture, so are social constructs and criteria used to define the understanding of gender."); see also Valerie Oosterveld, "The Definition of 'Gender' in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?," *Harvard Human Rights Journal 18 (2005): 65–69, 74–75 (hereinafter Oosterveld, "Definition of 'Gender'").*

51 Executive Order No. 14,204, Addressing Egregious Actions of the Republic of South Africa, 90 Fed. Reg. 9497 (February 12, 2025) (hereinafter Executive Order 14,204).

States,[52] and the State Department described the first arrivals as victims of "government-sponsored racial discrimination."[53] In September 2026, the State Department escalated further. It announced a visa restriction policy aimed at foreign nationals it deems responsible for or complicit in race-based discrimination, uncompensated land seizures, or incitement of violence against minority groups in South Africa. The U.S. Embassy in Pretoria described the policy as the first step in a series of escalatory measures.[54]

South Africa's government rejected these policies. It responded that the February 2025 order lacks factual accuracy, fails to recognize the country's history of colonialism and apartheid, and rests on a claim of persecution that is widely discredited. It noted the irony of extending refugee status to one of the country's most economically privileged communities as vulnerable people elsewhere were being deported and denied asylum.[55]

The disagreement between the U.S. and South African governments bears on the CAH treaty's text because it concerns what racial discrimination means, specifically whether discrimination is contextual and structural, or formal and biological. The South African position rests on the framework ICERD establishes. Racial discrimination under ICERD requires that a distinction have "the purpose or effect of nullifying or impairing" the equal enjoyment of human rights,[56] which is not the case for South Africa's policies. The CERD Committee has confirmed that special measures to secure the advancement of groups historically denied equal rights are not racial discrimination but rather its remedy.[57] Within that framework, post-apartheid equity policies are the dismantling of a system of racial domination, not the imposition of a new one.

The Trump administration's position presupposes an older and narrower conception of race. It frames race as a biological or hereditary category and, on that premise, treats any differential treatment of racial group members as discrimination, without regard to history, structure, social context or the difference between subordination and its remedy. The eligibility criteria under EO 14,204 require that applicants be "of Afrikaner ethnicity or be a member of a racial minority in South Africa."[58] Its hereditary understanding is even clearer in the language of one of the program's officially designated referral partners.[59] Amerikaners' guide repeatedly informs applicants that purported persecution for "being white" is key to sustaining their application. It further claims that South Africa's current laws target people for their "skin colour."[60]

52 U.S. Department of State, Bureau of Population, Refugees and Migration, Office of Refugee Processing, Summary of Refugee Admissions as of June 30, 2026, at 2 (Cumulative Summary table, FY 2026), https://www.wrapsnet.org/admissions-and-arrivals/ (recording in June 2026 that 7,727 of the 7,730 refugees admitted in fiscal year 2026 were chargeable to South Africa, the remaining three being from Afghanistan). The admissions data classifies by country of chargeability. That the South African admissions were overwhelmingly Afrikaner follows from the terms of Executive Order 14,204, which directed the resettlement of Afrikaners specifically, and from the State Department's own characterization of the arrivals.

53 Morgan Phillips, "White South African Refugees Brought to US Due to 'Government-Sponsored Racial Discrimination': State Dept," Fox News, May 12, 2025, https://www.foxnews.com/politics/white-south-african-refugees-brought-us-due-government-sponsored-racial-discrimination-state-dept.

54 U.S. Department of State, Office of the Spokesperson, "Announcement of New Visa Restriction Policy Targeting Foreign Nationals Involved in Race-Based Discrimination and Incitement of Imminent Violence, as well as Uncompensated Land Seizures in South Africa," September 15, 2026, https://www.state.gov/releases/office-of-the-spokesman/2026/09/announcement-of-new-visa-restriction-policy-targeting-foreign-nationals-involved-in-race-based-discrimination (invoking Executive Order 14,204 and section 212(a)(3)(C) of the Immigration and Nationality Act).

55 Ministry of International Relations and Cooperation (South Africa), "Government of South Africa Notes the USA Executive Order," February 8, 2025, https://dirco.gov.za/government-of-south-africa-notes-the-usa-executive-order/; see "South Africa: SA Responds to US Refugee Programme for Afrikaners," AllAfrica, October 30, 2025, https://allafrica.com/stories/202510310488.html.

56 ICERD (note 9 above), art. 1(1).

57 CERD Committee, General Recommendation No. 32, The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination, ¶ 20, U.N. Doc. CERD/C/GC/32 (2009).

58 U.S. Embassy and Consulates in South Africa, "Refugee Admissions Program for South Africans," https://za.usembassy.gov/refugee-admissions-program-for-south-africans/ (accessed September 6, 2026).

59 U.S. Embassy and Consulates in South Africa, "Refugee Admissions Program for South Africans" (note 58 above) (designating Amerikaners as a Department of State referral partner that gathers information from potential applicants, assesses eligibility, and refers cases for access to the refugee program).

60 Amerikaners, Application Guidelines (June 2025), https://www.amerikaners.com/wp-content/uploads/2025/06/Application-Guidelines.pdf. Amerikaners claims that "in South Africa, more than 140 laws currently exist that exclude or disadvantage people based on skin colour" and that this "ongoing legal discrimination is part of the persecution that many minorities face today." Ibid.

U.S. law has codified the biological conception directly, defining a racial group in its genocide statute as a set of persons distinctive "in terms of physical characteristics or biological descent."[61] The current U.S. administration has taken the same view of the term "sex," defining it by executive order as an immutable biological classification and directing federal agencies to use sex rather than gender identity as a category.[62] Under the current administration's view, Afrikaners are a racial group, equity policies treat them differently on the basis of race, and they are therefore victims of racial discrimination.

The example exposes the deeper flaw in organizing legal protection from discriminatory crimes around biologically verifiable group membership. Courts and commentators often call this "objectively" verifiable membership, a question taken up at the close of this section. A court that asks which group a claimant belongs to hereditarily, rather than whether a regime of domination has been constructed and maintained against them, has lost sight of the discriminatory crime. It adopts the perpetrator's own classificatory logic as the law's standard. South Africa's "pencil test" makes the point unforgettable.[63]

The flaw compounds for victims whose persecution operates through intersecting grounds. A membership test sorts a claimant into one category at a time, yet systems of domination do not always target one category at a time. Under apartheid in South Africa and Namibia, black women lived under a regime that enforced racist and patriarchal domination as one mutually reinforcing system. Section 7 analyzes this history and Part Two brings it into the evaluative criteria for modernizing the definition of apartheid. A framework that isolates race from gender cannot recognize a victim's experience as a whole and erases the compounding discrimination they experienced.

The same argument the executive order advances could be attempted under the Rome Statute's apartheid provision. At the ICC, Article 21(3) counteracts this by giving courts a textual basis for reading the provision through ICERD's social understanding rather than the biological one. The draft CAH treaty, however, reproduces the racial group language without Article 21(3). It inherits the term's interpretive vulnerability while omitting the provision that corrects it, leaving the new definition more exposed to this type of inversion. Nor is the risk confined to victims of racial oppression. If "gender groups" were codified in the apartheid definition, the same biological assumptions could attach to gender at the very moment international criminal law and human rights law are converging on race and gender as social and historical constructs. And the two provisions together could still miss victims' full experiences. Race and gender would stand as separate fixed groups, each demanding its own proof of physical characteristics, and the intersectional targeting described above would be divided into fragments that neither category captures whole. Section 8 sets out what an equivalent to Article 21(3) in the new treaty must contain. The Afrikaner refugee policy shows what is at stake when law denies the social construction of race. Negotiations at the U.N. are an opportunity to ensure the draft treaty restores a social understanding of racial discrimination.

61 Genocide Convention Implementation Act of 1987 (Proxmire Act), 18 U.S.C. § 1093(6) (defining "racial group" for the crime of genocide); see Davis and Anwar, "Recognizing All Victims" (note 47 above), 24 (identifying this definition as an instance of the 1948 Convention's biological framing migrating into domestic criminal statutes). Note that the statute does not establish a general federal definition of race; its definition of "racial group" governs only the federal genocide provisions and does not control the meaning of race under other federal or constitutional law, including Title VII, the Fourteenth Amendment, or immigration law.

62 Executive Order No. 14,168, Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, § 2(a), (d)–(e), 90 Fed. Reg. 8615 (January 30, 2025) (defining sex as "an individual's immutable biological classification as either male or female," providing that sex "is not a synonym for and does not include the concept of 'gender identity,'" and defining "female" and "male" by reference to the reproductive cell the person belongs to at conception); see U.S. Department of Health and Human Services, Defining Sex: Guidance for Federal Agencies, External Partners, and the Public (February 19, 2025) (implementing the order and adopting the definition that "[s]ex is a person's immutable biological classification as either male or female").

63 Population Registration Act 30 of 1950 (South Africa) (requiring the classification of every inhabitant as "white, coloured, or native," with the statutory criteria turning on appearance and general acceptance); see Deborah Posel, "Race as Common Sense: Racial Classification in Twentieth-Century South Africa," *African Studies Review 44 (2001): 105 (documenting the administrative tests, including the pencil test, through which classification boards applied those criteria; to apartheid's administrators, a pencil pushed into a person's hair was an "objective" method of determining race.).*

5. *The Racial Groups Question:* How a Biological Reading Borrowed from Genocide Took Hold

The Afrikaner refugee policy discussed in Section 4 is one modern example of a biological understanding of race at work. A biological framing of race has also shaped how accountability mechanisms have approached the term "racial groups" when assessing apartheid. Because no court has yet completed an apartheid prosecution,[64] the crime has no jurisprudence. U.N. accountability mechanisms, however, have examined apartheid. The ICJ, while encouraged by states to weigh it as a crime, has examined the ICERD article prohibiting segregation and apartheid. To give "racial group" content, these mechanisms and ICJ judges' separate or dissenting opinions have usually turned to the only developed body of case law interpreting the term, the genocide tribunals' doctrine. The pattern across two decades is consistent. Where nothing formally directs the decision-maker to apply human rights law's contextual understanding of race, the biological reading returns by default. This approach may leave apartheid harder to establish than genocide. This section traces the development of required "objective" characteristics (such as biological or hereditary characteristics) under genocide jurisprudence, then explains how mechanisms imported genocide's reading when interpreting "racial groups" under apartheid. It underscores the need for CAH treaty drafters to move from "groups" to "grounds" in the apartheid provision and to add a Rome Statute Article 21(3) equivalent.

Genocide Jurisprudence

In *Akayesu*, the first international case to result in a genocide conviction, the International Criminal Tribunal for Rwanda defined a racial group by reference to inherited physical characteristics.[65] Referring to the Genocide Convention's *travaux préparatoires*, it determined that the Convention's four groups were stable and permanent ones that people belonged to automatically by birth, in what it called a "continuous and often irremediable manner."[66] Ironically, this approach echoes methods used to classify people under apartheid and Nazism. It was also difficult to apply to the facts of the Rwandan genocide. Hutu and Tutsi people shared the same language and religion, shared many cultural practices, and could not be reliably distinguished by their physical appearance.

Later courts therefore began to consider not only what they called "objective" characteristics of a group, inherited or otherwise but also how the perpetrators viewed the victims subjectively. The Trial Chamber in *Jelisić* went furthest in this direction. It rejected the idea that protected groups could be defined using "scientifically irreproachable criteria."[67] Instead, it said that group membership should be assessed from the perspective of those who seek to single a group out. This approach is consistent with the ICERD, which rejects the idea that

64 Prosecution proceedings are underway in South Africa, where the COSAS 4 case represents the first criminal indictment anywhere in the world to charge apartheid as a crime against humanity. See Miles Jackson and Hannah Woolaver, "Apartheid on Trial: The COSAS 4 Prosecution and the Direct Application of Customary International Law in South Africa," *EJIL: Talk!, April 30, 2025,* https://www.ejiltalk.org/apartheid-on-trial-the-cosas-4-prosecution-and-the-direct-application-of-customary-international-law-in-south-africa/; Foundation for Human Rights, "Press Release: COSAS 4 Trial: Judgment on the Crimes Against Humanity Charges," April 14, 2025, https://unfinishedtrc.co.za/press-release-cosas-4-trial-judgment-on-the-crimes-against-humanity-charges/. See note 12 above.

65 *Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 511, 514 (International Criminal Tribunal for Rwanda, September 2, 1998). Akayesu also held that the Genocide Convention protects "any stable and permanent group", ibid., ¶ 516, which would have extended protection beyond the Convention's four enumerated categories. Later chambers and the International Court of Justice instead required that the protected group be positively identified within those categories, foreclosing that extension. See Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶¶ 20–22 (International Criminal Tribunal for the former Yugoslavia, March 22, 2006); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, ¶¶ 193, 194 (February 26, 2007) (rejecting group qualification in the negative, i.e. "non-Serbs", and noting Genocide Convention drafters' dismissal of proposals to political or cultural groups). Its treatment of the four categories as rigidly bounded, each identified by its own hereditary markers, gave way to a mixed "objective-subjective" approach, requiring victims possess at least some "objective" characteristics, as discussed further on. In practice, accountability mechanisms also apply the "ensemble approach," under which chambers draw on indicators across the national, ethnical, racial, and religious categories together rather than confining a victim population to one, an approach discussed later in this section.*

66 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 511 (International Criminal Tribunal for Rwanda, September 2, 1998).

67 *Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 70 (International Criminal Tribunal for the Former Yugoslavia, December 14, 1999).*

race is based on biological differences.[68] It also reflects how the crime of persecution works. Under persecution, the perpetrator's own perception or classification can identify the targeted group, and victims need not be shown to belong by any "objective" criteria.[69] However, *Jelisić's* purely subjective approach did not prevail. In 2006, the ICTY Appeals Chamber in *Stakić* held that courts cannot identify a protected group based only on the perpetrators' perceptions[70] and that some "objective" basis for the group's existence must also be established. The following year, in *Bosnia and Herzegovina v. Serbia and Montenegro*, the International Court of Justice noted that the parties essentially agreed that international jurisprudence had come to accept a combined subjective-objective approach to identifying protected groups.[71] This combined approach became the settled legal standard. Courts now determine group membership on a case-by-case basis, considering both the group's "objective" characteristics and how the perpetrators perceived it.[72]

In practice, courts rely on subjective criteria while retaining an "objective" requirement. Where a single protected group (like a racial group) proves difficult to establish, courts and accountability mechanisms have also taken what is called an "ensemble approach." They blend the Genocide Convention's four protected groups – national, ethnical, racial, and religious – and assess the victims' group across those categories without establishing any one of them alone. As Antonio Cassese observed, race "is a notion whose scientific validity has been debunked by anthropologists" yet "must nevertheless be interpreted and applied when used in a legal provision."[73] The consequence is a jurisprudence in which biological assumptions continue to play a role.

Accountability Mechanisms Applying Apartheid's Elements

The U.N. accountability mechanisms applying the Rome Statute's definition of apartheid have utilized the mixed standard without applying its Article 21(3). Article 21(3), which binds the ICC, is easily overlooked as it sits among the Statute's provisions on applicable law rather than alongside the definitions of the crimes. With no jurisprudence from the Court on apartheid to signal its relevance, no fact-finding mission has viewed itself as bound to read "racial group" under the apartheid provision through human rights law. Results have diverged according to the framework each entity chose.

In its 2018 report, the Independent International Fact-Finding Mission on Myanmar (IIFFMM) analyzed for genocide under the Genocide Convention, which Myanmar has ratified. It examined the crimes against humanity of persecution and apartheid under the Rome Statute's definitions, alongside scholarship and the ICC's and ad hoc tribunals' persecution jurisprudence.[74] It found that the crimes committed against the Rohingya were "similar in nature, gravity and scope to those that have allowed genocidal intent to be established

68 The International Convention on the Elimination of All Forms of Racial Discrimination does not define race and instead indicates its social construction by defining racial discrimination to include that based on "race, colour, descent, or national or ethnic origin." ICERD (note 9 above), art. 1(1). The CERD Committee repeatedly affirms this construction. Gay McDougall, Introductory Note: International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Audiovisual Libr. of Int'l L. (2021) [hereinafter McDougall, Introductory Note], https://legal.un.org/avl/ha/cerd/cerd.html).

69 Rome Statute, arts. 7(1)(h) and 7(2)(g); Elements of Crimes, Article 7(1)(h), element 2 (permitting the targeted group to be identified subjectively, through the perpetrator's own targeting, with "objective" criteria available but not required). The ad hoc tribunals adopted the same understanding, holding that it is the perpetrator who defines the targeted group; the jurisprudence is collected in ICC Office of the Prosecutor, Policy on the Crime of Gender Persecution (note 11 above), ¶¶ 42–44.

70 *Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶ 25 (International Criminal Tribunal for the Former Yugoslavia, March 22, 2006).*

71 *Bosnia and Herzegovina v. Serbia and Montenegro (note 65 above), p. 124, ¶ 191.*

72 For a detailed examination of how the objective-subjective standard has developed across international criminal jurisprudence and its implications for the racial group requirement under the crime of apartheid, see Davis and Anwar, "Recognizing All Victims" (note 47 above), 16–27, 54–57.

