

Codifying Gender Apartheid: Closing the Rome Statute's Structural Gap in Crimes Against Humanity

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In July 2025, the International Criminal Court's Pre-Trial Chamber II issued arrest warrants for Taliban Supreme Leader Haibatullah Akhundzada and Chief Justice Abdul Hakim Haqqani¹ for the crime against humanity of persecution under Article 7(1)(h) of the Rome Statute, on gender and political grounds.² Three months later, the People's Tribunal for Women of Afghanistan convened before the Permanent Peoples' Tribunal in Madrid,³ amplifying the testimonies of Afghan women and girls.⁴ Together, these proceedings mark a jurisprudential turning point: for the first time, international and civil mechanisms have recognized the systematic exclusion of women from public life as conduct amounting to crimes against humanity.⁵

¹ International Criminal Court, *Situation in Afghanistan: ICC Pre-Trial Chamber II Issues Arrest Warrants for Haibatullah Akhundzada and Abdul Hakim Haqqani* (July 8, 2025), <https://www.icc-cpi.int/news/situation-afghanistan-icc-pre-trial-chamber-ii-issues-arrest-warrants-haibatullah-akhundzada> (discussing the ICC's issuance of arrest warrants for senior Taliban leaders as a landmark step toward accountability for gender-based persecution and crimes under the Rome Statute).

² *Rome Statute of the International Criminal Court* art. 7(1)(h), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) (defining persecution as a crime against humanity when directed against an identifiable group on political, racial, national, ethnic, cultural, religious, or gender grounds).

³ Permanent Peoples' Tribunal, *Panel of Judges and Program of the Session on Women of Afghanistan* (Sept. 26, 2025), <https://permanentpeopletribunal.org/panel-of-judges-and-program-of-the-session-on-women-for-afghanistan/?lang=en> (announcing the Madrid hearings for October 2025, and listing the panel of judges and aims of the session to examine Taliban gender persecution under international law).

⁴ Rukhshana Media, *From Kabul to Madrid, Afghan Women Are Raising Their Voices Against the Taliban* (Oct. 21, 2025), <https://rukshana.com/en/from-kabul-to-madrid-afghan-women-are-raising-their-voices-against-the-taliban/> (highlighting the convening of the Madrid session and the testimonies of Afghan women and girls as part of a broader accountability initiative against Taliban gender-based oppression).

⁵ Amnesty International & International Commission of Jurists, *The Taliban's War on Women: The Crime Against Humanity of Gender Persecution in Afghanistan* (Mar. 2023) (analyzing how the Taliban's systematic exclusion of women from education, employment, and public life meets the legal threshold for the crime against humanity of gender persecution).

Yet, despite this breakthrough, the Rome Statute still lacks a doctrinal category for regimes that govern through gender domination itself.⁶ Existing provisions fragment structural oppression into discrete acts—persecution, enslavement, imprisonment—without naming the regime that organises them.⁷ This omission leaves international criminal law ill-equipped to prosecute systems of gender-based rule, even as such regimes have re-emerged in Afghanistan, Iran, and beyond.⁸ This Article advances a doctrinal framework for codifying gender apartheid—an institutionalised regime of systematic oppression and domination by one gender over another—as a distinct crime against humanity under Article 7 of the Rome Statute.⁹ It proceeds in three steps.

First, it identifies Article 21(3)'s interpretive mandate as a textual and normative foundation for extending apartheid's logic to gender.¹⁰ Second, it demonstrates that Article 121 provides a formal amendment pathway consistent with the principle of legality.¹¹ Third, it grounds the codification of gender apartheid in jus cogens equality norms and established doctrines of regime crimes.¹² By closing this structural gap, the Article brings the Rome Statute into

⁶ Rosemary Grey, *On Hope, Reform and Risk: The Rome Statute's Definition of 'Gender' and the Crimes Against Humanity Convention*, 36 Eur. J. Int'l L. 369 (2025) (arguing that the Rome Statute of the International Criminal Court still frames gender narrowly and lacks doctrinal capacity to capture regimes that wield gender-domination as a form of governance).

⁷ See *Rome Statute*, *supra* note 2, art. 7(1) (listing persecution, enslavement, and imprisonment among discrete acts of crimes against humanity without identifying the organizing regime).

⁸ Rhonda Gossen, *Laws Discriminating Against Women in Iran and Afghanistan Go Beyond Borders*, Global Governance Forum (Jan. 9, 2025), <https://globalgovernanceforum.org/laws-discriminating-against-women-iran-afghanistan/> (highlighting how both Iran and Afghanistan institutionalize gender-based exclusion through law and policy, underscoring international criminal law's current gap in addressing regime-wide gender domination).

⁹ Working Group on Discrimination Against Women and Girls, Draft Articles on Prevention and Punishment of Crimes Against Humanity - Input from the Working Group on Discrimination Against Women and Girls, U.N. Human Rights Council, A/HRC/WG.11/40/1 (Feb. 15, 2024) (arguing for the recognition of gender-apartheid as a crime against humanity and advancing a doctrinal framework for an institutionalised regime of systematic gender-based domination under Article 7 of the Rome Statute).