73 Antonio Cassese et al., "Genocide," in *The Oxford Companion to International Criminal Justice, ed. Antonio Cassese (Oxford: Oxford University Press, 2009), 332, 334.*

74 Human Rights Council, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, ¶ 1442, U.N. Doc. A/HRC/39/CRP.2 (September 17, 2018) (hereinafter IIFFMM 2018 Detailed Report).

in other contexts."[75] The IIFFMM found the systematic oppression against the Rohingya amounted to persecution and "may also amount to the crime of apartheid."[76] When weighing apartheid, rather than analyze the term "racial group," it cross-referenced the group analysis it conducted for genocide.[77] Genocide's ensemble approach had allowed it to blend the Convention's racial, ethnic, and religious categories without establishing any of them on its own.[78] Apartheid offers no such latitude. It contains a single category: racial groups, which the Mission did not analyze. Persecution, on the other hand, presented no difficulty at all. Because persecution reaches *any* group targeted on specific prohibited grounds,[79] the Mission could identify ethnic and religious grounds of targeting without determining the physical characteristics of the group. The same body, in the same report, on the same facts, found persecution readily and found conduct bearing the marks of genocidal intent. It stopped short on apartheid and failed to analyze one of the crime's terms.

Special Rapporteur Michael Lynk grappled directly with the term racial group under apartheid. In his final report he found that the system of entrenched rule in the Occupied Palestinian Territory "satisfies the prevailing evidentiary standard for the existence of apartheid."[80] He acknowledged that the Apartheid Convention's initial approach to "racial group" might suggest the influence of the categories the southern African regimes employed, which focused on characteristics like skin color.[81] He asserted that the term should be understood as a social construct produced through racialization rather than through biological inheritance.[82] His argument relied in significant part on ICERD's enumeration of color, descent, and national and ethnic origin and on the Convention's own preambular invocation of ICERD. He framed the oppression of the Palestinian people as the domination of one "racial-national-ethnic group" over another.[83]

That is the right reading of the term and is the reading Article 21(3) would require. But a human rights mandate can adopt it in a way a criminal court cannot. The principle of legality requires criminal provisions to be strictly construed.[84] A court applying the Apartheid Convention or a treaty that reproduces the Rome Statute's definition without an equivalent to Article 21(3) or other express authority to read "racial group" through human rights law could be directed toward the outdated biological understanding. Special Rapporteur Lynk applied the approach Article 21(3) prescribes without invoking it. A treaty that omits an equivalent provision may foreclose that strategy.

Special Rapporteur Francesca Albanese's reports proceed from a finding of apartheid and situate it within Israel's settler colonial project. She points to

75 Human Rights Council, Report of the Independent International Fact-Finding Mission on Myanmar, ¶ 85, U.N. Doc. A/HRC/39/64 (September 12, 2018).

76 IIFFMM 2018 Detailed Report, ¶¶ 622, 1511.

77 IIFFMM 2018 Detailed Report, ¶ 1505.

78 IIFFMM 2018 Detailed Report (note 74 above), ¶ 1391 (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 512-15 (Sept. 2, 1998)). See Lingaas, *Concept of Race (note 48 above), 69–73; Carola Lingaas, "Imagined Identities: Defining the Racial Group in the Crime of Genocide," Genocide Studies and Prevention 10 (2016): 79–106. As Lingaas observes, the ensemble approach offers no corresponding advantage in the apartheid context, where the protected group is limited to a single category ("racial group") rather than the full combination of four groups the ensemble draws upon. Lingaas, Concept of Race, 69–73. Note that the IIFFMM referenced a "biological" understanding of race in case law when discussing genocide.* See also Schabas, *Genocide in International Law (note 46 above), 129–131 (describing the drafters' understanding of the overlapping, mutually reinforcing nature of the four protected groups as the foundation for the ensemble approach).*

79 The face of the Statute makes this explicit. Rome Statute, art. 7(1)(h), reaches persecution against "any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender … or other grounds that are universally recognized as impermissible under international law." The provision requires proof that the perpetrator targeted a group on those discriminatory grounds, not that the group members satisfy threshold biological or hereditary criteria for racial group membership.

80 Michael Lynk, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, ¶ 52, U.N. Doc. A/HRC/49/87 (August 12, 2022) (hereinafter Lynk Report).

81 Lynk Report, ¶ 32.

82 Lynk Report, ¶¶ 32–33.

83 Lynk Report, ¶¶ 52, 54.

84 Rome Statute, art. 22(2).

"a regime of settler colonial apartheid"[85] organized through differential legal regimes for settlers and the occupied population, and through territorial fragmentation, forced displacement, and denial of self-determination. That analysis finds support in the Apartheid Convention's architecture, which recognizes apartheid's roots in colonialism. It bypasses the contested racial group question. She instead identifies the regime through its colonial domination rather than through bounded group membership. Part Two draws on that approach in evaluating the Fourth Proposal since a colonial discrimination ground would reflect her analysis in treaty text.

The International Court of Justice has displayed some instability in its approach to apartheid. In the 1971 *Namibia* advisory opinion the Court described apartheid as the enforcement of "distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights,"[86] language that tracks ICERD's Article 1. ICERD had entered into force two years earlier.[87] The Apartheid Convention itself was still two years from adoption, and no instrument yet provided for individual criminal responsibility for the crime.[88] The Court thus assessed South Africa's conduct through the grounds of its discrimination rather than through an inquiry into the biological composition of its victim groups, and it counted national or ethnic origin among those grounds. It also refused to read a 1920 mandate as though the intervening half-century had not happened. The Court held that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" and that "its interpretation cannot remain unaffected by the subsequent development of law."[89] Judge Sir Gerald Fitzmaurice dissented in part on the ground that states had not consented to that interpretive move.[90] His objection identifies a structural problem. Without express textual authority, an evolutionary interpretation depends on a particular bench's willingness to adopt it.

Qatar v. United Arab Emirates[91] shows what happens when a bench is unwilling to do so. The case did not concern apartheid. It arose within human rights law, under the very instrument that anchors the contemporary understanding of race. Qatar alleged that the UAE's measures against Qataris, including expulsion, travel bans, and exclusion from education and employment, discriminated based on national origin under ICERD. The ICJ held that "national origin" does not encompass current nationality.[92] In reaching that conclusion, it characterized ICERD's five protected categories of race, color, descent, and national and ethnic origin as characteristics "inherent at birth."[93]

85 Francesca Albanese, Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, From economy of occupation to economy of genocide, ¶ 1, U.N. Doc. A/HRC/59/23 (June 30, 2025).

86 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 131 (June 21) (hereinafter Namibia Advisory Opinion).*

87 The United States, still maintaining Jim Crow laws at home even as it claimed to lead the free world, faced strategic pressure to demonstrate that its values stood for something different, and that pressure made refusing to support the anti-discrimination instrument politically untenable. See Egon Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," *International and Comparative Law Quarterly 15 (1966): 996, at 999–1005 (tracing the political dynamics of ICERD's adoption, including the roles of the Soviet bloc, Latin American states, and Western states) or Mary L. Dudziak, Cold War Civil Rights: Race and the Image of American Democracy* (Princeton: Princeton University Press, 2000).; Natan Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination, 2nd ed. (Alphen aan den Rijn: Sijthoff and Noordhoff, 1980), 14, 21 (same); Mary L. Dudziak, Cold War Civil Rights: Race and the Image of American Democracy (Princeton: Princeton University Press, 2000), 200–205 (documenting how Cold War competition with the Soviet Union created strategic pressure on the United States to address racial discrimination internationally); Thomas Borstelmann, The Cold War and the Color Line: American Race Relations in the Global Arena (Cambridge, MA: Harvard University Press, 2001) (analyzing how the Soviet bloc used Western racial hierarchy, and specifically apartheid, to undermine Western democratic credibility among newly independent states).*

88 The General Assembly had called apartheid a "crime against humanity" in political declarations. U.N. General Assembly, Resolution 2202 A (XXI), ¶ 1, December 16, 1966; U.N. General Assembly, Resolution 2396 (XXIII), December 2, 1968.

89 *Namibia Advisory Opinion, ¶ 53.*

90 *Namibia Advisory Opinion (Fitzmaurice, J., dissenting), ¶ 7.*

91 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, 2021 I.C.J. 71, (February 4) (hereinafter Qatar v. UAE).*

92 *Qatar v. UAE*, ¶ 81.

93 *Qatar v. UAE*, ¶ 81.

Framed as textual interpretation, the ICJ's judgment reintroduced the biological logic ICERD's drafters had deliberately rejected. Influenced in part by UNESCO's repudiation of race as a scientific category, ICERD's drafters left "race" undefined and enumerated overlapping grounds to capture discrimination whether it operated through perceived biology or through social meaning.[94] Since 1990, the CERD Committee has held that racial or ethnic group membership rests on self-identification, and reads ICERD as defining race as a social construction.[95] The Committee, contrary to the ICJ, had read the UAE measures against the Qataris as discrimination on national or ethnic origin, with nationality as the mechanism.[96]

The ICJ acknowledged that the Committee's guidance warrants great weight but reached the opposite conclusion over the dissenting votes of six judges, the Court's president among them.[97] The lesson bears directly on the CAH treaty. ICERD is itself grounds-based, and the Court still read its grounds through a biological lens, making the addition of a Rome Statute Article 21(3) equivalent in the draft CAH treaty all the more important.

Several states encouraged the ICJ to find apartheid as a crime against humanity in its 2024 *Palestine* advisory opinion. The ICJ did not analyze the crime but found that Israel's legislation and measures in the West Bank and East Jerusalem violate Article 3 of ICERD, which it noted prohibits "two particularly severe forms of racial discrimination: racial segregation and apartheid."[98] This was the first time it found a state in violation of that provision. It did so without defining what makes Palestinians protected under ICERD and without using the word "apartheid" in its operative finding. It described instead a "separation … between the settler and Palestinian communities" that breaches Article Three.[99] Paragraphs earlier, the court found Israel's restrictions on Palestinians to be "systemic discrimination based on, *inter alia*, race, religion or ethnic origin, in violation of … Article 2 of CERD" and nondiscrimination articles of ICESCR and ICCPR, in effect mirroring genocide jurisprudence's ensemble approach.[100]

The separate opinions laid bare a divide underlying the majority's silence on apartheid. President Nawaf Salam and Judge Dire Tladi understood the finding to recognize, at least implicitly, the apartheid character of Israel's policies, while Judge Yuji Iwasawa read the Court as having found a discriminatory "separation" without qualifying it as apartheid.[101] Judges who resisted an apartheid finding read Article 3 at least in part through the criminal law definitions, thus importing a group structure that the ICERD framework does not require.[102] The judges who supported finding apartheid proceeded without invoking biological criteria. President Salam adopted the socially constructed understanding ICERD's framework prescribes, treating Palestinians and Israeli Jews as distinct groups based on self-identification rooted in descent, national or ethnic origin, religion, and culture. Judge Tladi treated the presence of racial

94 The ICERD drafters were directly influenced by UNESCO's rejection of biological race as scientifically valid and deliberately left "race" undefined to avoid reducing it to a biological category. See UNESCO, *The Race Question 6–8 (1950), reprinted in UNESCO, Four Statements on the Race Question (Paris: UNESCO, 1969); Patrick Thornberry, The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary (Oxford: Oxford University Press, 2016), 102–105.*

95 See CERD Committee, General Recommendation No. 8, Membership of Racial or Ethnic Groups Based on Self-Identification, ¶ 1, U.N. Doc. A/45/18, at 79 (1990); Thornberry, *A Commentary (note 94 above), 102–105 (reading the Convention's conception of race as socially constructed).*

96 CERD Committee, Decision on Jurisdiction, *State of Qatar v. United Arab Emirates, ¶¶ 58, 63, U.N. Doc. CERD/C/99/3 (August 27, 2019).*

97 See Qatar v. UAE (Yusuf, President, decl.), ¶¶ 2–6, 16; (Sebutinde, J., diss. op.), ¶¶ 17–20; (Bhandari, J., diss. op.), ¶¶ 8–13, 30; (Robinson, J., diss. op.), ¶¶ 7, 11–13, 27; (Iwasawa, J., sep. op.), ¶¶ 32, 50; Judge Cançado Trindade also voted against the Court's disposition of the first preliminary objection without appending an opinion. Qatar v. UAE, ¶ 115.

98 *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion, ¶¶ 225, 229 (I.C.J. July 19, 2024) (hereinafter ICJ, Palestine Advisory Opinion).*

99 Ibid., ¶ 229.

100 Ibid at ¶ 223.

101 ICJ, *Palestine Advisory Opinion (Salam, President, decl.), ¶¶ 15–17; id. (Tladi, J., decl.), ¶ 41; id. (Iwasawa, J., sep. op.), ¶ 13.*

102 Judge Iwasawa, for example, states that it is difficult to assess apartheid, in part because of its lack of definition in ICERD, while noting the Rome Statute requires "domination by one racial group over another". *Id. (Iwasawa, J., sep. op.), ¶ 12.*

groups as beyond serious dispute.[103] Judge Leonardo Brant, agreeing that the violation of Article 3 was established, drew the constituent elements from the Apartheid Convention and the Rome Statute without pausing on group identification at all.[104]

In *South Africa v. Israel*, decided six months earlier, the Court found Palestinians plausibly a protected group under the Genocide Convention by blending the Convention's categories without isolating any one indicator[105] – the ensemble approach that framework affords. Apartheid's single racial group category offers no equivalent route, so biological assumptions embedded in the group inquiry can impact interpretation.

The ICC might be weighing the crime against humanity of apartheid for the first time. Reporting since confirmed by Israeli officials signals that the ICC Office of the Prosecutor may have filed arrest warrant applications against Smotrich and Ben-Gvir on charges reported to include persecution and apartheid.[106] Whatever the applications contain, Article 21(3) binds the ICC and supports an inclusive reading of "racial groups" under apartheid, grounded in human rights law. Absent it, genocide jurisprudence's hereditary criteria would likely supply the default interpretation.

The Office of the Prosecutor's gender persecution policy is expressly grounded in Article 21(3). Pre-Trial Chamber II's July 2025 warrants against two Taliban leaders for gender persecution read the Statute's crimes in light of its aim of protecting civilian populations from serious, systemic fundamental rights violations.[107] An apartheid application should follow the same path, reading "racial group" through the CERD Committee's socially constructed understanding. To facilitate this reading under the CAH treaty, drafters should move from "groups" to "grounds" in the apartheid definition and include a provision equivalent to Article 21(3). Both changes together would close structural and interpretive gaps.

6. *The Higher Threshold for Inhumane Acts:* How the Rome Statute Abandoned the Apartheid Convention's Comprehensive Scope

The Apartheid Convention's list of inhumane acts is distinctive for its breadth. It was written to capture the full range of violations through which racist oppression and domination is organized and sustained. Alongside murder, torture, and arbitrary imprisonment, the Convention names legislative and administrative measures that deny a group's rights to work and form trade unions, to education, and to freedom of movement, opinion, expression, peaceful assembly, and association.[108] The list reflects what apartheid looks like in practice – an integrated system of civic exclusion and economic subjugation, enforced through law and policy that reaches the most mundane daily interactions.

The Rome Statute (art. 7(2)(h)) replaced that list with a general category of acts "of a character similar to" the other crimes against humanity. In one sense the substitution broadens the definition, since qualifying acts are no longer confined to a list. But it also sets a higher bar because conduct must now reach a character comparable to acts such as murder, torture,

103 ICJ, *Palestine Advisory Opinion (Salam, President, decl.)*, ¶¶ *21–22; id. (Tladi, J., decl.)*, ¶ *39.*

104 *See generally, Id., (Brant, J., decl.)*, ¶¶ *7–11.*

105 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order,* ¶ *45 (January 26, 2024) (hereinafter South Africa v. Israel).*

106 Sondos Asem, "Exclusive: ICC Prosecutor's Office Seeks Arrest Warrant for Israel's Smotrich," Middle East Eye, May 18, 2026, https://www.middleeasteye.net/news/exclusive-icc-prosecutor-seeks-arrest-warrant-israeli-minister-smotrich-apartheid-charges (reporting the April 2 filing, charges including persecution and apartheid as crimes against humanity, and that an application against Ben Gvir had been prepared but not yet filed); Tia Goldenberg and Sam Mednick, "Israeli Minister Orders West Bank Hamlet Evicted After Hearing He May Face Arrest Warrant Overseas," Associated Press, May 19, 2026, https://apnews.com/article/smotrich-arrest-warrant-khan-al-ahmar-68bffe70027bab508e650641f71324bd (Smotrich publicly confirmed the application, calling it "a declaration of war").

107 *Situation in the Islamic Republic of Afghanistan, ICC-02/17, Warrants of Arrest for Haibatullah Akhundzada and Abdul Hakim Haqqani (International Criminal Court, Pre-Trial Chamber II, July 8, 2025).*

108 Apartheid Convention, art. II(c).

or sexual violence. That bar excludes much of what apartheid actually was. The pass laws, for example, that controlled black South Africans' movement, or the policies that denied economic participation and enforced residential segregation do not easily satisfy that standard alone.

Under the Rome Statute, persecution is the most viable pathway for bringing these structural deprivations into the fold of inhumane acts committed to uphold apartheid. Article 7(2)(g) defines persecution as the intentional and severe deprivation of fundamental rights, contrary to international law, on discriminatory grounds. This captures both individual harm and systematic discrimination operating through law and policy. Because persecution is itself an enumerated crime against humanity, persecutory conduct can satisfy the apartheid charge's "similar character" requirement. This allows the rights deprivations the Apartheid Convention named to re-enter the apartheid framework as the persecutory acts that fulfill its inhumane acts element. That pathway is supported by Article 21(3), the safeguard the draft CAH treaty currently omits, which directs courts to read "fundamental rights" through the human rights framework.

Take for example, South Africa's Bantu Education Act. It denied black children access to quality schooling expressly to reinforce racial hierarchy and limit black economic and political agency.[109] This precisely the kind of legislative measure the Convention named among its inhumane acts. The Rome Statute apartheid provision's inhumane acts threshold does not include these measures directly. Rather, they must be included through a separate persecution analysis.