¹⁰ See *Rome Statute*, *supra* note 2, art. 21(3) (explaining that Article 21(3) provides the interpretive basis for extending the Rome Statute's prohibition of apartheid to gender-based regimes).

¹¹ See *Rome Statute*, *supra* note 2, art. 121 (clarifying that Article 121 outlines the formal amendment procedure, ensuring consistency with the principle of legality).

¹² International Law Commission, Report of the International Law Commission: Seventy-first Session, Chapter V: Peremptory Norms of General International Law (jus cogens), U.N. Doc. A/74/10, ch. V (Aug. 20, 2019) (grounding the codification of gender apartheid in jus cogens equality norms and established doctrines of regime crimes).

alignment with contemporary systems of domination and affirms that gender-based governance—like racial apartheid—is not merely discriminatory but criminal.

I. Introduction

In July 2025, the International Criminal Court's Pre-Trial Chamber II issued arrest warrants for Taliban Supreme Leader Haibatullah Akhundzada and Chief Justice Abdul Hakim Haqqani¹³ for the crime against humanity of persecution under Article 7(1)(h) on gender and political grounds.¹⁴ Three months later, in October 2025, the People's Tribunal for Women of Afghanistan, convened by the Permanent Peoples' Tribunal in Madrid¹⁵, held public hearings addressing impunity for gender-based persecution and amplifying the testimonies of Afghan women and girls.¹⁶ These proceedings, though distinct in legal character, share a common significance: they mark the first time the international legal system has treated the systematic exclusion of women from education, employment, and public life as a potential crime against humanity.¹⁷

Yet both processes expose an enduring limitation in the architecture of international criminal law. Under the Rome Statute, apartheid is codified only as a racial regime of oppression.¹⁸ The Statute's Article 7(1)(j) defines apartheid as an "institutionalized regime of systematic oppression and domination by one racial group over another," while its provision on

¹³ See ICC Press Release, *supra* note 1.

¹⁴ See *Rome Statute*, *supra* note 2, art. 7(1)(h).

¹⁵ Ewelina Ochab, *Who Are the Taliban Indicted by the People's Tribunal for Afghanistan?*, *Forbes* (Oct. 12, 2025), <https://www.forbes.com/sites/ewelinaochab/2025/10/12/who-are-the-taliban-indicted-by-the-peoples-tribunal-for-afghanistan/> (discussing the convening of the People's Tribunal for Women of Afghanistan in Madrid to examine gender-based crimes under Taliban rule).

¹⁶ Women for Women International, *No One Hears Our Voices: A One Year Update* (2024), <https://www.womenforwomen.org/no-one-hears-our-voices> (highlighting the testimonies of Afghan women and girls and the ongoing crisis of gender-based persecution under Taliban rule).

¹⁷ Priya Pillai, *Al Hassan: The International Criminal Court's First Judgment on Gender Persecution (Part 1)*, *Opinio Juris* (Aug. 2, 2024), <https://opiniojuris.org/2024/08/02/al-hassan-the-international-criminal-courts-first-judgment-on-gender-persecution-part-1/> (noting that this case marks a historic moment in treating exclusion of women from public life as gender persecution under international criminal law).

¹⁸ See *Rome Statute*, *supra* note 2, art. 7(2)(h) (illustrating that Article 7(2)(h) confines the crime of apartheid to racial regimes of systematic oppression and domination).

persecution under Article 7(1)(h) addresses acts of discrimination only when connected to other enumerated crimes.¹⁹ This bifurcated framework leaves a doctrinal gap: it recognizes racial domination as a system of governance, but treats gender domination as a derivative form of persecution.²⁰ The law, in effect, condemns gender-based acts but not gender-based regimes.²¹

That gap is increasingly untenable in a world where governance itself can be organized through gender hierarchy.²² Across certain jurisdictions, gender inequality is not a byproduct of culture or religion—it is the organizing principle of the state. Through codified restrictions, enforcement mechanisms, and bureaucratic design, these governments sustain institutionalized regimes of gender-based domination that systematically exclude women from social, political, and economic participation.²³ The Taliban’s rule in Afghanistan, for instance, has produced an internally coherent system of gender-based governance maintained through law and coercion.²⁴ It operates not as a series of isolated abuses but as a regime that

¹⁹ See *Rome Statute*, *supra* note 2, arts. 7(1)(j), 7(1)(h) (contrasting Article 7(1)(j)’s definition of apartheid as a racial regime with Article 7(1)(h)’s treatment of persecution as an act dependent on other enumerated crimes).

²⁰ Azadah Raz Mohammad & Akila Radhakrishnan, *The Growing Imperative to Recognize and Codify Gender Apartheid: Demonstrating the Need and Responding to Critics (Part II)*, *OpinioJuris* (Apr. 7, 2025), <https://opiniojuris.org/2025/04/07/the-growing-imperative-to-recognize-and-codify-gender-apartheid-demonstrating-the-need-and-responding-to-critics-part-ii/> (arguing the current framework leaves a doctrinal gap by treating gender domination as derivative of persecution rather than a distinct crime).

²¹ Amnesty International, *Gender Apartheid Must Be Recognized in International Law*, (June 17, 2024), <https://www.amnestv.org/en/latest/news/2024/06/gender-apartheid-must-be-recognized-international-law/> (arguing that existing law condemns gender-based acts but not gender-based regimes).

²² Annica Kronsell, *Gender and Governance*, *Oxford Research Encyclopedia of International Studies* (Oct. 26, 2022), <https://oxfordre.com/internationalstudies/display/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-186> (explaining how governance itself can organise power through gender hierarchies).

²³ ACAPS, *Afghanistan: Taliban Directives and Decrees Affecting Human Rights and Humanitarian Actors* (Apr. 24, 2023), https://www.acaps.org/fileadmin/Data_Product/Main_media/20230424_acaps_thematic_report_afghanistan_taliban_directives_and_decrees_0.pdf (arguing that gender-inequality is not a byproduct of culture or religion but the organising principle of the state through codified restrictions, enforcement mechanisms and bureaucratic design).

²⁴ Wesna Saidu & Iavor Rangelov, *How the Taliban Is Using Law for Gender Apartheid, and How to Push Back*, *Atlantic Council* (May 29, 2025), <https://www.atlanticcouncil.org/content-series/inside-the-talibans-gender-apartheid/how-the-taliban-is-using-law-for-gender-apartheid-and-how-to-push-back/> (arguing the Taliban’s rule in Afghanistan has produced an internally coherent system of gender-based governance maintained through law and coercion).

subordinates women as a class, closely reflecting the definitional contours of apartheid as understood in international criminal law.²⁵

This Article argues that gender apartheid constitutes a distinct and prosecutable crime against humanity and that the Rome Statute should be interpreted—or amended—to recognize it as such.²⁶ While the Statute’s treatment of persecution captures the gravity of gender-based harm, it remains act-oriented and limited to specific instances of deprivation.²⁷ By contrast, the concept of gender apartheid captures the structural dimension of subjugation: a system of governance in which subordination is institutionalized, bureaucratized, and sustained through legal and coercive apparatuses of the state.²⁸

The Article makes three interrelated claims.

First, the Article contends that gender apartheid fits within the Rome Statute’s normative and structural logic.²⁹ The Statute’s object and purpose—to prevent and punish the most serious crimes of concern to the international community—together with Article 21(3), require that its provisions be interpreted and applied consistently with internationally recognized human rights and without adverse distinction, including on grounds of gender.³⁰

²⁵ Human Rights Watch, *Gender Apartheid Should Be an International Crime*, (July 14, 2025), <https://www.hrw.org/news/2025/07/14/gender-apartheid-should-be-an-international-crime/> ((arguing that the current framework treats gender domination as derivative rather than distinct).

²⁶ Office of the United Nations High Commissioner for Human Rights, *Gender Apartheid Must Be Recognised as a Crime Against Humanity, UN Experts Say* (Feb. 20, 2024), <https://www.ohchr.org/en/press-releases/2024/02/gender-apartheid-must-be-recognised-crime-against-humanity-un-experts-say> (arguing that gender apartheid constitutes a distinct and prosecutable crime against humanity and that the Rome Statute of the International Criminal Court should be interpreted—or amended—to recognise it as such).

²⁷ See *Rome Statute*, *supra* note 2, art. 7(1)(h) (explaining that Article 7(1)(h) addresses persecution as individual acts of deprivation rather than systemic gender-based subordination).

²⁸ Karima Benmoune, *The International Obligation to Counter Gender Apartheid in Afghanistan*, 54 Colum. Hum. Rts. L. Rev. 1 (2022) (arguing that gender apartheid captures the structural dimension of subjugation as a system of governance institutionalized, bureaucratized, and sustained through legal and coercive state apparatuses).

²⁹ Parliamentarians for Global Action, *Gender Apartheid - Policy Brief: A Parallel Path to Include Gender Apartheid as a Crime under the Rome Statute* (2025), <https://www.pgaction.org/ilhr/rome-statute/gender-apartheid.html> (arguing that gender apartheid fits within the normative and structural logic of the Rome Statute of the International Criminal Court and should be recognized or amended to do so).

³⁰ See *Rome Statute*, *supra* note 2, art. 21(3) (emphasizing that Article 21(3) mandates interpretation and application of the Statute in conformity with internationally recognized human rights and gender equality).