The persecution pathway, however, exposes an incongruence between the two provisions' approaches to discrimination. Persecution can be committed against *any* identifiable group (or collectivity) targeted on prohibited grounds, a class as broad as the perpetrator's own intent and conduct. Its victim group is thus broader than apartheid's. The apartheid provision limits victims of the regime to members of a racial group, a class that tends to require biological qualification under the prevailing reading. Some victims the persecution charge recognizes will therefore fall outside the racial group the apartheid charge protects, even where the same acts were committed against them.

While the persecution that victims experience as inhumane acts can enter the apartheid charge, a defense may still argue that some victims fall outside the racial group the apartheid provision protects, conceding the conduct while contesting the victims. For the Palestinian people, this misunderstanding could be used to exclude the entire population and result in the failure of apartheid charges. Their recognition as a racial group has been contested under a biological reading of the term,[110] even as the same population is recognized without difficulty under persecution's grounds-based approach. What turns on the argument is more than the label attached to a conviction. Reparations practice typically follows the categories of victimhood the law recognizes. Recognition of apartheid in the Palestinian context would open the door to repair for the full breadth of victims and duration of the system.

If gender is added to the apartheid definition as a group, certain victims will face the same challenge. As discussed under Section 7, limiting the scope of "gender groups" to biological features risks excluding some women and girls and all LGBTQI+ persons from the crime's protection.

109 Bantu Education Act 47 of 1953 (South Africa).

110 See the discussion in Part One, Section 5, tracing how the genocide tribunals' biological readings of "racial group" have been carried into apartheid analysis and contrasting the Myanmar Fact-Finding Mission's hesitation on apartheid with its ready persecution findings on the same facts.

7. *The Missing Component:* Why Gender Belongs in the Crime of Apartheid and Must Enter as a Ground

Apartheid's own history was gendered. In South Africa and Namibia, the regime enforced racist and patriarchal domination as one mutually reinforcing system, and black women experienced its compounded weight.[111] Recognizing gender in the apartheid definition is therefore a return to the crime's roots rather than a departure from them. The case for recognition has become urgent. The Taliban's construction of an institutionalized system of gender oppression and domination in Afghanistan has generated growing agreement among experts and civil society that such regimes are apartheid.[112] The question this section addresses is not whether gender should enter the definition of apartheid, but how. The choice between two available forms, gender as a ground and gender as a group, determines whether recognition reaches the victims it is meant to protect.

Grounds under persecution as a crime against humanity grew from three at Nuremberg – political, racial, and religious – to seven-plus grounds in the Rome Statute.[113] Each additional ground extended protection by naming a reason for targeting rather than by certifying a new protected group of victims. Of the grounds added at Rome, gender was the hardest-fought. When "gender" replaced "sex" during the Rome Conference, states adopted a term that had been named and developed in international discourse, most prominently through the 1995 Beijing Declaration and Platform for Action.[114] A coalition of civil society advocates, led by the Women's Caucus for Gender Justice, won its codification within the persecution provision. The Human Rights and Gender Justice Clinic at CUNY School of Law (then the International Women's Human Rights Law Clinic) served as the secretariat, and the feminist organization MADRE housed and sponsored the Caucus, together helping to coordinate the global advocacy that secured recognition of sexual violence crimes and gender persecution in the Rome Statute.[115]

The lesson is that a new legal term can propel the law forward when it is built on a developed concept and placed within existing doctrinal structures. The converse is equally instructive. When a term enters the law without a codified contemporary understanding, a lack of prosecution can result. Despite the grounding of the term "gender" in international discourse, gender persecution itself was on the books for 25 years before cases began to move forward and the Office of the Prosecutor's 2022 Gender Persecution Policy gave it detailed content.[116]

That history offers lessons for ensuring effective inclusion of gender as a ground for apartheid in the draft treaty. If the provision centers "groups" rather than "grounds" language, courts could find themselves construing

111 See Pumla Dineo Gqola, *What Is Slavery to Me? Postcolonial/Slave Memory in Post-Apartheid South Africa (Johannesburg: Wits University Press, 2010) (analyzing the entwined operation of racial and gendered domination in South Africa and its afterlives).*

112 Situation of Women and Girls in Afghanistan, Report of the Special Rapporteur on the Situation of Human Rights in Afghanistan and the Working Group on Discrimination against Women and Girls, U.N. Doc. A/HRC/53/21 (June 15, 2023) ¶¶ 96-97, 100(c) (concluding that the Taliban's discriminatory and misogynistic policies and harsh enforcement methods constitute gender persecution and an institutionalized framework of gender apartheid and recommending that states mandate a report on gender apartheid with a view to developing further normative standards and tools). Israel's apartheid regime also appears to have features of intersecting forms of oppression. For example, the U.N. Commission of Inquiry on the Occupied Palestinian Territory found that Israel has systematically employed sexual, reproductive, and other forms of gender-based violence against Palestinians—deploying gendered violence to uphold a system of domination. Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, "More than a human can bear": Israel's Systematic Use of Sexual, Reproductive and Other Forms of Gender-Based Violence Since 7 October 2023, U.N. Doc. A/HRC/58/CRP.6 (March 13, 2025) ¶¶ 2, 41–42, 175.

113 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, August 8, 1945, 82 UNTS 279, art. 6(c) (hereinafter Nuremberg Charter) (reaching "persecutions on political, racial or religious grounds"). The statutes of the ad hoc tribunals carried the same three grounds forward. Statute of the International Criminal Tribunal for the Former Yugoslavia, SC Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), art. 5(h); Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, U.N. Doc. S/RES/955 (November 8, 1994), annex, art. 3(h). The Rome Statute enumerates political, racial, national, ethnic, cultural, religious, and gender grounds, together with the residual category of "other grounds that are universally recognized as impermissible under international law." Rome Statute (note 5 above) art. 7(1)(h).

114 Beijing Declaration and Platform for Action (note 10 above).

115 HRGJ Clinic, CUNY School of Law, "A New Treaty on Crimes Against Humanity," https://www.law.cuny.edu/academics/clinical-programs/hrgj/projects/new-treaty-crimes-against-humanity/; Lisa Davis, "Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTIQ Persons," *William and Mary Journal of Women and the Law 24 (2018): 513, at 534–539.*

116 ICC Office of the Prosecutor, Policy on the Crime of Gender Persecution (note 11 above).

the term "gender groups" for the first time. "Gender groups" (as opposed to gender grounds) is a compound category with no settled meaning in international criminal law.[117] In addition to novelty, the formulation has potential for restrictive interpretation. Its closest intellectual antecedents come from scholarship urging gender be added to the Genocide Convention's rigid list of protected groups.[118] Genocide's biologically inflected readings risk excluding recognition of, for example, some women and girls and all LGBTQI+ people from "gender groups" in a context where anti-rights commentators argue only two biologically fixed categories qualify under "gender."[119] No interpretive tool directly addresses the issue, since Article 21(3), the Gender Persecution Policy and the ICC policy papers that followed do not formally carry over to the CAH treaty or bind a prosecutor enforcing its provisions.

The method for proving the targeted group under persecution stands in contrast. Persecution, like apartheid and genocide, requires the prosecution to establish a group, but the Rome Statute on its face (Art. 7(1)(h)) defines that group as "*any* identifiable group or collectivity." Under persecution, the group can be constituted by the discriminatory targeting.[120] The perpetrator's intent qualifies the conduct. The victims are those the perpetrator targeted on a prohibited ground and are not limited to those who can prove membership in a protected group of victims defined independently of the targeting.[121] Put simply, under persecution the victim is whoever the perpetrator targeted on a prohibited ground. Under genocide, and under the likely reading of apartheid, the victim's membership in a protected group must instead be proven through at least some biological or other "objective" criteria.

The downside is the limiting role of the "groups" language. Any person could be a victim of an inhumane act committed to uphold an apartheid regime, but recognition as a victim of the systematic regime of oppression and domination itself runs by group rather than by ground. Where prosecutors utilize the broader route for identifying persecution victims, "groups" language under apartheid can exclude those victims from recognition as members of the protected group. A group defined as "women," for instance, could still capture an inhumane act against a queer person, since the crime covers inhumane acts committed with the intention of maintaining the regime, while excluding that person from membership in the group. The reason the perpetrator targeted them, their sexual orientation or gender identity, would then drop out

117 International human rights law contains no single binding definition of "gender," and neither it nor international criminal law defines a "gender group." Under the persecution provision the phrase is shorthand for a group targeted on gender grounds. Under persecution a "gender group" can be any identifiable group and is identified by the perpetrator's targeting rather than by fixed traits. It is therefore fluid in a way that protected groups under genocide have not been. The same person may be targeted as a woman or girl, as a man or boy, as an LGBTQI+ person, or on any combination. See ICC Office of the Prosecutor, Policy on the Crime of Gender Persecution (note 11 above), ¶ 43.

118 The scholarship that has attempted to define gender groups, largely in debates over adding gender to the Genocide Convention's protected categories, has tended to resolve the term as sex, using a more conservative meaning for it. This indicates how thin the ground beneath the category can be. See, e.g., Mary Anne Warren, *Gendercide: The Implications of Sex Selection (Totowa, NJ: Rowman and Allanheld, 1985); Adam Jones, "Gendercide and Genocide," Journal of Genocide Research 2 (2000): 185 (each defining gender-selective destruction by reference to sex).*

119 See Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, Bodily Autonomy and Integrity: The Danger of Anti-Gender Narratives (2021), https://www.ohchr.org/sites/default/files/2021-11/Summary-Bodily-Autonomy-Integrity.pdf (summarizing the mandate's findings that anti-gender narratives, which cast gender as reducible to fixed biological categories, threaten the rights of women and LGBTQI+ persons, including to bodily autonomy and integrity). The case of Afghanistan is just one example of a setting where such a restrictive view would fail to include victims or relay their full experiences of discrimination, including that based on sexual orientation, gender identity and expression, or sexual characteristics. See, e.g., Afghanistan LGBTIQ+ Organization (ALO) and Advocates for Human Rights, Shadow Report: LBTQ Women in Afghanistan Under Taliban Rule (May 2025); ICC Office of the Prosecutor, Policy on the Crime of Gender Persecution (note 11 above), ¶¶ 42–44.

120 See note 79 above.

121 The Elements of Crimes, Article 7(1)(h), element 2, provides that "[t]he perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such." On its face, the element offers two routes to persecution's group requirement, and the two routes codify the two conceptions of a group, one resting on the perpetrator's perception of whom to target, which can reach any group, and one on a fixed category whose membership stands prior to the crime. Under the first, the perpetrator targets persons "by reason of the identity of a group or collectivity," and membership is determined by the discriminatory ground as discussed above. Under the second, the perpetrator targets "the group or collectivity as such," a higher threshold that resembles genocide, where membership is established as a fact through some measure of "objective" criteria. That the drafters included both routes is telling. They recognized persecution's breadth, its capacity to reach any group a perpetrator targets on prohibited grounds and preserved that as the primary route. But they added the second, identity-based route as well, which allows persecution to align with the way genocide and likely apartheid define their groups. That alignment makes the three crimes easier to charge cumulatively, since a persecution finding can serve as evidence toward the group element in the others, though the alignment runs only one way because not everyone persecution recognizes as a victim can be counted within the fixed group that apartheid protects.

of the charge and the findings. This matters not only for the historical record but also for future reparations, which are often grounded in membership in a victim group.[122]

The principle of legality plays a role in a restrictive interpretation. It requires criminal provisions to be construed narrowly, and international criminal law treats human rights law as an interpretive aid that cannot simply be transposed onto a criminal definition. The Apartheid Convention's drafters discussed the relationship, and the Convention's preamble invokes ICERD.[123] They understood that condemning apartheid as a human rights violation requires a lower bar than convicting an individual of apartheid as a crime.[124] Genocide jurisprudence has borne the distinction out. Early chambers experimented with defining victim groups through the perpetrator's perceptions, but that reading was overturned on appeal and the correction was later confirmed by the International Court of Justice (ICJ).[125] This left courts with a mixed subjective and objective approach that always requires some "objective" criterion, even where it goes unstated, a development Section 5 traces. That is the interpretive approach "gender groups" is set to inherit, and it is why gender must enter the definition as a ground rather than a group.

8. *The Missing Interpretive Safeguard:* Why the Rome Statute Article 21(3)'s Human Rights Consistency Requirement Belongs in the Draft CAH Treaty

Treaty provisions and terms that reflect the understanding of their drafters can later differ with law that has moved on. The longer a text goes unrevised, the wider that gap may grow. The draft CAH treaty compounds that ordinary diversion. It adopts, nearly word for word, language settled at Rome more than 25 years ago, some of which traced to even older instruments. If adopted in its present form, the CAH treaty will lock this terminology in for decades to come. The Rome Statute contains a safeguard, Article 21(3), which requires judges to interpret and apply its terms consistently with internationally recognized human rights. The draft CAH treaty omits this provision. It takes its definitions of crimes against humanity from Article 7 of the Rome Statute, which the International Law Commission adopted with only three changes, none of which touched the apartheid provision. The Commission's stated aim was uniformity with the Rome Statute. With the single exception of the gender definition, which it deleted, it declined to reopen the borrowed definitions, despite governments and civil society proposing it do so.[126] It did not, however, carry over the Article 21(3) safeguard that made such borrowing safer. Article 21(3) provides that:

> The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be

122 Reparations may in principle reach every victim of the crimes a court finds, but limited resources often lead programs to draw lines around the victim groups the law has recognized, so that those outside a recognized group are left out of repair. Naming every group a perpetrator targeted matters for that reason, and for historical memory, since the record a judgment leaves shapes how a society understands what happened and what must change to prevent its recurrence. A record that names only women as the targeted group leaves LGBTQI+ victims out of both. *See* Lisa Davis, "Post-Conflict Reparations: Methods for Addressing Discrimination," *University of Pennsylvania Journal of International Law* 46 (2025): 979–80, 989, 1012–13, and 1022.

123 In their studies of apartheid as a crime modeled on genocide, U.N. experts repeatedly distinguished the two registers, treating apartheid practices as plain violations of human rights while insisting that criminal liability for the same conduct demands a stricter and more rigorously construed standard. See, e.g., Commission on Human Rights, Study on Ways and Means of Insuring [sic] the Implementation of International Instruments Such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, Including the Establishment of the International Jurisdiction Envisaged by the Convention, ¶¶ 51–52, U.N. Doc. E/CN.4/1426 (January 19, 1981); Report of the Ad Hoc Working Group of Experts under Commission Resolution 8 (XXVII), Study Concerning the Question of Apartheid from the Point of View of International Penal Law, ¶¶ 72(f), 73, U.N. Doc. E/CN.4/1075 (February 15, 1972).

124 See Davis and Anwar, "Recognizing All Victims" (note 47 above), 44–45.

125 See Part One, Section 5. On appeal, the ICTY rejected reliance on perception alone, holding that a genocide determination cannot rest on a purely subjective approach and must include some measure of "objective" criteria. Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶ 25 (Int'l Crim. Trib. for the former Yugoslavia, Mar. 22, 2006). The ICJ endorsed the same position the following year. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. V. Serb. & Montenegro), 2007 I.C.J. 43, 124, ¶ 191 (Feb. 26).

126 Leila Nadya Sadat, *Introduction to the Work of the ABILA Study Group on the Convention on the Prevention and Punishment of Crimes against Humanity (January 12, 2026), 2,* https://www.ila-americanbranch.org/wp-content/uploads/2026/01/SadatIntroduction-to-the-Work-of-the-ABILA-Study-Group-14-January.pdf. *See also Davis and Bradley, "Victory for Women and LGBTIQ Rights" (note 11 above).*

> without any adverse distinction founded on grounds such as gender … age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

The opening clause, "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights" does important work. Article 21(3) does not add an element to any crime. It instructs the Court, when construing the terms of a crime, to do so consistently with human rights law. For the apartheid provision, that instruction is decisive because the provision's controlling term, "racial group," was inherited without examination and could otherwise be interpreted through the biological or hereditary assumptions that have shaped genocide jurisprudence. A court left to fill that silence from adjacent criminal law will naturally look to those assumptions. By contrast, an Article 21(3) equivalent would require a court to read "racial group" in light of the social and contextual understanding that human rights law, and ICERD in particular, settled decades ago.

The International Law Commission's own reasoning confirms the point. It explained its removal of the Rome Statute's definition of gender from the draft treaty by reference to developments in international human rights law and international criminal law that reflect the current understanding of the term. It quoted the ICC Prosecutor's policy describing the Rome definition as one that acknowledges the social construction of gender and is applied, under Article 21(3), in accordance with internationally recognized human rights.[127] The Commission then observed that the other persecution grounds, "racial" among them, were likewise left undefined, which leaves them to be read according to the same evolving understanding.[128] The Commission thus treated human rights law, channeled through Article 21(3), as the mechanism that keeps the treaty's terms current, and the understanding it endorsed for gender was a social one. But the Commission will not be in the room when a court construes the treaty. Its commentary are interpretive sources but not binding, and the questions it deferred will recur as the treaty's language ages in its turn. The Article 21(3) instruction the Commission relied on must therefore be in the draft CAH treaty text. The same reasoning also bears on the choice between groups and grounds, taken up below.

The principle of legality makes that interpretive instruction indispensable. Legality bars a criminal court from moving beyond what the text clearly supports. Put simply, a court may not stretch the words of a crime beyond what they clearly say, and any doubt is resolved in favor of the person on trial. One cannot assume a human rights body's interpretation is available to a criminal court operating under the stricter constraints of legality. The treaty must itself provide the interpretive direction. A provision like Article 21(3) could prevent a biological interpretation of groups from becoming the default interpretive framework for groups under apartheid in the CAH Treaty.

The draft treaty itself already binds courts to human rights law, but only on one side of the case. The Commission drew on the Rome Statute's provisions protecting the accused when it drafted Article 11. It did not draw on the provision that, at the ICC, ensures the crime's terms are read in line with human rights law for victims.[129] Draft Article 11 guarantees any defendant "full protection of his or her rights under applicable national and international law, including human rights law and international humanitarian law." The Commission's commentary identifies the principle of *nullum crimen sine*

127 ILC, draft CAH treaty (note 3 above), art. 2 cmt. ¶¶ (41)–(42) (quoting OTP, Policy Paper on Sexual and Gender-Based Crimes ¶ 15 (June 2014)).

128 Ibid. ¶ (42).

129 Compare Rome Statute (note 5 above), arts. 55, 66–67, with id. art. 21(3). The Commission's commentary to draft article 11 itself cites Rome Statute articles 55 and 66–67 as comparators for the rights of persons under investigation and of the accused. ILC, draft CAH treaty (note 3 above), art. 11 cmt. ¶ (2) n.484.

lege among the rights so protected.[130] Human rights law thus enters the draft as a guarantee for the accused. The result is a text whose only human rights instruction, the protections it extends to the accused, points toward the narrower construction of the crime, while the instruction that would help protect victim recognition appears nowhere.

None of this is an argument against the rights of the accused. Those rights are the condition of a criminal instrument's legitimacy. The point is that the principle Article 11 applies is not particular to defendants. Law extends its firmest protections to those who cannot protect themselves. The accused facing a state's law enforcement machinery can be one such person. The victim of a discriminatory crime is another. No one chooses to be such a victim. A person becomes one because someone else singled them out for who they believed them to be. Whether that person satisfies an objective criterion of group membership has no bearing on what they suffered. Persecution already recognizes this. Its grounds-based approach asks why the perpetrator targeted the victim, not whether the victim can be certified as belonging to a group. The apartheid provision, as drafted, does not necessarily do so. The victims of a regime of institutionalized oppression are therefore doubly exposed. Populations at issue, Palestinians under a system that contests their standing as a group and Afghan women, girls, and LGBTQI+ persons under a system that contests theirs, are among those least able to secure recognition on their own. A treaty that draws on human rights law to protect defendants must not withhold its protections from victims. As Professor Rhonda Copelon argued, it would offend the basic principle of the law to extend human rights protection to one party before the court, the defendant, and withhold it from the victim.[131] Nor does the extension come at the defendant's expense. A rule of priority governs how the terms of a crime are read, not what must be proved or by what standard. It leaves every guarantee in Article 11 in place. It satisfies the principle of legality by supplying the express textual authority that legality requires before a court may read an inherited term through the law that has developed it. Article 21(3) has sat in the Rome Statute alongside Articles 55, 66, and 67 for more than two decades without any of them displacing each other. The draft treaty must afford the same consistency.

Without a provision like Article 21(3), victim exclusion would not stay confined to the apartheid provision. The definitions are the gateway through which every operative obligation in the treaty runs. The treaty obliges states to prevent and investigate crimes, to prosecute or extradite defendants, to afford mutual legal assistance, and to provide victim redress. Each of those duties attaches only to conduct the definitions reach. Recognition of apartheid opens the door to repair for the full breadth and duration of an oppressive discriminatory system. Reparations can reach back in time, as did Germany's payments for Nazi-era crimes, negotiated years after World War II and continuing for decades. The genocide case before the International Court of Justice is confined to Gaza and to conduct that began in October 2023. Apartheid stretches back decades and across the whole of the Palestinian territory. In principle, every violation committed within an atrocity's scope is eligible for reparations. In practice, the scale of abuse forces reparations programs to limit victim recognition

130 ILC, draft CAH treaty (note 3 above), art. 11, ¶ 1 and cmt. ¶¶ (3), (7) (explaining that "fair treatment" is "viewed as incorporating the specific rights possessed by an alleged offender under international law" and listing among the rights protected under human rights law and international humanitarian law "the right to face punishment only for an act that was criminalized by law at the time the act was performed (the principle of nullum crimen, nulla poena sine lege)"). The phrase "and international humanitarian law" was added on second reading. The 2017 text ended with "including human rights law." See Office of the U.N. High Commissioner for Human Rights, Observations on the Text of Draft Articles on Crimes Against Humanity (2018) (quoting the first-reading text).

131 Rhonda Copelon, "Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law," McGill Law Journal 46, no. 1 (2000): 217–40, at 236–37 (arguing that article 21(3)'s requirement that the Statute be applied and interpreted consistently with internationally recognized human rights governs the definition of gender, and that human rights protection cannot be extended to the accused while withheld from victims).

and adhere to the categories of victimhood the law has already recognized.[132] Recognition of apartheid is what places the regime itself, rather than a series of discrete acts, within reach of repair. Read with persecution charges, it should allow the full population subjected to discriminatory fundamental rights deprivations under that regime, not just those able to prove a particular act against a particular person, to be counted among its victims.

Human rights law has moved decisively toward understanding race and gender as social constructs. International criminal law has moved with it, most clearly in the treatment of gender and other categories under persecution. A CAH treaty that reproduces the Rome Statute's language while omitting the clause that binds interpretation to human rights law would codify an older framework at the moment the two bodies of law are converging. This could lock criminal courts to the narrower reading the principle of legality will be understood to require. The drafting stage is the point at which this can be most easily corrected. The April 30, 2026, benchmark for government proposals to the compiled text has passed, but Resolution 79/122 contemplates amendments by governments at any stage of a process that runs through the Preparatory Committee and Working Group to the Diplomatic Conference itself.[133]

Against this background, the proposal advanced by the American Branch of the International Law Association's (ABILA) study group on crimes against humanity is a constructive initial contribution. While requiring revision, its central instinct is correct. The proposal recognizes that the draft treaty needs an application and interpretation clause, and models that clause on Article 21(3). It states that:

> The present Convention shall be interpreted and applied in a manner consistent with international law, including international human rights law, international humanitarian law, and international criminal law, without any adverse distinction founded on grounds such as race, colour, language, gender, age, disability, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.[134]

It improves on Article 21(3), adding disability to the enumerated grounds, in line with the Convention on the Rights of Persons with Disabilities, which was adopted after the Rome Statute. Moreover, its omission of reference to a gender definition adheres to the current CAH treaty draft, which no longer contains the definition.

The difficulty lies in the interpretive anchor. The difference between the two formulations is consequential because Article 21(3) functions as a rule of priority. In plain terms, when two bodies of law point in different directions, it tells the court which one wins. Article 21(3) directs that interpretation be consistent with internationally recognized human rights and names no competing source. Where human rights law and international criminal law's own case law point in different directions, the human rights reading should prevail. ABILA's proposed clause, on the other hand, names three bodies of law without ranking them. At the point of potential divergence, for instance on

132 See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, U.N. General Assembly, Resolution 60/147, ¶ 8, December 16, 2005; see also Lisa Davis, "Post-Conflict Reparations: Methods for Addressing Discrimination," *University of Pennsylvania Journal of International Law 46 (2025): 949, at 955–956, 970, 987 (examining, at 970, Germany's post-World War II program, the longest-running reparations program in the world).*

133 U.N. General Assembly, Resolution 79/122, ¶¶ 4–5, 9, December 4, 2024 (setting the four-year timeline, designating the ILC Draft Articles together with a compilation of government proposals as the basis for negotiation, and inviting proposals for the compiled text by April 30, 2026); Sadat, ABILA Introduction (note 126 above), 1–2 (observing that the text remains open to amendment by governments at any time during the negotiations and that the Draft Articles are the starting point of the negotiations, not the endpoint). The ABILA Study Group's next phase contemplates a study group or committee at the level of the International Law Association, with broader international participation and an expanded mandate, a natural venue in which the revision proposed below could be taken up. Ibid., 3.

134 ABILA Study Group on Crimes Against Humanity, Non-Discrimination Provision: Proposed Article XX of the Draft Articles on Prevention and Punishment of Crimes Against Humanity (December 23, 2025), https://www.ila-americanbranch.org/abila-study-group-on-crimes-against-humanity/ (hereinafter ABILA, Non-Discrimination Provision).

whether racial groups can be read to include the Palestinian people or gender groups to include LGBTQI+ persons, courts receive no instruction to definitively resolve the conflict in favor of the human rights framework.

An unranked list is not neutral in a criminal instrument because the instrument itself supplies the ranking. The draft treaty is a criminal convention, and its default follows from that character, with criminal jurisprudence binding and human rights law persuasive. A court construing the terms of a crime works first within criminal law, and the doctrines, precedents, and methods that govern its interpretation. On top of that disciplinary default sits the principle of legality. *Nullum crimen* sine lege requires strictly construing criminal provisions. It directs any ambiguity be resolved in favor of the accused. As between a human rights reading that broadens a crime's reach and a criminal law reading that narrows it, a court is bound to the narrower reading unless the treaty's own text supplies express authority to depart from it. That is why a human rights mandate holder may easily read "racial group" through ICERD's contextual understanding, while a criminal court construing the same term is less able to.

Each ABILA proposal is accompanied by explanatory notes, the drafters' commentary on their sources and reasons. The notes describe the proposal as drawn from Article 21(3) and as substantively identical to it, which shows the drafters believed they were carrying the safeguard over, not weakening it. However, they do not address the change to the interpretive anchor. The amendment that follows is correspondingly modest. The clause need only add a rule of priority, providing that where these bodies of law diverge in the interpretation of the Convention's terms, the reading consistent with internationally recognized human rights governs. Two formulations to that effect are set out below.

If this proposal is adopted without amendment, the constraint may tighten at the national level, where the treaty is currently built to operate. States will implement the convention through domestic penal legislation. The judges who apply that legislation will construe it through their own penal codes and their act-centered criminal jurisprudence. In these bodies of law, structural crimes of discriminatory oppression and domination generally have no analogue and international human rights law sits at its furthest remove. Listing the three bodies of law as equals therefore misdescribes the adjudication it is meant to guide. In a criminal instrument they are not equal. Criminal law is where a court begins, and legality is what keeps it there. The danger of adopting the clause in ABILA's proposed form could be greater than the danger of adopting no clause at all. Silence leaves the human rights argument open for a prosecutor to make and a court to accept. A clause that expressly names international criminal law as an interpretive source may close that opening.

The corrective does not require abandoning the study group's contribution, and it does not require novel language. The simplest course is to carry Article 21(3) itself into the draft treaty. The formulation asks negotiators for something already agreed to. It carries a settled meaning and has governed the same definitions for more than two decades. It presents the human rights anchor as the continuation of an existing consensus rather than a new commitment. Alternatively, if the study group's broader reference to international law is thought valuable for other provisions of the treaty, the clause could retain that reference while adding a rule of priority, so that where interpretations of the Convention's terms diverge, the reading consistent with internationally recognized human rights governs. A revised clause on that model would read:

> The present Convention shall be interpreted and applied in a manner consistent with international law, including international human rights law, international humanitarian law, and international criminal law, **and, where these bodies of law diverge in the interpretation of**

the Convention's terms, consistent with internationally recognized human rights, without any adverse distinction founded on grounds such as race, colour, language, gender, age, disability, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Either formulation supplies the safeguard the draft treaty omits and helps give the apartheid provision the ability to recognize all of its victims.

III.

Part Two: Four Proposed Definitions for Apartheid in the Draft CAH Treaty

I. *Definitional Stakes:* Four Proposals and the Criteria for Evaluating Them

As governments move to negotiate the long-awaited treaty on crimes against humanity, the draft retains a definition of apartheid built for a different era, one that risks excluding many who most need its protection. The current draft reproduces verbatim the language of the Rome Statute, defining apartheid as "inhumane acts … committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."[135] That language is now nearly 30 years old and inadequate to protect victims for the reasons described above.

In South Africa, a country still marked by extreme inequality, domestic cases addressing apartheid-era crimes are only now beginning to move forward.[136] The compounded harms black women experienced under apartheid remain legally invisible. For decades, the Palestinian people have sought formal acknowledgment of apartheid under international criminal law. Meanwhile, following the Taliban's takeover of Afghanistan in 2021, U.N. experts, Afghan feminists and other civil society advocates renewed calls to recognize their systematic oppression of women, girls, and LGBTQI+ persons as gender apartheid.[137]

The definition states adopt will impact which victims are recognized as such. Four proposed new definitions include the recognition of systematic gender oppression and domination. The five criteria below supply a means to determine each proposal's effectiveness. Each distills conclusions developed in Part One and supplies what is needed to apply the criterion, with cross-references to the fuller analysis. Following that is an analysis of each of the four proposed definitions, evaluated against all five of the below criteria. None of the four proposals addresses the institutionalized regime requirement or the elevated threshold for inhumane acts. Those two problems are therefore not treated in this part and are taken up in the recommendations.

Criterion 1. Recognize gender oppression within the crime of apartheid. Apartheid's definition must account for regimes that construct and enforce regimes of oppression and domination based on gender. All four proposals attempt this, reflecting an emerging consensus among U.N. experts, states, and civil society that such regimes should be within the definition's reach. What separates the proposals is how gender enters the definition. The remaining criteria test those differences.

135 ILC, draft CAH treaty (note 3 above), art. 2(2)(h).

136 See note 12 above.

137 See e.g., Special Rapporteur on the Situation of Human Rights in Afghanistan and Working Group on Discrimination against Women and Girls, "Treaty on Crimes Against Humanity: States Must Give Afghan Women a Central Voice and Recognise Gender Apartheid, Experts Say," press release, Office of the United Nations High Commissioner for Human Rights, January 19, 2026, https://www.ohchr.org/en/press-releases/2026/01/treaty-crimes-against-humanity-states-must-give-afghan-women-central-voice (hereinafter U.N. Experts Joint Statement); Working Group on Discrimination against Women and Girls, Draft Articles on Prevention and Punishment of Crimes Against Humanity, Recommendations from the Working Group on Discrimination against Women and Girls, U.N. Doc. A/HRC/WG.11/40/1 (February 15, 2024) ¶ 9.

Criterion 2. Recognize all of apartheid's victims. A definition should recognize everyone an apartheid regime targets on a prohibited ground of discrimination, not just victims who can prove they fit in a fixed group. Otherwise, the burden falls on the victim to prove their group membership, rather than on the perpetrator to answer for what they did. A definition satisfies this criterion if it identifies victims based on how a regime targets them rather than first requiring proof that the victims belong to a group whose membership is fixed at birth. A grounds-based, rather than groups-based, mechanism to identify victims would satisfy this criterion.

Criterion 3. Recognize victims targeted on intersecting grounds. Systems of oppression and domination often target victims on multiple, intersecting discriminatory grounds. A victim targeted on intersecting race and gender grounds must be recognizable within a single charge. A grounds-based definition, for example, helps deliver that, allowing a prosecutor's charge to carry a combination of grounds an apartheid regime employed. It asks why the perpetrator targeted the victims rather than to which group they belong. A definition should account for black South African and Namibian women's full experiences under apartheid. They lived under racist and patriarchal domination as one mutually reinforcing system. A definition that cannot recognize the women whose oppression was a key feature of the apartheid system falls short of this criterion.

Criterion 4. Preserve apartheid's historical and colonial roots within a universally applicable crime. The crime of apartheid emerged under international law with two defining features. As recognized by the Apartheid Convention, it was rooted in colonial, racist domination in South Africa and Namibia, a history that was itself gendered, and enforced through mutually reinforcing racist and patriarchal policies and violence. The Apartheid Convention definition was also universal by design, chargeable wherever a regime organizes systematic racist oppression and domination. A definition satisfies this criterion if it holds both features together. It must keep the crime anchored in the history that gives its elements their meaning, and that supplies prosecutors with precedent and factual pattern, including the record of what black South African and Namibian women endured. It must also remain a universal crime, chargeable in any context, including those without colonial roots. Severing the crime from its history, including by presenting gender as an addition external to a history that was gendered from the start, would deprive prosecutors a key reference for its elements. On the other hand, treating colonial history as a precondition would narrow victim recognition and create unnecessary prosecutorial burden.

Criterion 5. Avoid disjuncture in international criminal law. A definition satisfies this criterion if it preserves continuity with the existing architecture of international criminal law. Disjuncture can emerge in at least three ways, via formulations that (1) create a separate crime for conduct the definition already reaches, (2) establish separate analytical tracks within a single criminal provision targeting a single regime, or (3) introduce vocabulary with no antecedent in an instrument or tribunal. Each risks fragmenting jurisprudence by inviting courts to rank parallel provisions or to make accountability dependent on the charging provision rather than on the conduct that meets key elements.

The table below summarizes how each proposal fares against the five criteria.

Criterion	**First Proposal** (two crimes of apartheid codified)	**Second Proposal** (one crime with gender groups added)	****Second Proposal** (one crime with merged groups variant)	**Third Proposal** (one crimes with groups replaced by grounds)	**Fourth Proposal** (one crime that adds colonial ground or preamble)
1. Gender oppression recognized within the crime	Satisfied	Satisfied	Satisfied	Satisfied	Satisfied
2. Reaches all of apartheid's victims	Not satisfied	Not satisfied	Not satisfied	Satisfied	Satisfied
3. Allows intersecting grounds within a single charge	Not satisfied	Possible but impractical	Possible but impractical	Satisfied	Satisfied
4. Recognizes historical and colonial roots within a universal crime	Satisfied only with preamble*	Satisfied only with preamble*	Satisfied only with preamble*	Satisfied only with preamble*	Satisfied
5. No definitional disjuncture	Not satisfied	Partly satisfied	Partly satisfied	Satisfied	Partly satisfied

* Colonialism can be recognized in the treaty's preamble rather than as an operative ground. A preamble guides interpretation of the whole treaty without adding an element to any crime, so preambular recognition meets the historical and colonial roots criterion for any proposal and, unlike an operative colonial ground, does so without creating the disjuncture Criterion 5 identifies.