While Article 21(3) does not permit the judicial creation of new crimes, it obliges the Court to construe existing provisions in harmony with the preemptory principle of equality and non-discrimination, which many authorities understand to encompass gender equality.³¹ On that basis, the current limitation of apartheid to race in Article 7(1)(j) can be understood not as conceptually exhaustive, but as a historically contingent formulation of a broader legal concept aimed at institutionalized regimes of systematic domination.³²

Second, this Article argues that codifying gender apartheid through an amendment to Article 7 is both doctrinally coherent and legally feasible.³³ The Rome Statute establishes in Article 121 a formal mechanism for amending its provisions, allowing the Assembly of States Parties or a Review Conference to adopt amendments by a two-thirds majority, subject to ratification by individual States Parties.³⁴ Building on the procedural precedent of the Kampala Amendments³⁵, this Article proposes the insertion of a new provision—Article 7(1)(j bis)—defining gender apartheid as “an institutionalized regime of systematic oppression and domination by one gender over another, committed with the intention of maintaining that regime.” Such an amendment would operate prospectively, in accordance with Articles 24 and 121(5), and would expand and clarify the Statute’s

³¹ Jonathan Wampler, *Jus Cogens and the Lack of a Universal Gender Equality Norm*, Oxford Human Rights Hub (June 15, 2023), <https://ohrh.law.ox.ac.uk/jus-cogens-and-the-lack-of-a-universal-gender-equality-norm/> (arguing that the absence of a firmly recognized *jus cogens* norm on gender equality limits how far Article 21(3) can extend existing crimes under the Rome Statute).

³² End Gender Apartheid Campaign, *Public Q&A on Gender Apartheid Codification in the Crimes Against Humanity Convention*, (July 11, 2024), <https://endgenderapartheid.today/download/PublicQAonGenderApartheidCodificationInCAHC.pdf> (arguing that the limitation of apartheid in art. 7(1)(j) reflects a historical contingency rather than a conceptual limit on regime-scale domination).

³³ See Parliamentarians for Global Action, *supra* note 29 (explaining that Parliamentarians for Global Action outlines the procedural and legal feasibility of amending Article 7 to include gender apartheid).

³⁴ See *Rome Statute*, *supra* note 2, art. 121 (clarifying that Article 121 sets out the procedure for proposing, adopting, and ratifying amendments to the Statute).

³⁵ *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, June 11, 2010, Kampala, 2187 U.N.T.S. No. XVIII-10 b (entered into force May 8, 2013) (establishing the procedural precedent for amendment adoption by two-thirds majority at the Kampala Review Conference).

treatment of crimes against humanity to reflect contemporary forms of organized oppression.³⁶

Third, the Article develops an operational legal framework for identifying and prosecuting gender apartheid before international or domestic tribunals. Drawing from the ICC's Elements of Crimes³⁷ and from jurisprudence on persecution and enslavement,³⁸ as well as the Statutory definition and Elements of Crimes for apartheid (supplemented by comparative and UN materials on racial apartheid),³⁹ it outlines the key *actus reus* and *mens rea* components necessary to establish liability.⁴⁰ It further identifies evidentiary indicators—state decrees, enforcement mechanisms, and intent to maintain systemic subordination—that distinguish gender apartheid from other gender-based crimes.⁴¹

By articulating these pathways, the Article contributes to a growing recognition that international criminal law must evolve to address structural forms of domination that persist beyond the traditional paradigms of war and conflict. The prohibition of discrimination, long central to international human rights law, can no longer remain peripheral to international criminal law. When states institutionalize inequality as a system of governance, the resulting harm transcends mere violation—it constitutes a crime against humanity.⁴²

³⁶ See *Rome Statute*, *supra* note 2, art. 7(1), 24, 121(5) (explaining that Articles 7(1), 24, and 121(5) ensure amendments operate prospectively while expanding the Statute's framework to encompass modern forms of organized oppression).

³⁷ *Elements of Crimes*, International Criminal Court (2013) (establishing the evidentiary and definitional elements for crimes under the Rome Statute, including persecution, apartheid, and other crimes against humanity).

³⁸ Tess Graham, *Progress, Resistance, and Silence on Gender Justice in the Draft Crimes Against Humanity Treaty*, Just Security (June 6, 2023), <https://www.justsecurity.org/86803/progress-resistance-and-silence-on-gender-justice-in-the-draft-crimes-against-humanity-treaty/> (drawing on jurisprudence on persecution and enslavement to highlight gaps in the regime design of the draft treaty).

³⁹ *International Convention on the Suppression and Punishment of the Crime of Apartheid*, Nov. 30, 1973, 1015 U.N.T.S. 243 (entered into force July 18, 1976) (establishing a crime-against-humanity regime of institutionalized domination by one racial group over another).

⁴⁰ Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 Duke J. Comp. & Int'l L. 307, 328 § IV(A)(3)(2000) (outlining the *actus reus* and *mens rea* components necessary to establish liability).

⁴¹ See Human Rights Watch, *supra* note 25 (highlighting evidentiary indicators that differentiate gender apartheid from other gender-based crimes).

⁴² See Amnesty Int'l & Int'l Comm'n of Jurists, *supra* note 5 (affirming that the institutionalization of inequality as state policy transforms discrimination into a crime against humanity).

A. The Doctrinal Blind Spot

The Rome Statute's architecture reflects a late-20th-century understanding of discrimination as episodic rather than systemic.⁴³ While its drafters codified the most visible manifestations of oppression—racial apartheid, genocide, persecution—they did so within the conceptual boundaries of their time.⁴⁴ The exclusion of gender from the definition of apartheid was not the product of legal principle but of political compromise.⁴⁵ Yet this omission now constrains the law's ability to respond to regimes that weaponize gender as an instrument of governance.⁴⁶

This structural limitation has practical implications. Under Article 7(1)(h), the crime of persecution requires a nexus to other acts such as imprisonment or deportation, thereby treating discrimination as contingent rather than constitutive.⁴⁷ Consequently, even in the face of sustained, state-led systems of exclusion—where women are denied education, employment, or freedom of movement by law—the existing framework cannot capture the *regime itself* as criminal.⁴⁸ The persecution model fragments structural oppression into discrete acts, obscuring the underlying legal system that perpetuates those acts.

B. The Necessity of a Regime-Based Lens

⁴³ Inter-American Commission on Human Rights, *Compendium on Integral Reparations with a Gender Perspective in Transitional Justice Contexts* (2024), <https://www.oas.org/en/iachr/reports/pdfs/2024/Compendium-Integral-Reparations-ENG.pdf#page=75> (arguing that late-20th-century treaty architectures treat discrimination as episodic).

⁴⁴ *International Convention on the Suppression and Punishment of the Crime of Apartheid*, G.A. Res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974) (entered into force July 18, 1976) (establishing apartheid as an international crime and codifying the most visible manifestations of structural oppression within the conceptual boundaries of its time).

⁴⁵ could not find something to substantiate that this was a political compromise

⁴⁶ Elin Bjarnegård & Pär Zetterberg, *How Autocrats Weaponize Women's Rights*, 33 J. Democracy 60 (Apr. 2022), <https://www.journalofdemocracy.org/articles/how-autocrats-weaponize-womens-rights/> (arguing that regimes exclude systemic gender-governance forms by treating gender primarily as episodic).

⁴⁷ See *Rome Statute*, *supra* note 2, art. 7(1)(h) (explaining that Article 7(1)(h) treats persecution as contingent upon other acts, such as imprisonment or deportation, rather than as an autonomous form of discrimination).

⁴⁸ United Nations News, *Four Years On, Here's What Total Exclusion of Women in Afghanistan Looks Like* (Aug. 2025), <https://news.un.org/en/story/2025/08/1165622> (noting that even in the face of sustained, state-led systems of exclusion, the existing framework cannot capture the regime itself as criminal).

The recognition of apartheid as a crime against humanity introduced the notion of a *regime crime*—one that criminalizes systems of domination rather than isolated acts.⁴⁹ This doctrinal innovation reflected the international community's acknowledgment that certain forms of organized oppression, when institutionalized and enforced by the state, threaten the foundations of international peace and security.⁵⁰ The same reasoning applies with equal force to gender apartheid.

A regime-based lens does not displace existing gender-based crimes; it complements them by addressing their structural cause. Whereas sexual violence, persecution, or enslavement target individual acts of harm, gender apartheid addresses the *institutional logic* that makes those harms systemic.⁵¹ Codifying it would therefore bridge the conceptual divide between human rights and international criminal law—transforming patterns of inequality into matters of international responsibility and individual accountability.

C. A Turning Point for the Rome Statute

The ICC's 2025 arrest warrants and the People's Tribunal's proceedings have exposed the limits of the existing legal vocabulary.⁵² They show that international law can name and condemn systemic gender oppression, yet lacks the doctrinal tools to prosecute it as a *regime crime*.⁵³ Codifying gender apartheid would align the Statute with its interpretive mandate under Article 21(3), strengthen its coherence with universal human rights principles, and reaffirm the ICC's capacity to respond to evolving forms of systemic violence.⁵⁴

⁴⁹ See *Rome Statute*, *supra* note 2, art. 7(1)(j) (clarifying that Article 7(1)(j) establishes apartheid as a regime crime targeting systems of domination rather than individual acts).

⁵⁰ See *Apartheid Convention*, *supra* note 44 (recognizing that the *Apartheid Convention* codified organized, state-enforced oppression as a threat to international peace and security).

⁵¹ See *ICC, Elements of Crimes*, *supra* note 37, at 4 (emphasizing that the *Elements of Crimes* distinguishes individual acts of harm from systemic crimes rooted in institutionalized structures of oppression).

⁵² See *ICC*, *supra* note 1 (highlighting how recent ICC proceedings reveal the inadequacy of current legal frameworks to address systemic gender-based oppression).

⁵³ Heather Barr, *Gender Apartheid as an International Crime: Taliban Oppression in Afghanistan Triggers Campaign*, Georgetown J. Int'l Affairs (Sept. 2, 2025), <https://gia.georgetown.edu/2025/09/02/gender-apartheid-as-an-international-crime-taliban-oppression-in-afghanistan-triggers-campaign/> (arguing that international law can name and condemn systemic gender oppression, yet lacks the doctrinal tools to prosecute it as a regime crime).

⁵⁴ See *Rome Statute*, *supra* note 2, art. 21(3) (underscoring that Article 21(3) requires the ICC to interpret and apply the *Rome Statute* consistently with internationally recognized human rights and without adverse distinction).