**See discussion under the Second Proposal, Criterion 3 below.

1. *First Proposal:* Adding "Gender Groups" through Two Distinct Crimes of Apartheid

The first proposal creates a second, standalone crime of "gender apartheid" alongside the existing definition, mirroring the Rome Statute's apartheid provision with "gender groups" in place of "racial groups." The two provisions would read:

> "The crime of apartheid means 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."
>
> "The crime of **gender** apartheid means 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."

The formulation traces to the End Gender Apartheid Campaign's early materials, which describes the approach as substituting "gender" or "sex" for "race" in the existing definitions of apartheid, producing a parallel provision with gender groups in place of racial groups.[138] Measured against the criteria, the proposal satisfies Criterion 1, since it would bring gender within the law of apartheid. It does so, however, in the form least able to deliver on that recognition, given it falls short of Criteria 2, 3, 4, and particularly 5.

Criterion 1. Recognize gender oppression within the crime of apartheid. The proposal satisfies this criterion. It would bring gender oppression within the law of apartheid and was the first formulation to give that demand concrete legislative form, placing the Taliban's institutionalized system squarely on the negotiating agenda.

Criterion 2. Recognize all of apartheid's victims. The test is simple: Does the definition recognize victims by the conduct directed at them, or does it

138 End Gender Apartheid Campaign, "Fact Sheet No. 1: What Is Gender Apartheid?" (March 8, 2023), https://endgenderapartheid.today/download/FactSheet1.pdf (describing the approach as "substituting 'gender' or 'sex' for 'race'" in existing apartheid definitions). In October 2023 the Campaign shifted to the amendment formulation examined under the Second Proposal. See "End Gender Apartheid Campaign, Joint Letter and Legal Brief to Amend the Draft Crimes Against Humanity Convention to Encompass Gender Apartheid" (October 5, 2023), https://endgenderapartheid.today/legal-brief.php (hereinafter Joint Letter and Legal Brief).

first require each victim to establish membership in a fixed group? A definition built on group membership, as this proposal is, asks who the claimant is, not what was done to them. The risk is not theoretical. As described earlier, some who contest the characterization of Israel's regime as apartheid argue that Palestinians are not a racial group.[139] The same logic also supports disingenuous victim recognition of those privileged under apartheid. Treating group membership as requiring some biologically verifiable showing, however small, reproduces the classificatory logic of apartheid regimes rather than its historical reality.

The proposed definition's incongruence with persecution deepens the shortfall in application. Persecution identifies victims by the grounds of their targeting, a net cast as wide as the perpetrator's own discriminatory views. This proposal, on the other hand, identifies victims by membership in a fixed group, a net cast only as wide as the victims who can prove membership. That divergence may provide the defense an argument that the population targeted on gender or racial grounds under persecution is broader than the population able to prove membership in a gender or racial group under apartheid. Victims who fall into that gap may lack recognition as a member of the group under apartheid.

Criterion 3. Recognize victims targeted on intersecting grounds. A victim subjected to a combination of racial and gender oppression cannot be recognized within a single charge under this proposal. It requires dividing the compounded experience between two separate crimes, a racial case under one provision and a gender case under the other. Victims are forced into one box or the other, and the evidence that the two systems reinforced each other, the fact that made the domination what it was, belongs fully to neither charge.

Under this formulation, a prosecutor who wants the record to capture experiences akin to those black women suffered under apartheid might choose to charge both criminal provisions together. International criminal law routinely permits cumulative charging, which is charging the same acts under multiple provisions where distinct elements are met. Convictions under both could in principle stand since each would contain a materially distinct element, a racial regime for one and a gender regime for the other.[140] However, charging both creates vulnerabilities at the prosecutor's desk, in the judge's review, and at trial.

The first challenge is the weight of the undertaking. A prosecutor would have to prove every element of an institutionalized regime twice, once for racial apartheid and again for gender apartheid. Next, the prosecutor would have to construct the intersectional account connecting the two, which neither provision recognizes. Each of these burdens, and all of them together, may push a prosecutor toward charging one provision only. The second challenge arrives if a prosecutor nonetheless brings both charges.

Charging the conduct under both provisions may also prove challenging at the judicial stage. A judge reviewing two charges based largely on the same evidence could regard the second apartheid charge as redundant. The test for cumulative convictions gives that instinct doctrinal form. International criminal law permits convictions under more than one provision for the same conduct only when each offense requires proof of at least one element the other does not. When one offense is wholly contained within the other, the narrower conviction falls away as subsumed within the broader one. This presents a

139 This is despite the Israeli regime codifying the categories of its own construction, see ICJ, Palestine Advisory Opinion (note 98 above) (Salam, President, decl.), ¶ 22 (analyzing Israel's Basic Law of 2018, which declares the Land of Israel the historical homeland of the Jewish people and commits the State to securing the welfare of members of the Jewish people, as "drawing a clear distinction between Jewish and non-Jewish people").

140 *Prosecutor v. Delalić et al. (Čelebići), Case No. IT-96-21-A, Appeal Judgment, ¶¶ 412–413 (February 20, 2001) (permitting cumulative convictions for the same conduct only where each offense contains a materially distinct element). See also Lisa Davis, Kirby Anwar, Wendy Isaack, and Huma Saeed, "April 30th Deadline: States Should Start CAH Treaty Negotiations with this Modernized Apartheid Definition," Opinio Juris, April 2, 2026,* https://opiniojuris.org/2026/04/02/april-30th-deadline-states-should-start-cah-treaty-negotiations-with-this-modernized-apartheid-definition/ (hereinafter Davis et al., "April 30th Deadline") (analyzing the burdens parallel racial and gender apartheid charges would impose on prosecutors).

new dilemma open to argument, namely: Do two provisions that differ only in the word "racial" or "gender" each demand proof the other does not require?[141] A court could conclude that the overlap is too nearly complete for both convictions to stand where the same inhumane acts, committed against the same victims, are charged against the same defendant.

The third stage arrives if the charges clear that test at the arrest warrant or charging phase because cumulation can still fail in application. The South African example, particularly the experiences of black women, highlights the need for an intersectional approach to gender and race in the definition of apartheid. On the historical facts a gender apartheid charge would likely collapse before cumulation. This is because the proposed provision requires proof of a regime of men dominating women without a racial analysis. Apartheid South Africa included racial domination and oppression on its own, as well as racial and gender oppression together, in the pass laws that extended to black women, the migrant labor system that severed them from their families, and the influx controls that confined them to reserves. Were the regime only racist, black men and black women would have experienced the regime in the same way, and they did not. Were it only gendered, all women would have been subordinated in the same way, and they were not. White women, though subject to real legal constraints, never experienced the totalizing oppression and domination that constitutes apartheid. A gender charge without a showing of racial oppression therefore would lack a solid regime to attach to, a difficulty the third criterion analysis of the Second Proposal examines in depth. Where both regimes (one gendered and one racist) could be shown, the two charges then pull against each other in relation to intent, since each conviction requires the specific intent to maintain its own regime. Acts serving the racial order may hand the defense its answer to the gender charge, and the reverse. Even the fullest success, two convictions, records two parallel wrongs rather than the one compounded wrong the victim lived. One judgment sees a black person, the other sees a woman, and the harm she experienced as a black woman, the two systems interacting in one life, belongs to neither. A prosecutor pays twice the proof for a result that still misdescribes the harm. The single charge this criterion requires is structurally unavailable.

Criterion 4. Preserve apartheid's historical and colonial roots within a universally applicable crime. Apartheid in South Africa and Namibia was itself gendered, enforced through mutually reinforcing racist and patriarchal domination. A freestanding gender apartheid provision, with no textual or historical connection to the existing crime, presents gender oppression as an addition appended to apartheid rather than as a return to its own gendered history. That placement carries costs in the current negotiations. States and civil society organizations with the deepest historical stake in the crime have voiced concern that an expansion motivated by developments in Afghanistan could dilute the crime or sever it from its roots while South African survivors still await a first completed prosecution. A parallel crime confirms rather than answers that concern. Furthermore, it does nothing to restore the colonial recognition this criterion requires, though as the summary table notes, preambular recognition of colonialism remains available. A formulation that instead includes gender in a singular apartheid crime and which retains its historical colonial context would address the concerns.

Criterion 5. Avoid definitional disjuncture in international criminal law. The proposal introduces disjuncture via the three means the criterion identifies. First, a separate crime generates separate bodies of jurisprudence.

141 Cumulative convictions are a matter of judicial assessment, and courts have divided on closely related pairings. At the ICC, for example, the Bemba Pre-Trial Chamber declined even to confirm torture charges cumulative with rape resting on the same conduct. *Prosecutor v. Bemba, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) on the Charges, ¶¶ 199–209 (June 15, 2009). The ICTY Appeals Chamber, however, had permitted rape and torture convictions to stand together on the same conduct. E.g., Prosecutor v. Kunarac et al., Case Nos. IT-96-23 and IT-96-23/1-A, Appeal Judgment, ¶¶ 179–185 (June 12, 2002).*

Materially identical conduct may then satisfy one provision but not the other where different courts develop different readings of shared elements. Analysis could diverge on what, for example, constitutes an "institutionalized regime" or an "inhumane act" and what evidence establishes intent, fracturing apartheid's legal and symbolic unity.

Second, a separate gender apartheid provision may risk nonrecognition of victims. Legal systems do not interpret new provisions in a vacuum. A provision understood to solely address the domination of women and girls could be construed narrowly by institutions and states that have historically dismissed gender discrimination. For example, in some countries, legal systems channel "honor" killings, which usually target women, girls, and LGBTQI+ people, into a separate legal track. In those jurisdictions, statutory sentence reductions or provocation defenses treat killing a woman for perceived sexual or social transgression as a lesser offense than an otherwise identical murder.[142] A court interpreting a new gender apartheid provision may take a narrower view than that under the existing provision of what constitutes an inhumane act or what counts as evidence of oppression. This could particularly arise where gendered harms such as reproductive control, forced marriage, or restrictions on movement, education, and expression are not recognized as evidence of oppression, or are discounted as custom rather than understood as the instruments of oppression that they are.

The third disjuncture is the term "gender groups," which has no antecedent in international criminal instruments, treaties, or tribunals and no settled understanding among states. Gender *grounds*, on the other hand, has been a codified category since 1998 and has received, albeit recent, detailed prosecutorial guidance.[143] Human rights law understands gender as a social construct, but international criminal law's protected *groups* jurisprudence has repeatedly pulled toward biological characteristics. Readings that attach biology to "racial group" have encouraged misinterpretation that excludes Palestinians from recognition as apartheid victims. The same contest is already underway over gender. Organized anti-rights movements press a biological definition of the term, a reading that would not only exclude LGBTQI+ persons from any "gender group" but would confine women to a reproductive function and prescribed inferior role. On that discriminatory understanding, the harms Afghan women are fighting to have recognized, including the denial of education, of work, of movement, and of public voice, register as the ordinary ordering of family and social life rather than as persecution or apartheid. The scholarship that has attempted to define gender groups, largely in debates over adding gender to the Genocide Convention's protected categories, has tended to resolve the term as sex, confirming how fragile the ground beneath the category remains.[144] The proposal thus asks states both to create a second crime and to negotiate, from nothing, what a gender group is and where its boundaries lie, where a settled alternative would better protect those targeted on gender grounds.

142 E.g., Egypt Penal Code No. 58 of 1937, art. 237 (reducing the penalty for a husband who kills his wife upon discovering her in the act of adultery); Iraq Penal Code No. 111 of 1969, art. 409 (limiting to three years' imprisonment the penalty for killings framed as defending family honor).

143 See note 107 above (the July 2025 arrest warrants for gender persecution); on the prosecutorial guidance, see note 11 above. On the Colombian cases, see note 174 below.

144 See note 118 above.

2. *Second Proposal:* Adding "Gender Groups" to the Existing Definition

A second proposal retains apartheid as a single, unified crime but adds gender by expanding the definition to read:

> "The crime of apartheid means 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, **or by one gender group over any other gender group or groups**, and committed with the intention of maintaining that regime."

This formulation was introduced in an October 2023 Joint Letter and Legal Brief to U.N. Member States, drafted by attorneys at the Atlantic Council Strategic Litigation Project and the Global Justice Center and issued by the End Gender Apartheid Campaign.[145] This definition avoids the fracture the First Proposal introduces, which is a genuine improvement. Measured against the criteria, the proposal satisfies Criterion 1. Its groups-based architecture produces the remaining shortfalls in subtler forms: it falls short of Criteria 2 and 4, satisfies Criterion 3 but only in a form whose evidentiary demands make it unlikely ever to be used, and partly satisfies Criterion 5.

Criterion 1. Recognize gender oppression within the crime of apartheid. The proposal satisfies this criterion. Gender is included in the existing definition, preserving apartheid's legal and symbolic unity on the face of the text. The criteria that follow measure the costs of the groups-based formulation of that inclusion.

Criterion 2. Recognize all of apartheid's victims. The structure defines the crime through two separate relationships of domination: one racial group over another, or one gender group over another. Each relationship assumes a discrete dominant group and a discrete subordinate group. Before a court can examine the conduct, the prosecutor must prove that the victims belong to a fixed, subordinate group. This risks borrowing the perpetrator's logic without recognizing all the perpetrators' victims. Regimes themselves rarely, if ever, have difficulty sorting people into groups. Perpetrators often devise discriminatory "biological" tests to decide who belongs to the group they oppress, the "pencil test" being apartheid South Africa's notorious example. A definition built on fixed group membership does not adopt any particular test, but it does adopt the premise that a victim is someone who can be shown, by some biological or hereditary marker, to belong to the subordinated group. Independently certifying each victim's membership does nothing to advance the apartheid provision's purpose, which is to condemn the discriminatory intent and effect of the perpetrator's conduct. It instead adds a layer of exclusion for the victims the law is meant to protect from the acts it prohibits.

The definition risks excluding victims whom the regime subordinates but whom a court declines to place in the subordinated group. That would happen where a court refuses to read a people as a "racial group," a misreading that has been applied to the Palestinian people. Under that misreading, Palestinian victims of persecution under apartheid may not be recognized as apartheid victims. The regime that persecutes them based on characteristics including race for the purpose of oppressing and dominating them is paradoxically not understood as an apartheid regime, because the court can find no "racial group." In other words, where Israel uses persecution to enforce apartheid, the Palestinian people may not be read as a "racial group" under apartheid, despite being targeted on grounds of race for persecution.

Exclusion could also occur where LGBTQI+ people are not understood to count as part of a "gender group" or where they are forced into a "woman" or "man" box that either discounts their sexuality, misgenders them, or both. A person persecuted for being LGBTQI+, discriminatorily denied fundamental rights to,

145 End Gender Apartheid Campaign, Joint Letter and Legal Brief (note 138 above); Atlantic Council Strategic Litigation Project and Global Justice Center, "Why the Crimes Against Humanity Treaty Should Codify Gender Apartheid," *Just Security, October 5, 2023,* https://www.justsecurity.org/89193/why-the-crimes-against-humanity-treaty-should-codify-gender-apartheid/.

for example, expression or freedom from torture, may not be understood as part of the victim group under this configuration, even where the apartheid regime expressly oppresses LGBTQI+ people, as in Afghanistan.[146] For example, if a court views the oppressed gender group as "women" and the oppressor group as "men," it may not recognize a gay man as a victim. The targeting on compounded discriminatory ground that a lesbian endures could also be erased from the record.

Inevitably, encouragement to weigh biological characteristics for "gender groups" will invite discriminatory and exclusionary analyses for LGBTQI+ people, including nonbinary people, as well as for both trans and cisgender men and women. The problem is a definition that requires some biological characteristic to be established before the victim counts. Under that requirement, perception can supplement the characteristic but never substitute for it, so a victim the regime plainly targeted but whose membership cannot be shown biologically remains outside the group. Recognizing all apartheid victims requires categories of discrimination to capture those subordinated based on the perpetrators' perception of them, whether or not a biological characteristic can also be shown. A regime that decrees how gender must be lived persecutes whoever violates its decrees, whether they are women who resist, LGBTQI+ persons whose very existence defies the order, or anyone who stands with them. If the definition as drafted can be read to exclude Palestinian or LGBTQI+ people, it would mirror the discrimination of apartheid regimes. It would apply the regime's membership test to victims in the very law meant to recognize them.

A subtler problem with the "gender group over gender groups" framing is that men who oppose apartheid and are denied fundamental rights to, for example, assembly or speech in opposition to apartheid are, in a sense, lumped into the oppressor class.[147] Undoubtedly, the oppression or domination that they suffer is far less than that of women, girls or LGBTQI+ people – a difference that must be accounted for in reparations or rebuilding processes. No court would hold such men to be perpetrators. But a definition that sorts a population into a dominating group and a dominated one invites a public understanding in which they belong to the former, and that understanding denies their solidarity when solidarity is necessary to end apartheid. In the case of Afghanistan, it also risks entrenching stereotypes of Muslim men as a monolithic and uniquely oppressive class.[148] So, too, in contexts of apartheid based on race, even quiet acts of solidarity by those from the non-subordinated class with those the regime subordinates, can contribute to furthering the anti-apartheid struggle and should be encouraged. A grounds-based definition can more easily countenance such allies.