The challenge, in essence, is not whether international law can recognize gender apartheid, but whether it will. To name and codify it would not expand the boundaries of international criminal law—it would fulfill them.

II. The Structural Blind spot in Article 7

The Rome Statute's definition of crimes against humanity was designed to capture systematic patterns of violence that offend the conscience of humanity.⁵⁵ Yet within that framework, gender-based crimes remain conceptually fragmented. While the Statute recognizes *gender persecution* as a crime under Article 7(1)(h), it confines that provision to discriminatory acts linked to other enumerated crimes, thereby treating gender oppression as a secondary manifestation of harm rather than as a regime of domination.⁵⁶ In contrast, Article 7(1)(j) identifies apartheid as a *standalone crime*—but limits its scope to racial hierarchies.⁵⁷ This asymmetry reveals a structural blind spot: international criminal law recognizes systems of racial domination as inherently criminal, yet continues to view systems of gender domination through the narrower lens of persecution.

A. The Architecture of Article 7: Persecution and Apartheid

Article 7 enumerates eleven categories of crimes against humanity, ranging from murder and enslavement to enforced disappearance.⁵⁸ Among them, two provisions—persecution and apartheid—deal explicitly with systemic discrimination.⁵⁹ Article 7(1)(h) defines persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by

⁵⁵ See *Rome Statute*, *supra* note 2 (defining the architecture of crimes against humanity as encompassing systematic patterns of violence that offend the conscience of humanity).

⁵⁶ See *Rome Statute*, *supra* note 2, art. 7(1)(h) (clarifying that Article 7(1)(h) limits persecution to discriminatory acts connected to other enumerated crimes, thereby excluding systemic regimes of domination from its scope).

⁵⁷ See *Rome Statute*, *supra* note 2, art. 7(1)(j) (explaining that Article 7(1)(j) establishes apartheid as an independent crime against humanity but confines it to racial systems of oppression).

⁵⁸ See *Rome Statute*, *supra* note 2 (outlining Article 7's broad range of systematic abuses).

⁵⁹ See *Rome Statute*, *supra* note 2, art. 7(1)(h) & (j) (noting that Articles 7(1)(h) and 7(1)(j) specifically address persecution and apartheid as forms of systemic or institutionalized discrimination).

reason of the identity of the group or collectivity.”⁶⁰ This definition reflects an act-based model: persecution is criminalized when it accompanies or is connected to other crimes such as imprisonment, deportation, or torture. It thus functions as an *aggravating dimension* of existing crimes rather than an autonomous regime offense.

By contrast, [Article 7\(1\)\(j\)](#) defines apartheid as an “institutionalized regime of systematic oppression and domination by one racial group over another committed with the intention of maintaining that regime.”⁶¹ Unlike persecution, apartheid requires no linkage to other acts. The provision targets not the individual manifestations of harm but the *structural apparatus*—the laws, institutions, and coercive mechanisms—that sustain racial domination. It thereby transforms inequality itself into an autonomous criminal wrong.

This structural distinction has profound implications. Persecution criminalizes discriminatory acts; apartheid criminalizes discriminatory governance. One punishes *what states do*; the other punishes *how states are organized*. Yet when it comes to gender-based subjugation, the Rome Statute offers only the former lens.

B. The Inadequacy of Persecution as a Doctrinal Category

Persecution, though essential, is doctrinally limited in three ways.

1. Derivative Character.

The requirement that persecution be connected to another enumerated crime⁶² reflects an assumption that discrimination is consequential rather than constitutive. The harm arises not from the existence of a system of inequality, but from the specific acts it produces. This framing renders invisible the bureaucratic and legislative mechanisms that generate those acts

⁶⁰ See *Rome Statute*, *supra* note 2, art. 7(1)(h) (quoting Article 7(1)(h), which defines persecution as the intentional and severe deprivation of fundamental rights on prohibited grounds of identity).

⁶¹ See *Rome Statute*, *supra* note 2, art. 7(1)(j) (quoting Article 7(1)(j), which defines apartheid as an institutionalized regime of systematic oppression and domination by one racial group over another, maintained by intent).

⁶² See *Rome Statute*, *supra* note 2, art. 7(1)(h) (clarifying that Article 7(1)(h) conditions persecution on a nexus to other enumerated crimes, limiting its application to discrete acts rather than systemic regimes).

in the first place. As a result, persecution cannot capture *governance itself* as a mode of criminality.⁶³

2. Temporal Fragmentation.

Persecution is defined by discrete events—arrests, expulsions, denials of rights—that occur within a bounded time frame.⁶⁴ But gender apartheid, like racial apartheid before it, operates as a continuing offense. Its harm lies in its *durability*: in the ordinary, daily operation of laws and institutions that reproduce subordination.⁶⁵ Because persecution is episodic, it fails to encompass the continuity and institutionalization that define regime crimes.

3. Absence of Structural Intent.

The mens rea of persecution centers on intent to discriminate,⁶⁶ not intent to *maintain a system of domination*. The difference is crucial. A government may systematically deny women employment or education not out of animus toward individuals, but to preserve a legal and social order predicated on gender hierarchy. Persecution's focus on animus thus obscures the political and structural nature of gender oppression.

For these reasons, while the ICC's recent reliance on Article 7(1)(h) to charge gender persecution represents a historic advance, it remains a **doctrinal stopgap**.⁶⁷ It enables prosecutors to name gender-based harm but not to describe its systemic architecture. Gender apartheid, by contrast, names the regime itself.⁶⁸

⁶³ Amnesty International, *The Problematic Formulation of Persecution under the Draft Convention on Crimes against Humanity* (Oct. 2018), <https://www.amnesty.org/en/documents/ior40/9248/2018/en/> (critiquing the draft Convention's formulation of persecution as neglecting systemic governance).

⁶⁴ *Prosecutor v. Kupreškić et al.* (Trial Chamber, IT-95-16-T, Jan. 14 2000) (defining persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”).

⁶⁵ See Amnesty Int'l, *supra* note 21 (emphasizing that *Amnesty International* describes gender apartheid as a continuous system of subordination embedded in daily governance structures).

⁶⁶ *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26 2001) (noting that the mens rea of persecution centers on intent to discriminate).

⁶⁷ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18, Trial Judgment (Int'l Crim. Ct. June 26, 2024) (holding that charges of gender persecution under Article 7(1)(h) mark a historic doctrinal advance but remain a provisional step toward recognizing systemic gender oppression as a regime-level crime).

⁶⁸ United Nations Office of the High Commissioner for Human Rights, *Gender Apartheid Must Be Recognised as a Crime against Humanity, UN Experts Say* (Feb. 20 2024),

C. Apartheid as the Appropriate Analogue

The crime of apartheid was codified in the *Apartheid Convention* of 1973⁶⁹ and later incorporated into the Rome Statute.⁷⁰ Its core innovation was to criminalize *regimes of organized domination*, rather than the individual acts they produced.⁷¹ The drafters understood that some systems of inequality are not reducible to the sum of their constituent abuses; they are crimes because of their *structure*. Racial apartheid in South Africa epitomized this logic: laws, courts, and administrative machinery were marshaled to sustain the subordination of one group by another.⁷²

The same legal architecture characterizes gender apartheid. In certain states, legal systems are designed to enforce the subordination of women as a matter of policy.⁷³ These systems display the hallmarks of apartheid as codified in Article 7(1)(j): an institutionalized regime, systematic oppression, domination by one group over another, and an intent to maintain that regime.⁷⁴ The only distinction lies in the axis of domination—gender rather than race. There is no principled reason why the criminal law should condemn one and not the other.

Moreover, the textual structure of Article 7 does not preclude this broader interpretation. The use of the term “racial” in Article 7(1)(j) reflects the historical context of the Statute’s drafting, not a conceptual limitation.⁷⁵ The *Travaux Préparatoires* reveal that gender-based regimes were not discussed, not

<https://www.ohchr.org/en/press-releases/2024/02/gender-apartheid-must-be-recognised-crime-against-humanity-un-experts-say> (observing that while the ICC’s recent reliance on Article 7(1)(h) enables naming gender-based harm, it lacks the doctrinal tools to describe its systemic architecture; gender apartheid, by contrast, names the regime itself).

⁶⁹ See *Apartheid Convention*, *supra* note 39 (affirming that the *Apartheid Convention* formally codified apartheid as an international crime in 1973).

⁷⁰ See *Rome Statute*, *supra* note 2 (noting that the Rome Statute subsequently incorporated apartheid as a crime against humanity within its framework).

⁷¹ See *Apartheid Convention*, *supra* note 39 (explaining that the *Apartheid Convention* marked a doctrinal shift by criminalizing entire regimes of organized domination rather than isolated acts of abuse).

⁷² Truth and Reconciliation Commission of South Africa, *Report, Vol. 1* (Pretoria: Government Printer, Oct. 1998) (illustrating how laws, courts and administrative machinery were marshaled to sustain racial subordination).

⁷³ Amnesty Int’l, *Iran: New Compulsory Veiling Law Intensifies Oppression of Women and Girls* (Dec. 10, 2024), <https://www.amnesty.org/en/latest/news/2024/12/iran-new-compulsory-veiling-law-intensifies-oppression-of-women-and-girls/> (observing that in certain states legal systems are designed to enforce the subordination of women as a matter of policy).

⁷⁴ See *Rome Statute*, *supra* note 2, art. 7(1)(j) (illustrating that Article 7(1)(j) of the *Rome Statute* enumerates the defining elements of apartheid, including institutionalized oppression and intent to sustain the regime).

⁷⁵ *Id.* art. 7(1)(j) (clarifying that the reference to “racial” in Article 7(1)(j) reflects its drafting era rather than a substantive restriction on the concept’s broader applicability).

because they were excluded as a matter of law, but because they had not yet emerged as a recognized international phenomenon.⁷⁶ As international law evolves, so too must the interpretation of its foundational instruments. Article 21(3) of the Rome Statute,⁷⁷ which requires that the Statute be interpreted consistently with internationally recognized human rights, provides the necessary textual anchor for that evolution.