Criterion 3. Recognize victims targeted on intersecting grounds. The proposal does not foreclose an intersectional charge, so the criterion is not necessarily failed outright. However, keeping "gender group over gender group" distinct from "racial group over racial group" could read as a deliberate decision by the CAH treaty drafters to keep the tracks apart. As with the first proposal, that structure makes the showing so demanding that it is less likely to be made. Consider what a prosecutor would have to prove to capture the compounded harms akin to the ones black women experienced under apartheid. First, they would have to show that the regime enforced domination

146 The nature of the Taliban regime's gender oppression is reflected in the ICC's July 2025 arrest warrants against the Taliban's Supreme Leader and Chief Justice for the crime against humanity of persecution on gender grounds, see note 107 above. Work remains on recognizing the intersection of ethnicity and gender in the Taliban's treatment of the Hazara. See New Lines Institute for Strategy and Policy, *The Hazaras: An Overlooked Humanitarian Crisis in Afghanistan (2026)*, https://newlinesinstitute.org/intl-law-peace/the-hazaras-an-overlooked-humanitarian-crisis-in-afghanistan/; Minority Rights Group, "MRG Alarmed by Ongoing and Systematic Persecution of Hazaras" (2025), https://minorityrights.org/hazaras-2025/.

147 Inhumane acts committed against men who resist the regime's policies remain chargeable as apartheid because the definition asks whether the act served the regime, not whether its victim belonged to the oppressed group. What the structure withholds is recognition as members of the group targeted by the regime's systematic oppression and domination, as described further in the text.

148 Nora Jaber, "Gender Apartheid and the Limits of Criminalisation," *EJIL:Talk!, January 12, 2026,* https://www.ejiltalk.org/gender-apartheid-and-the-limits-of-criminalisation/.

and oppression by one racial group over another. Second, and separately, they would have to show the same regime enforced domination by one gender group over another. Third, they would have to show that compounding harm arose from the two systems' application. This would be three showings for a regime that operated as one system of oppression and domination. That added evidentiary and analytical work increases the prosecutorial burden and multiplies the openings for defense challenge.

The third step is the weak point because it appears nowhere in the definition's terms. Had the clause read, for example, "one racial or gender group over any other racial or gender group," a cross-cutting charge would at least be visible on the face of the text, though the approach has some problems of its own, taken up below. Under the proposal at hand, the defense could argue that giving the third step legal effect would expand liability beyond what the definition provides, infringing the principle of legality.[149] This framing could sideline intersectionality at each stage. Prosecutors, particularly resource-constrained ones, will likely not bring the intersectional case at all. The compounded harm of overlapping oppression would be left legally invisible.[150] Even a prosecution equipped to carry that burden with a judge willing to consider it will fail in some contexts, because the facts themselves may not divide the way the definition demands. The gender track may be understood to require a regime of gender domination that stands on its own, separate from the racial one. Where racial and gender oppression operated as one system and the record supplies no such freestanding regime, the gender track has nothing to attach to.

The positions of black and white women under South African apartheid illustrates the cost. Apartheid South Africa's architecture of domination was racist and gendered at once. What raised the regime's conduct to apartheid for black women was the combination itself. A definition that sorts domination into separate race and gender tracks fails to recognize that. A gender charge brought in isolation from race fails where a groups-based definition requires proof that men as a group dominated women as a group, an understanding the South African record does not supply. Black men were themselves subordinated, and the harms black women endured as black persons and as women were harms that neither white women nor most black men experienced in that combination.[151] White women faced discrimination including real legal constraints by South Africa's regime[152] but nothing that amounted to the totalizing domination that constitutes apartheid. Black women were targeted both for being black and for being women. They endured the inhumane acts directed at black South Africans because black South Africans were those the apartheid regime subordinated, and those acts alone met the threshold of apartheid.[153]

149 The Rome Statute states the rule expressly that crimes are to be strictly construed and not extended by analogy, with ambiguity resolved in favor of the accused. Rome Statute, art. 22(2).

150 While the acts themselves can enter the case as inhumane acts, the victims of those acts would not be recognized as part of the group in their joint identity. The harms come in, but the group identity does not, a gap that carries the risks and consequences discussed elsewhere in this report, among them exclusion from reparations frameworks built on recognized categories of victimhood. A black woman would be recognized for harms against women as part of the gender group, or for harms against black South Africans as part of the racial group, but not as a black woman targeted as such. See Davis and Anwar, "Recognizing All Victims" (note 47 above), 51–58.

151 Sexual violence against black men and boys under apartheid was itself a form of gender persecution, and where committed to maintain the regime it can amount to apartheid on racial and gender grounds alike. Such violence often operates through the same gender order that subordinates women, weaponizing norms of masculinity against its victims, so its recognition as persecution complements rather than competes with accountability for crimes against women. See ICC Office of the Prosecutor, Policy on the Crime of Gender Persecution (note 11 above) ¶ 51.

152 White women under apartheid were subject to patriarchal legal subordination of their own. Under the marital power, for example, a married white woman could not sign a contract or go to court without her husband's consent, a restriction South Africa did not abolish until 1993. See General Law Fourth Amendment Act 132 of 1993 (South Africa) (abolishing the marital power). These constraints violated international human rights norms, but they were different from the totalizing racial and gender domination imposed on black women, and the comparison is drawn here for its evidentiary value rather than to equate the experiences. The legal architecture the regime built for the women of its own dominant group records what its authors thought of women as such, and for black women that view of gender compounded with the regime's view of race.

153 These included the pass laws, extended to women in the 1950s over mass resistance; the migrant labor system, which severed black women from husbands and children while channeling them into domestic service in white households; and the influx-control rules, which confined many to impoverished reserves where they carried the burdens of subsistence alone. See notes 38, 40, and 41 above.

Taken in the aggregate, the regime did oppress women. But oppression of women as a whole is not what rose to the level of apartheid. What rose to that level is the compounding of gender oppression with racist oppression against black women. A definition that treats all women as a single undifferentiated gender group cannot register that difference. Worse, the proposed definition's "groups" framework inadvertently puts South Africa's discrimination against white women, which did not amount to apartheid, in competition with or on the same level as that against black women. This dilutes what black women suffered as apartheid victims and erases the identity and the oppression at the center of it.

A grounds approach would instead turn the same facts into corroborating evidence of intersectional harm. It can recognize discrimination against women on gender grounds yet distinguish white women's experience from the oppression black women faced on both race and gender grounds and which rose to the level of apartheid. It can recognize black men oppressed on racial grounds while making room for black men targeted on race and gender grounds at once, as victims of sexual violence were targeted. On the gender grounds reading, white women's experience does the opposite of what it does under a groups approach. Rather than competing with black women's case, it supports it, standing as evidence that the regime discriminated on gender grounds. The regime targeted all women, and it targeted black women far more severely. That combination amounts to racist and gendered apartheid together, visible in the structure of oppression and in the inhumane acts committed against black women. A record of that kind tells the more complete story of how discrimination based on race and gender operated within one system of domination. It offers a better blueprint for societies to address discrimination as they heal and rebuild. The cost of leaving that story untold is already written into the historical record. South Africa's Truth and Reconciliation Commission largely failed to capture black women's compounded experience, and the gendered dimension of apartheid remains largely legally unrecognized in South Africa and Namibia.

The compounding effects of discrimination can also arise within gender alone, harming those whom the groups framework most visibly fails. A regime that prescribes dress codes and social norms for women punishes every woman who will not or cannot conform, an inconformity that also captures most LGBTQI+ persons.[154] The compounding is what makes their position distinct. A lesbian can be discriminated against as a woman and as a member of the LGBTQI+ community. As a woman in Afghanistan, for example, she is subjected to the oppression every woman faces, including the denial of the right to work, move freely, or go to school. As a lesbian she faces a heightened risk of forced marriage, and of rape, torture, and death.[155] A transgender person is targeted through the same compounding of misogyny and transphobia. A transgender man misgendered as a woman is subjected to all the same fates. A transgender woman perceived by perpetrators as a man faces gender discrimination for failing to be what a man is required to be. She faces a heightened likelihood of rape or other violence because presenting femininity is treated as subverting or threatening men's status.[156] A definition built on two fixed and all-encompassing groups (women and men), in which everyone must fall on one side or the other and every member is assumed to stand identically

154 Homophobia is itself a form of misogyny. Both enforce the same prescribed gender order, punishing women for whom they love and punishing anyone whose life departs from the roles assigned to their perceived gender, and under regimes of gender domination the two operate together rather than in parallel.

155 See Human Rights Watch and OutRight Action International, *"Even If You Go to the Skies, We'll Find You": LGBT People in Afghanistan After the Taliban Takeover (January 2022), 14–15, 31, 36–37 (documenting a lesbian threatened with death by relatives and forced into marriage, and the heightened risk of forced marriage and of sexual violence within marriage facing lesbian and bisexual women).*

156 Ibid., 16–17, 34–35 (documenting the abduction, detention, and rape of trans women, including an assailant's statement that the rape would "show you how it is to be a woman"); see also note 151 above (explaining how sexual violence against men and boys enforces the same gender order by treating femininity as degradation).

within it, can be read, and mischaracterized, as excluding LGBTQI+ people altogether.

If the relevant acts make it into the case, the "groups" framing would throw into question how they would be recorded, potentially obscuring the apartheid regime's full ideology. A lesbian's persecution could be recorded in truncated form, leaving out that she was punished for being in a relationship with another woman, as though the part of her womanhood the regime punished most directly were separable from the rest. Yet regimes that oppress based on gender do not merely regulate what a woman or girl may do; they prescribe what a woman or girl is. In the Taliban's ordering, as in the teaching of fundamentalist movements more broadly, girls and women are by nature submissive and dependent, made for marriage to a man rather than for education, work, or independence. These criteria are presented not as social rules but as biology.[157] Thus a woman who seeks schooling, a woman who financially supports herself, a woman who declines to marry, and a woman who loves another woman are all punished for the same offense: departing from a femininity the regime treats as innate. To carve the last of these out of gender discrimination and file it elsewhere would be artificial. It would encourage courts to position themselves as determining which "biological" criteria buy entry into the gender group. Furthermore, a trans woman could be excluded from the gender group altogether or recorded under an identity she does not hold. That recognition may count the harm while erasing the person, a humiliation that would be written into the record itself.[158] Nor are such recordings neutral. They reinforce the homophobic and transphobic premises used to argue that gender-based rights are secondary rights, or not human rights at all, a dynamic examined in more detail under Criterion 5.

Criterion 3 Applied to a Merged Variant: "One Racial or Gender Group over Any Other Racial or Gender Group or Groups." This variant has not been formally proposed. It is the Second Proposal with its two tracks merged, and it is assessed briefly here for the contrast it provides. A drafter persuaded by the critiques above might respond by merging the tracks rather than abandoning the structure, revising the clause to read domination by **"one racial or gender group over any other racial or gender group or groups."** The revision would improve the disjunctive text. It removes the requirement of proving two parallel regimes, permitting a single charge to describe a regime whose lines of domination run across race and gender. The merger, however, leaves intact exclusionary architecture. The definition would still identify victims through membership in a fixed group rather than through the grounds of the perpetrator's targeting, so every burden that flows from proving membership survives the revision intact. The prosecution must still certify a dominant group and a subordinate group as groups, antecedent to and independent of the conduct.

Persecution also requires proof of a group, but the bar is lower – it includes *any* identifiable group or collectivity targeted on prohibited grounds. The perpetrator's own targeting can identify the group. Perceived membership suffices for victim recognition, and no victim carries the added burden of being required to prove that she belongs to it by biological criteria. On first read the merger would include victims of compounding oppression, since a single

157 See Courtney W. Howland, "The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter," *Columbia Journal of Transnational Law 35 (1997): 271 (analyzing fundamentalist doctrines that cast women's obedience and subordination as natural and divinely ordained); Ahmed Shaheed, Special Rapporteur on Freedom of Religion or Belief, Gender-Based Violence and Discrimination in the Name of Religion or Belief, U.N. Doc. A/HRC/43/48 (2020) (documenting the invocation of religious precepts to cast restrictions on women and LGBTQI+ persons as reflecting their assigned natures); see also note 62 above (defining sex in exclusively biological terms as a matter of US federal policy). That a perpetrator justifies gender discrimination through religious belief does not alter its character as gender discrimination; the invocation of religious precepts to enforce prescribed gender roles is itself evidence of the intent to discriminate on gender grounds. See ICC Office of the Prosecutor, Policy on the Crime of Gender Persecution (note 11 above) ¶¶ 27, 53, 79, 94.*

158 See ICC Office of the Prosecutor, Policy on the Crime of Gender Persecution (note 11 above) ¶¶ 42–45 (recognizing targeting based on perceived non-conformity with gender criteria, including of transgender, nonbinary, and intersex persons); see also Davis and Anwar, "Recognizing All Victims" (note 47 above), 7–9, 59–61 (examining how group-membership requirements exclude transgender and other LGBTQI+ victims from recognition).

merged finding can now describe a black South African woman's targeting on race and gender together, though the evidentiary burdens Criterion 3 describes do not disappear. What the merger cannot reach, however, are the victims the membership screen itself excludes, including LGBTQI+ persons targeted under the oppressive gender order, or anyone a court simply rules to fall outside a group's boundaries. "Racial group" also survives the merger intact, and with it the fixed-membership reading that has been invoked to contest Palestinian inclusion.

The merged text also introduces a novelty of its own. A formulation in which any racial or gender group may dominate any other invites pairings the law has never contemplated, a racial group dominating a gender group among them, and leaves courts to decide whether such cross-category domination is cognizable at all. A grounds-based definition (proposals three and four) accomplishes everything the merger seeks. It charges a single regime for whatever combination of grounds it employed, without requiring biological proof of victims' group membership.

Criterion 4. Preserve apartheid's historical and colonial roots within a universally applicable crime. The proposal does not satisfy this criterion. Preambular recognition would help cure this, as it would for any of the proposals, and nothing in the structure forecloses that option. Another hindrance lies in how the crime is built. The proposal's "or" sorts racial and gender oppression into two parallel tracks within one provision, one racial group over any other *or* one gender group over any other. Read in the current negotiating environment, that structure presents the crime as expanding into a new form of oppression without connecting the expansion to the history that gave the crime its meaning. Many receive this as a dilution, drawing recognition toward a new application while the original victims still await accountability. The answer to that concern is a definition grounded in the intersectional experience of the communities whose struggles built the crime. A two-track structure cannot supply a grounding in the fact that black South African and Namibian women lived racial and gender oppression as one system. That apartheid system was a continuation and further codification of multifaceted discrimination inherent to colonialism.[159]

Criterion 5. Avoid definitional disjuncture in international criminal law. A disjuncture, for purposes of this criterion, is a break between the definition proposed and the law as it stands, a gap that courts must bridge before they can apply the text. The disjuncture here is subtler than the First Proposal's, leaving the criterion satisfied only in part. The proposal avoids the most visible break: It keeps apartheid a single crime rather than creating a second provision. Two subtler breaks remain.

The first lies in the word "or." Persecution's definition also joins its grounds with "or," and no disjuncture results because its grounds are reasons, not groups. Persecution asks why the perpetrator targeted the victim, and any ground, or any combination of grounds, answers that question and satisfies that element. The "or" in this proposal does different work. It joins two regimes, not two reasons. Domination "by one racial group over another" and domination "by one gender group over another" may be understood as each amounting to an institutionalized regime that must be proved along with proving the perpetrator specifically intended to maintain them. A prosecutor cannot plead them as alternative answers to a single question. She must establish one regime or the other, or both separately, and the intent element follows whichever she chooses. That is what produces the two analytical tracks described under Criterion 3, with the evidentiary consequences set out there.

159 Colonial practices are marked by both racist and patriarchal subordination, including colonizers controlling and regulating colonized women's lives to the most intimate detail to fuel and maintain a cheap or enslaved labor source or to otherwise control reproduction according to their whims. See, e.g., Karen Bouwer, *Gender and Decolonization in the Congo: The Legacy of Patrice Lumumba (New York: Palgrave Macmillan, 2010), 7, 9, 40–50.*

The second break is the undefined-term disjuncture examined under the First Proposal's fifth criterion. It applies here without change. "Gender groups" is a compound category that has no antecedent in international criminal instruments, treaties, or tribunals and no settled understanding among states.[160] Its closest intellectual antecedents lie in scholarship urging that gender be added to the Genocide Convention's rigid list of protected groups. That scholarship has tended to resolve the term as sex.[161] The lineage matters because criminal law's protected-group jurisprudence, even as it moved toward the perpetrator's perception, never released its anchor in biological fixity, while human rights law came to treat both race and gender as social and contextual constructs. Part One shows where that anchor leads for race. Readings that attach biology to "racial group" adopt the perpetrator's own classificatory logic as the law's standard, and they have kept the recognition of Palestinians as apartheid victims contested.

The same contest is underway over gender. Vocal movements press a biological definition of the term that would exclude LGBTQI+ persons from any "gender group" and confine women to a reproductive function and prescribed role.[162] They seek to classify the denial of education, work, movement, and public voice as the ordinary ordering of family and social life rather than as the inhumane acts of an apartheid system.[163] Pairing "racial group," a term with a recognized if contested legal history, with a term that has none does not add a category to the crime so much as open a contest over one. The Rome Statute's own history shows what an unsettled term costs. Its opaque definition of gender left prosecutors largely silent on gender persecution for more than two decades after 1998, and the first charges and convictions have come only in recent years.[164]

3. *Third Proposal:* Replacing "Groups" with "Grounds"

A third way of understanding apartheid defines the crime by the grounds on which a regime targets its victims rather than by the fixed groups to which those victims are assigned. Under this approach, the definition reads:

> "inhumane acts … committed in the context of an institutionalized regime of systematic oppression and domination **by one group over any other group or groups, on race or gender grounds**, and committed with the intention of maintaining that regime."

The Third Proposal began as a question the organization MADRE put to communities that have lived under apartheid: whether the draft treaty's definition should recognize the victims they know. Over two years of convenings on three continents, participants from South Africa, Namibia, Palestine, and Afghanistan worked through the current definition with

160 See the discussion under Criterion 5 of the First Proposal.

161 See note 118 above.

162 See Valerie Oosterveld, "The Definition of 'Gender' in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?," *Harvard Human Rights Journal* 18 (2005): 55 (documenting efforts at Rome to confine gender to biological sex); Lisa Davis, "This Is How We Won a Historic Victory for Women's and LGBTIQ Rights in International Law," *openDemocracy*, June 26, 2019, https://www.opendemocracy.net/en/this-is-how-we-won-a-historic-victory-for-womens-and-lgbtiq-rights-in-international-law/ (describing fundamentalist movements that cast gender equality as an attack on the male-or-female binary, seek to confine women to traditional roles as mothers and caretakers, and seek to erase LGBTIQ rights because their existence challenges that narrative); Victor Madrigal-Borloz, Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity, *Practices of Exclusion*, U.N. Doc. A/76/152 (July 15, 2021) (documenting organized campaigns to define gender as biology and their exclusionary effects).

163 Ibid. See Charlotte Bunch, "Women's Rights as Human Rights: Toward a Re-Vision of Human Rights," *Human Rights Quarterly 12 (1990): 486 (critiquing the public/private divide that casts violence against women as private and beyond the reach of human rights protection).*

164 See generally ICC Office of the Prosecutor, Policy on the Crime of Gender Persecution (note 11 above), Executive Summary; ibid., 4 (noting that despite more than twenty years of recognition, the Office had "only just begun" to bring gender persecution charges). See also Lisa Davis, "Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities," Northwestern Journal of Human Rights 20 (2021): 1, at 35–38 (tracing the decades of prosecutorial silence on gender persecution and the first charges in Al Hassan).

international advocates.[165] At Johannesburg workshops, convened along with the Foundation for Human Rights among others, and held at the Nelson Mandela Foundation, they arrived at the answer persecution already supplies.[166] The proposed definition borrows persecution's language of grounds so that the crime asks why a regime targets its victims rather than who the victims are.[167]

The proposal makes a single structural change, from groups to grounds, which allows it to satisfy the criteria the first two proposals cannot. It asks not who the victim is but why the perpetrator targeted them. The approach has authoritative support. In 2024, the Working Group on Discrimination against Women and Girls proposed that the draft treaty define gender apartheid as "inhumane acts … committed in the context of an institutionalized regime of systematic discrimination, oppression and domination by **one group over another group or groups, based on gender**, and committed with the intention of maintaining that regime."[168] The Third Proposal builds on that recommendation, modernizing the definition of apartheid as a whole and extending the grounds-based approach to race, producing a unified framework for the crime without disjuncture.

Criterion 1. Recognize gender oppression within the crime of apartheid. Under the Third Proposal the definition includes gender within the single, unified crime. It does so through the grounds-based approach that persecution employs.

Criterion 2. Recognize all of apartheid's victims. The Third Proposal asks why, not who, and that reorientation reaches every population the "groups" language has left in doubt. The definition removes a contested threshold to recognition for the Palestinian people. It asks whether the regime organizes systematic oppression and domination on racial grounds, a question that does not depend on certifying victims as group members by some biological or hereditary marker. That protection carries weight in the CAH treaty because unlike the Rome Statute, the draft contains no Article 21(3) equivalent directing courts to read its terms consistently with human rights law. Under a groups-based definition, recognition of the Palestinian people as apartheid victims could depend on an interpretive safeguard found in the Rome Statute but currently not in the draft CAH treaty. Under the grounds-based text, the definition itself does the work the missing safeguard would otherwise have to do. For Afghan women, girls, and LGBTQI+ persons, the definition captures targeting for perceived nonconformity with gender norms. The Office of the Prosecutor's 2022 Gender Persecution Policy confirms such targeting is on gender grounds, understood as targeting a person for carrying criteria the perpetrator prohibits or for lacking criteria the perpetrator requires.[169] The word "group" survives in the text, but it does the work it does under persecution: the group is understood to include *any group* and is identified by the perpetrator's targeting. Perceived membership suffices and no victim must prove membership by biological criteria.

The proposal also satisfies the one precondition the persecution pathway requires, the route described in Part One under which persecutory acts constitute the inhumane acts required for an apartheid charge. This avenue

165 The three continents were North America, Africa and Europe. See MADRE, "Modernizing the Definition of Apartheid in the Draft Crimes Against Humanity Treaty," https://www.madre.org/modernizing-the-definition-of-apartheid-in-the-draft-crimes-against-humanity-treaty/.

166 See "Apartheid as a Crime Against Humanity, February 17–18, 2026," YouTube, March 17, 2026, https://www.youtube.com/watch?v=QWwUDKOA3CE (recording of the workshop co-hosted by MADRE and the Foundation for Human Rights at the Nelson Mandela Foundation, Johannesburg); see also Embassy of Colombia in South Africa, "Recognizing Apartheid Victims in International Criminal Law and the Draft CAH Treaty," February 27, 2026, https://sudafrica.embajada.gov.co/sala-de-prensa/noticias/recognizing-apartheid-victims-international-criminal-law-and-draft-cah-treaty (describing the February 19, 2026 dialogue hosted with MADRE in Pretoria and the definition developed at the February 17–18 workshop convened by MADRE and the Foundation for Human Rights).

167 Davis et al., "April 30th Deadline" (note 140 above); Lisa Davis and Kirby Anwar, "Race, Gender and Apartheid in the Draft CAH Treaty: South Africa's Role," *Opinio Juris, July 18, 2025,* https://opiniojuris.org/2025/07/18/race-gender-and-apartheid-in-the-draft-cah-treaty-south-africas-role/.

168 Working Group Recommendations (note 137 above) ¶ 9; See U.N. Experts Joint Statement (note 137 above).

169 ICC Office of the Prosecutor, Policy on the Crime of Gender Persecution (note 11 above) ¶¶ 42–45.

for victim inclusion is important because the direct victims of apartheid are those who suffer an inhumane act intended to enforce the apartheid regime. As an inhumane act, persecution can capture victims of severe fundamental rights violations that do not otherwise amount to crimes against humanity. This ensures greater recognition of apartheid victims where the two crimes are cumulatively charged. Under this proposed definition, apartheid and persecution would identify victims the same way. The persecutory acts, which carry the Apartheid Convention's rights deprivations into an apartheid charge,[170] attach to the same victims, with no threshold argument over whether those victims qualify and no seam for a defense to widen. A grounds-based definition accomplishes what the Second Proposal's merged variant seeks. It charges a single regime for whatever combination of grounds it employed, without requiring biological proof of victims' group membership. This is because it asks why the perpetrator targeted the victim rather than which group the victim belongs to.

Criterion 3. Recognize victims targeted on intersecting grounds. The Third Proposal permits a single charge to carry intersecting grounds, and it does so through a method international criminal law has long applied. It reflects how persecution already operates. Persecution under Article 7(1)(h) applies to *any identifiable group* on the enumerated grounds, and none of those grounds requires the targeted group to possess biological or hereditary characteristics.[171] Tribunals have recognized that targeting can occur on multiple discriminatory grounds since Nuremberg, where persecution was charged and proved on political and racial grounds together. Tribunals used this method at the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), where chambers routinely entered convictions for persecution on political, racial, and religious grounds in combination. So too have the ICC and Colombia's Special Jurisdiction for Peace today drawn on a combination of grounds to support the discriminatory finding.

The point deserves precision, because the proposal's "or" does different work than the Second Proposal's. In "race or gender grounds," the "or" lists alternatives a single case can draw on together. A charge may rest on race, on gender, or on both at once, and evidence of one ground reinforces rather than crowds out the other. The Second Proposal's "or" instead joins two freestanding regime descriptions, one racial group over another "or" one gender group over another, each requiring its own separately proven dominant and subordinate group. Under the grounds approach the "or" widens a single charge; under the groups approach the "or" multiplies the charges a prosecutor must build, with the practical consequences described under the Second Proposal. Evidence that black women were targeted because they were both black and women does not split between a racial case and a gender case. Nor would similar intersectional targeting in other settings such as Palestine split the case. The evidence instead strengthens one case by showing how the grounds reinforced each other to sustain the regime. A grounds framing renders the compounded harms to be understood as one unified crime, something South Africa's Truth and Reconciliation Commission largely failed to capture.[172] Courts have relied on "or" between grounds in persecution to find persecution on intersecting grounds. In the 2025 *Abd-Al-Rahman* judgment, the ICC recognized persecution on political, ethnic, and gender grounds within a single charge.[173] Colombia's Special Jurisdiction for Peace, in Macro-Case

170 See the discussion in Part One, Section 6, The Higher Threshold for Inhumane Acts.

171 Rome Statute (note 5 above), art. 7(1)(h); ICC, Elements of Crimes (2013), art. 7(1)(h).

172 The Commission heard women's testimony largely through a framework of political violence that treated gendered harm as incidental, and its final report acknowledged the resulting gap. See Beth Goldblatt and Sheila Meintjes, *Gender and the Truth and Reconciliation Commission: A Submission to the Truth and Reconciliation Commission (May 1996); Truth and Reconciliation Commission of South Africa, Final Report, vol. 4, ch. 10 (1998).*

173 Prosecutor v. Abd-Al-Rahman, Case No. ICC-02/05-01/20, Judgment (International Criminal Court, Trial Chamber I, October 6, 2025) (hereinafter Abd-Al-Rahman Trial Judgment).

002 and in Macro-Case 009 on crimes against ethnic peoples and territories, recognized persecution on racial, ethnic, and gender grounds against Indigenous and Afro-Colombian women and LGBTQI+ victims including where those grounds intersect.[174] Their approach treated the mutual reinforcement of those grounds as probative of the single system the perpetrator maintained.

Criterion 4. Preserve apartheid's historical and colonial roots within a universally applicable crime. The proposal does not meet this criterion. It does not restore the colonial recognition that African and other Global South states secured in the 1973 Apartheid Convention's preamble and that the Rome Statute then excluded. The criterion is thus unmet, absent preambular recognition. Preambular recognition is discussed under the Fourth Proposal. The grounds-based structure nonetheless begins to open the door toward recognition of the colonial roots of apartheid. This proposal grounds the inclusion of gender in the historical experience of the communities whose struggles gave the crime its meaning. The same definition that can encompass victims in Afghanistan also names what black South African and Namibian women endured in the colonial context that gave shape to apartheid. This fact makes the inclusion a return to the crime's roots rather than a departure from them. The definition remains universal, chargeable wherever an institutionalized regime of discriminatory oppression and domination arises.

Criterion 5. Avoid definitional disjuncture in international criminal law. The proposal avoids the disjuncture inherent in the prior definitions. It creates one crime and one analytical track. It follows the model used to expand coverage of discriminatory international crimes by adding grounds within an existing provision while correcting a standing interpretive risk. Under the "groups" formulation and in the absence of settled apartheid jurisprudence, accountability mechanisms have imported evidentiary standards from genocide jurisprudence, that narrow who counts as a victim. This definition, organized instead around discriminatory grounds, realigns apartheid with the perpetrator-focused architecture applied under the crime against humanity of persecution since 1945.

4. *Fourth Proposal:* Replacing "Groups" with "Grounds" and Adding "Colonial Discrimination" as an Operative Ground or a Preambular Recognition

Apartheid did not emerge in isolation. It was shaped by colonial systems of domination, as the Apartheid Convention's preamble acknowledges. That recognition did not survive the Rome Statute's revision, and the draft CAH treaty has not restored it. The Fourth Proposal addresses the omission directly, and in doing so answers Criterion 4 most completely of the four proposals. It takes two forms, one fuller in its historical recognition, the other more limited but perhaps more readily achievable. Criterion 4 below considers a third form, the enumeration of colonialism itself as a crime against humanity.

Operative Ground: The operative ground version adds colonial discrimination to the Third Proposal's grounds-based definition, reading as follows.

> "inhumane acts … committed in the context of an institutionalized regime of systematic oppression and domination **by one group over any other group or groups, on race, gender, or colonial discrimination grounds**, and committed with the intention of maintaining that regime."

Preambular Recognition: In addition, or in the alternative, the second form proposes adding recognition of colonialism to the CAH treaty's preamble,

174 Jurisdicción Especial para la Paz (JEP), Sala de Reconocimiento de Verdad, de Responsabilidad, y de Determinación de los Hechos y Conductas, Auto No. 03, Caso 02, ¶¶ 3198 ,1481 ,1477 ,1429 ,1428 ,911 ,414 ,413 (July 5, 2023), https://relatoria.jep.gov.co/documentos/providencias/1/1/Auto_SRVR-ADHC-03_05-julio-2023.pdf; JEP, Sala de Reconocimiento de Verdad, de Responsabilidad, y de Determinación de los Hechos y Conductas, Auto. No. 03, Caso 09 (June 17, 2026).

which would form part of the treaty text and carry interpretive weight across all of its provisions.[175]

The Fourth Proposal emerged from a convening organized by MADRE and the Foundation for Human Rights in Johannesburg and Pretoria in February 2026, the fifth in a series of dialogues MADRE has convened on three continents over the past two years.[176] Participants from South Africa, Afghanistan, Palestine and Namibia joined with international advocates, assessed the draft treaty's definition and produced the formulation set out above. Many had lived under apartheid, and for some South African and Palestinian anti-apartheid activists the convening was their first opportunity to consider how the draft treaty defines the crime. The addition of colonial discrimination to the grounds-based text responds to longstanding calls from civil society and African states to acknowledge apartheid's colonial roots. In the proposed definition, colonial discrimination refers to the structures of subordination built under colonial domination and inherited by apartheid. These include racial classification and the control of land, labor, movement, and family life. These systems bore on colonized peoples as such and on colonized women with particular force. The term keeps race and gender as grounds in their own right while naming the history in which their joint enforcement took institutional form.[177] Because the Fourth Proposal retains the Third Proposal's grounds-based text and adds to it, the evaluation of the Third Proposal under the five criteria applies to it in full. Those conclusions are incorporated here by reference rather than repeated. What follows addresses only what the addition of colonial discrimination changes.

Criterion 1. Recognize gender oppression within the crime of apartheid. In its operative ground version, the Fourth Proposal is structurally identical to the Third except for the additional ground of colonial discrimination. Gender is included as a ground within the single, unified crime exactly as under the Third Proposal, satisfying the criterion.

Criterion 2. Recognize all of apartheid's victims. The Fourth Proposal likewise inherits the Third Proposal's victim inclusiveness. It eliminates the misreading advanced against the Palestinian people's recognition as victims, and it recognizes Afghan women, girls, and LGBTQI+ persons as victims by framing them as those targeted for what the regime took them to be. It creates congruence with persecution that helps carry the Apartheid Convention's listed rights deprivations into the charge.

Criterion 3. Recognize victims targeted on intersecting grounds. The recognition of intersectional oppression as a unified wrong carries forward unchanged from the third provision. The additional ground strengthens intersectionality, as a single charge can now account for the interaction of racial, gender, and colonial discrimination where a regime employs all three.

Criterion 4. Preserve apartheid's historical and colonial roots within a universally applicable crime. The Apartheid Convention's recognition of apartheid's colonial roots reflected the understanding that apartheid was a feature of colonialism and the two were mutually constitutive. It made the crime's architecture legible. Apartheid in South Africa and Namibia was enforced through colonial land dispossession, differential legal treatment between settlers and colonized populations, and denial of self-determination, elements also fundamental to apartheid against the Palestinian people. Removing the linkage with colonialism stripped an interpretive framework, which was not what Global South states sought when they won apartheid's

175 See *Vienna Convention on the Law of Treaties (VCLT), May 23, 1969, 1155 UNTS 331, art. 31(2).*

176 See note 166 above.

177 Davis et al., "April 30th Deadline" (note 140 above). The convening participants' own account of why they declined to endorse a separate crime of gender apartheid is recorded in Nora Jaber, "Redefining Apartheid in the Crimes Against Humanity Treaty: Towards Inclusive Pathways Forward," *Opinio Juris, April 20, 2026,* https://opiniojuris.org/2026/04/20/redefining-apartheid-in-the-crimes-against-humanity-treaty-towards-inclusive-pathways-forward/.

inclusion at Rome. Criterion 4 makes two demands, historical grounding and universality, and the inclusion of colonial discrimination grounds meets both. Universality holds because the grounds structure builds it in.

Persecution supplies the model. The Rome Statute lists political, racial, national, ethnic, cultural, religious, and gender grounds within a single provision, and no one reads the religious ground to confine persecution to theocratic regimes or the political ground to one-party states.[178] Each ground names a basis of targeting rather than a required character of the regime, and colonial discrimination would operate the same way. A drafting note or a statement in the negotiating record confirming that colonial discrimination describes qualifying grounds rather than a required character of the regime would foreclose the contrary argument.

Proposed variations on this formulation should be raised and resolved before turning to what the ground adds in practice. One would codify apartheid by **one group over any other group or groups, on race, gender, or [other] colonial discrimination grounds**. The addition of "other," on its intended reading, does useful work. It confines any ground entering through the residual category to grounds emerging under colonialism, and it makes explicit what the historical record supports: that racial and gender discrimination are themselves paradigmatic examples of the discrimination colonial systems produced and reinforced. The concern raised against it is that the same word invites a broader misreading, under which every apartheid charge, including one brought on race or gender grounds alone, would require proof of a colonial context. As a matter of treaty interpretation, that reading fails. The Vienna Convention directs interpreters to the ordinary meaning of terms in their context and in light of the treaty's object and purpose. Read that way, the qualifier attaches to "other grounds" alone. It describes the class from which unenumerated grounds may be drawn and does not add an element of proof to the grounds the treaty has already named.[179] Persecution's own residual clause confirms the point. Article 7(1)(h) has its enumerated grounds or "other grounds that are universally recognized as impermissible under international law." That standard has never been read to require separate proof that racial or gender grounds are universally recognized, much less to govern the definition of persecution as a whole. The enumeration settles the status of the named grounds; the qualifier governs only what may join them.

The difficulty is that adding "other" rests more heavily on interpretive method than on the text, leaving room for misinterpretation. The CAH treaty contemplates its own incorporation into domestic penal codes.[180] Legislative drafters and courts may have no grounding in international law, no occasion to consult the Vienna Convention, and no familiarity with how persecution's residual clause has been applied. In those settings the colonial reference could be taken at face value as limiting the crime to colonial contexts. Because the misreading is foreclosed only by method, and because the same substance is available through formulations that do not invite it, the better course weighs against adding "other" in this form.

Given that "colonial discrimination" is undefined under international law, another variant would remove the word "discrimination." "Colonial grounds" or "colonialist grounds" (as opposed to "colonial discrimination grounds") could capture forms of discrimination that buttress and underlie colonial regimes. That linguistic framing, however, still may not be clear enough to apply. Alternatively, a footnoted definition of "colonial discrimination" could clarify that the term allows examination of other forms of discrimination through which colonial regimes sort and stigmatize people in relation to their goal of

178 Rome Statute (note 5 above), art. 7(1)(h).

179 VCLT (note 175 above), art. 31(1); Rome Statute (note 5 above), art. 7(1)(h).

180 ILC, draft CAH treaty (note 3 above), art. 6 (obligation to establish the crimes under national law).

colonial domination. This may, however, invite unhelpful attempts to define the other listed forms of discrimination, which would counteract the intended status for each such term throughout the treaty. On the other hand, because it has been undefined, a definition in this case may not be viewed as inviting definitions of all other terms as its novelty in this treaty would make clear why it alone carries a definition.

For the Palestinian context, the grounds-based structure already removes the contested racial group threshold. The colonial discrimination ground or preambular addition would contribute a fuller analytical and evidentiary frame for courts to engage with land dispossession, differential legal regimes of colonial control, and the denial of self-determination. Prosecutors could easily make that evidence recognizable as part of the substance of the apartheid charge, rather than routing it through a racial analysis that could be misinterpreted as obscuring part of the architecture. That frame reflects how the most developed contemporary apartheid analysis already proceeds, as the discussion of Special Rapporteur Albanese's reports in **Part One, Section 5** demonstrates. It also matches the position of the 24 states and three international organizations that treated apartheid and colonial domination as analytically connected in the 2024 advisory proceedings.[181] Importantly, colonial character functions as evidence, not as an element. A prosecutor may rely on it but would never be required to prove it.

Criterion 4 Applied to a Third Form: Colonialism as an Enumerated Crime Against Humanity. A third path is available alongside the two forms this proposal takes: enumerating colonialism itself as a crime against humanity in the treaty's list of prohibited acts. States have already placed that option on the table. In the Sixth Committee's debates in 2023 and again in 2025, delegations proposed expanding Article 2 to include colonialism alongside slavery, the slave trade, and the pillage of natural resources.[182] Resolution 79/122 makes the International Law Commission text the starting point of the negotiations rather than their endpoint.[183]

The crime of colonialism's claim to that list is strong. The General Assembly has regularly condemned colonialism as an unlawful violation of self-determination and other fundamental rights.[184] As noted, the Apartheid Convention, which codified apartheid as a crime against humanity, treats colonialism as the system from which apartheid emerged, and the Durban Declaration also links the two.[185] ICERD condemns colonialism in its preamble, inherently linking it to apartheid.[186] Protocol 1 of the Geneva Conventions clarifies that peoples' armed struggles against colonial domination are legitimate subjects of international humanitarian law.[187] The African Union's 39th Summit recognized colonialism as a crime against humanity by decision of its Assembly in February 2026.[188] An enumerated crime would give that recognition operative force beyond the apartheid provision and it would place

181 Victor Kattan, "The Implications of an ICJ Finding that Israel Is Committing the Crime Against Humanity of Apartheid," *Just Security, March 20, 2024,* https://www.justsecurity.org/93403/the-implications-of-an-icj-finding-that-israel-is-committing-the-crime-against-humanity-of-apartheid/; ICJ, Palestine Advisory Opinion (note 98 above), Written Statements and Written Comments, https://www.icj-cij.org/case/186.

182 The Sixth Committee's summaries of debate record the proposal in two sessions. See U.N. Sixth Committee, Crimes Against Humanity, 78th Session (2023), https://www.un.org/en/ga/sixth/78/cah.shtml (listing "colonization, enslavement, the slave trade, pillaging of natural resources, sexual and gender-based violence and gender apartheid" among the additional crimes delegations "specifically mentioned" for inclusion in the definition); U.N. Sixth Committee, Crimes Against Humanity, 80th Session (2025), https://www.un.org/en/ga/sixth/80/cah.shtml (recording that "some delegations proposed that the definition of crimes against humanity in draft article 2 be expanded to include, inter alia, slavery and the slave trade, colonialism and apartheid, the illegal exploitation or pillage of natural resources," among other categories).

183 Sadat, ABILA Introduction (note 126 above), 2–3; U.N. General Assembly, Resolution 79/122 (note 133 above) ¶¶ 5, 9.

184 E.g., Declaration on the Granting of Independence to Colonial Countries and Peoples (note 14 above); U.N. General Assembly, Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, October 24, 1970; U.N. General Assembly, Resolution 3201 (S-VI), Declaration on the Establishment of a New International Economic Order, May 1, 1974; U.N. General Assembly, Resolution 79/115 (note 35 above).

185 Durban Declaration and Programme of Action (note 14 above), pmbl. ¶ 28, ¶¶ 14, 99.

186 ICERD (note 9 above), pmbl. ¶ 4, art. 3.

187 Protocol I (note 6 above), art. 1(4).

188 See note 37 above.

the treaty in line with the growing international call to condemn colonialism as a crime against humanity.

A definition would have to identify the elements that distinguish colonial domination as a crime, and it would have to satisfy the principle of legality for conduct going forward. Those are questions the negotiations are equipped to answer as the same questions have been answered for every crime the list now contains. An enumerated crime would establish colonial domination as a wrong alongside apartheid in the treaty's list, the fullest recognition on offer. It answers a different question than the first two forms – whether colonial domination is itself criminal. What it does not do, standing alone, is write the connection between apartheid and its origins into the apartheid provision; the operative ground or the preamble does that. In practice, however, cumulative charging could supply even that connection, with apartheid and colonial domination charged together on the same facts, each marking a distinct wrong the same regime commits. A treaty of universal reach that adopted none of these various strategies would obscure the history from which the crime of apartheid came.

Criterion 5. Avoiding definitional disjuncture in international criminal law. The proposal's residual ground draws on a proposition international law has already accepted, that colonial systems, harmful in themselves, produced forms of discrimination whose harms and structures persist. That recognition converges independently across the major instruments and institutions of the field. The Durban Declaration and Programme of Action recognized colonialism's ongoing discriminatory legacies, including their gendered dimensions.[189] The CERD Committee has consistently engaged the linkages between racist and colonial discrimination.[190] The African Charter commits states parties to eliminate colonialism, neocolonialism, and apartheid alongside all forms of racial discrimination, treating them as mutually reinforcing systems.[191] The Inter-American human rights system has recognized that discrimination affecting Afro-descendant and Indigenous communities is rooted in colonial structures.[192] The European Parliament has recognized that racism in Europe is also shaped by colonial legacies.[193] The ICJ linked apartheid to colonial domination in the Namibia advisory opinion, and the ICC Prosecutor's policies recognize that racial, ethnic, and gender discrimination can be shaped by colonialism and slavery.[194] That convergence is the strongest available evidence that the concept is established rather than invented, which is what Criterion 5 requires.

The concept lacks definition as an operative ground, however, posing a genuine drafting question. The two routes this proposal offers – adding an operative ground and/or preambular inclusion – manage that incompleteness, each with tradeoffs drafters should weigh. The first route adopts the operative ground in open-ended form, directing courts to the recognized body of international law just described for its content. That approach anchors judicial interpretation in identifiable legal materials rather than a bare phrase. Questions would remain. The absence of a formal definition is not itself disqualifying since most of the grounds persecution law already protects, race among them, have no criminal law treaty definition, and courts have applied them for decades by reference to the same interpretive materials. But this report's analysis of the undefined gender group shows what a term without settled content can cost. It supplies the defense with objections, or at least

189 Durban Declaration and Programme of Action (note 14 above), ¶¶ 14, 69.

190 CERD Committee, General Recommendation No. 34 (note 30 above).

191 African Charter on Human and Peoples' Rights (note 14 above), pmbl.

192 Inter-American Commission on Human Rights, *The Situation of People of African Descent in the Americas, OEA/Ser.L/V/II. Doc. 62 (2011); European Parliament, Resolution of June 19, 2020 (note 28 above).*

193 European Parliament, Resolution of June 19, 2020 (note 28 above); Namibia Advisory Opinion (note 86 above).

194 Namibia Advisory Opinion (note 86 above), 131; ICC Office of the Prosecutor, Policy on the Crime of Gender Persecution (note 11 above) ¶ 91; ICC Office of the Prosecutor, Policy on Slavery Crimes (note 29 above) ¶ 94.

opens the door to them, and colonial discrimination would face the same test from a weak starting position. The gender group at least trails a body of scholarship from the Genocide Convention debates. Colonial discrimination enters with no definitional literature, no prior service as a ground in any instrument, and no jurisprudence construing it. The concept is understood to encompass forms of discrimination that characterize colonial contexts, yet a court would still ask how the ground is proved and how far it extends beyond formal colonial administration. Those questions develop through interpretation over time, and an anchored provision, unlike a bare undefined term, gives courts a methodology for answering them.

The second route is preambular recognition. A preamble expresses the treaty's purposes and informs interpretation without creating elements courts must apply directly, so it can accommodate a broader historical concept before the operative law matures. It carries less risk of inconsistent application across jurisdictions in the interim. The placement test is straightforward. A concept true of one crime belongs in that crime's elements. A concept true of the treaty as a whole belongs in the preamble. Colonialism passes the treaty-wide test because colonial regimes organized and sustained not only apartheid but also the treaty's other enumerated crimes such as enforced disappearance, extermination, forced displacement, sexual violence, enslavement, persecution, and other crimes across continents and generations. Preambular recognition would inform the interpretation of every provision, including the persecution provision's residual clause covering other grounds universally recognized as impermissible.[195]

The political record supports the preambular route as achievable now. The U.N. General Assembly has repeatedly recognized slavery, the slave trade, colonialism, and apartheid as grave fundamental rights deprivations and sources of continuing discrimination. For example, it established an International Day against Colonialism in December 2025.[196] Its March 2026 declaration recognizing the trafficking of enslaved Africans and racialized chattel enslavement as the gravest crime against humanity also reaffirmed its recognition that both slavery and colonialism are abhorrent regimes with lasting consequences.[197] The African Union's 39th Summit in February 2026 adopted a decision recognizing colonialism as a crime against humanity.[198] Preambular recognition would align the treaty with the instruments that built its own intellectual genealogy, beginning with the Apartheid Convention's preamble itself. Under the ordinary rules of treaty interpretation, a preamble forms part of the context in which every operative provision is read.[199] It would restore to an instrument of universal reach the connection between colonialism and crimes against humanity that the Rome Statute stripped away. A treaty of universal reach should be able to recognize the contribution of the legal struggles to end slavery, colonialism, and apartheid to the very formation of the law of crimes against humanity. Recognition costs the treaty nothing, and it tells a more complete truth about the history from which its protections come.

195 Under the Vienna Convention on the Law of Treaties (note 175 above), art. 31(2), the context for interpreting every operative provision comprises the treaty's text, "including its preamble and annexes," so preambular recognition would bear directly on the persecution provision's residual clause.

196 U.N. General Assembly, Resolution 80/106, International Day against Colonialism in All Its Forms and Manifestations, December 5, 2025, https://docs.un.org/en/A/RES/80/106 (adopted by 116 votes to 2, with 54 abstentions).

197 Declaration of the Trafficking of Enslaved Africans and Racialized Chattel Enslavement of Africans as the Gravest Crime Against Humanity (note 36 above).

198 U.N. General Assembly, Resolution 79/161, A Global Call for Concrete Action for the Elimination of Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Comprehensive Implementation of and Follow-up to the Durban Declaration and Programme of Action, December 17, 2024; U.N. General Assembly, Resolution 80/106 (note 196 above); Assembly of the African Union, Decision on the Qualification of Slavery, Deportation and Colonization as Crimes Against Humanity and Genocide Against the Peoples of Africa (note 37 above).

199 VCLT (note 175 above), art. 31(2).

IV.
Recommendations

Each of these proposed reforms for the draft Crimes Against Humanity treaty correct a defect identified above. Together they help restore the crime of apartheid to the breadth its history and the present state of international law require. Each one draws on language and concepts states have already adopted.

1 ADD GENDER TO THE DEFINITION OF APARTHEID, AND RECOGNIZE GENDER ALONGSIDE RACE IN THE DEFINITION OF THE CRIME

As regards history, the addition restores rather than innovates. In South Africa and Namibia, the apartheid regime enforced racist and patriarchal domination as one mutually reinforcing system, and black women bore its compounded weight, as history Part One, Section 7 recounts. Recognition would name that history and extend the crime's protection to the victims of institutionalized gender oppression today, including Afghan women, girls, and LGBTQI+ persons living under the Taliban's system of domination.

2 DEFINE APARTHEID BY GROUNDS RATHER THAN FIXED GROUPS

Replace the Rome Statute's racial group architecture with a grounds-based definition that identifies victims by the grounds on which a regime organizes its domination rather than by their membership in a fixed group. This single change resolves the contested racial group threshold that has kept the Palestinian people's recognition in dispute. It includes Afghan women, girls, and LGBTQI+ persons through the gender ground. It also allows oppression on intersecting grounds to be charged as one wrong, recognizing the racist and gendered oppression and domination that black South African and Namibian women endured as part of a single regime. In doing so, it gives effect to the recognition they have long sought for racist and gendered oppression and domination endured as one regime. It also brings the definition into congruence with the crime of persecution, so that the persecutory acts a regime commits to enforce its domination can be charged as the inhumane acts of apartheid without a mismatch between the victims each provision recognizes. It follows the only method international criminal law has used to widen protection against discrimination, adding grounds within an existing crime, and it introduces no category the law has not applied since 1998. The recommended definition reads:

> "inhumane acts … committed in the context of an institutionalized regime of systematic oppression and domination by **one group over any other group or groups, on race or gender grounds**, and committed with the intention of maintaining that regime."

3 RESTORE RECOGNITION OF COLONIALISM IN THE PREAMBLE

The Rome Statute stripped the colonial recognition the 1973 Apartheid Convention placed at the center of the crime, and the draft treaty has not restored it. States should recognize colonialism in the treaty's preamble, which under the law of treaties forms part of the text and informs the interpretation of every provision. Preambular recognition reaches further than an operative ground, because it bears on all the crimes the treaty codifies, from extermination and enslavement to persecution, rather than on apartheid alone. It can hold the broader history while the operative law matures.

4 ADD ROME STATUTE ARTICLE 21(3) OR THE EQUIVALENT AS AN INTERPRETIVE SAFEGUARD

Whatever definitional form states adopt, the treaty must direct courts to interpret its crimes consistently with internationally recognized human rights. Without that direction, the principle of legality binds courts to the narrowest reading of inherited terms, and the biological construction of racial group may return by default.

5 REMOVE THE "INSTITUTIONALIZED REGIME" REQUIREMENT

The Rome Statute added a threshold the 1973 Apartheid Convention never contained, requiring proof that inhumane acts were committed in the context of an institutionalized regime of systematic oppression and domination, a threshold the draft treaty carries forward. The Convention asked only whether the acts were committed for the purpose of establishing and maintaining domination by one group over another and systematically oppressing them. States should return to that purpose-based formulation. The institutionalized regime requirement shelters the forms of domination most likely to arise today. These include regimes that govern through facially neutral laws whose cumulative effect maintains hierarchy and nonstate actors that impose systematic oppression without the apparatus of a state. It invites a defense that no apartheid existed because no statute announced one. Purpose can be proved from a regime's laws, from its practices and their cumulative effects, and from its history, as the Convention's drafters intended. Removing the threshold restores the Convention's reach and returns the inquiry to what the perpetrators set out to do.

Adopted together, these reforms would give the treaty a definition of apartheid faithful to the crime's origins, capable of reaching all of its victims, and secured against interpretations that have narrowed it. A definition so restored would also be, in the truest sense, South Africa's definition. The crime entered international law from the lived experience of South Africa and Namibia, named and codified at the insistence of the Global South states. A definition that recognizes racist and gendered discrimination as capable of being one mutually reinforcing system, and that via the treaty's preamble, recalls its roots in colonial domination, describes apartheid as South Africans endured it. It also describes what Palestinians endure today under a regime that contests their very standing as a group, and what Afghan women, girls, and LGBTQI+ persons endure under a regime that decrees how gender must be lived. The correction would arrive fittingly, in the moment when South Africa has become the first state anywhere to affirm charges of apartheid as a crime against humanity. The negotiations now underway are the moment to make that correction, and, once a definition is codified, the last practical moment to make it for a generation.

6 CODIFY COLONIALISM AS A CRIME AGAINST HUMANITY

States should codify colonialism as a distinct crime against humanity. Prohibition of colonialism would have operative force in the treaty as a basis for individual criminal responsibility. Codification and preambular recognition serve distinct functions and are not alternatives. The preamble forms part of the text and informs the interpretation of every crime the treaty codifies, whereas a codified crime establishes liability for conduct that no provision presently reaches on its own terms.

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