D. The Normative Imperative of Equal Protection

International law's commitment to equality is not confined to human rights instruments; it is embedded within the logic of international criminal law itself. The Nuremberg Charter condemned persecution "on political, racial, or religious grounds" as a crime against humanity because such acts offend the very notion of human equality.⁷⁸ The subsequent development of apartheid as a distinct offense extended this principle to systems of racial domination. Extending it further to gender domination is not an act of innovation, but of consistency.

The principle of non-discrimination has since crystallized as a *jus cogens* norm from which no derogation is permitted.⁷⁹ It binds all states and informs the interpretation of all international legal instruments, including the Rome Statute.⁸⁰ When read through this lens, the Statute's omission of gender apartheid appears not as a deliberate exclusion but as an interpretive deficiency that must be remedied to preserve coherence with higher-order norms.

E. The Juridical Function of Naming

The absence of a legal category for gender apartheid has practical consequences beyond semantics. Without a recognized crime, prosecutors,

⁷⁶ Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results* (Hague/London/Boston: Kluwer Law Int'l 1999) (observing that gender-based regimes were absent from the *travaux préparatoires* due to historical context, not legal exclusion).

⁷⁷ See *Rome Statute*, *supra* note 2, art. 21(3) (emphasizing that Article 21(3) requires the *Rome Statute* to be interpreted in harmony with internationally recognized human rights principles).

⁷⁸ *Charter of the International Military Tribunal*, art. 6(c), 82 U.N.T.S. 279 (Aug. 8, 1945) (defining crimes against humanity to include persecution "on political, racial or religious grounds" because such acts offend the very notion of human equality).

⁷⁹ See International Law Commission, *supra* note 12, ch. V (affirming that the *International Law Commission* recognizes the prohibition of discrimination as a peremptory norm of international law from which no derogation is allowed).

⁸⁰ See *Rome Statute*, *supra* note 2 (underscoring that the *Rome Statute* must be interpreted consistently with the universal, non-derogable principle of equality and non-discrimination).

victims, and courts lack a coherent doctrinal framework to capture the full scope of gender-based governance systems.⁸¹ The language of “discrimination” or “persecution” diffuses responsibility, obscuring the fact that such systems are organized, intentional, and structural. Naming a crime performs a juridical function: it delineates the nature of the wrong and the scale of accountability it demands.⁸²

The recognition of apartheid as a crime against humanity transformed how international law conceptualized oppression—from individual violations to systemic regimes.⁸³ Naming gender apartheid would achieve a similar transformation for gender-based domination. It would not merely expand the list of crimes; it would refine the law’s capacity to describe and confront patterns of organized inequality that destabilize the international legal order.

F. Toward Doctrinal Coherence

From a jurisprudential standpoint, recognizing gender apartheid as a regime crime would enhance the coherence of Article 7 in three key respects.⁸⁴

First, it would align the treatment of gender-based oppression with the Statute’s broader logic of parity between comparable harms. The Statute already criminalizes persecution on various grounds—racial, political, religious, gender-based—yet elevates only racial domination to a regime-level offense.⁸⁵ This asymmetry lacks normative justification and undermines the Statute’s internal consistency.

⁸¹ Yvonne M. Dutton & Milena Sterio, *Beyond Policy: Overcoming Challenges in Prosecuting Gender Persecution at the International Criminal Court*, 19 *Fla. Int’l U. L. Rev.* (2025) (arguing that the absence of a recognized crime hampers prosecutors’ ability to capture gender-based governance systems).

⁸² Andreas Teutsch, *Names and Law*, in *The Oxford Handbook of Names and Naming* 554–71 (Carole Hough ed., Oxford Univ. Press 2016) (arguing that naming a crime performs a juridical function: it delineates the nature of the wrong and the scale of accountability it demands).

⁸³ Human Rights Watch, *Human Rights Watch Responds: Reflections on Apartheid and Persecution in International Law* (July 9 2021), <https://www.hrw.org/news/2021/07/09/human-rights-watch-responds-reflections-apartheid-and-persecution-in-ternational-law> (explaining that the recognition of apartheid as a crime against humanity transformed how international law conceptualised oppression—from individual violations to systemic regimes).

⁸⁴ See *Rome Statute*, *supra* note 2, art. 7 (arguing that treating gender apartheid as a regime crime strengthens the doctrinal coherence of Article 7).

⁸⁵ See *Rome Statute*, *supra* note 2, art. 7(1)(j) (highlighting that Article 7(1)(j) treats racial domination as a regime-level crime while other forms of discrimination remain act-based).

Second, codifying gender apartheid would clarify the relationship between persecution and apartheid, transforming them from overlapping categories into a coherent hierarchy: persecution would remain act-based, while apartheid—whether racial or gender-based—would capture the systemic dimension.

Third, it would strengthen the Statute's interpretive unity with other branches of international law. By harmonizing Article 7 with the *jus cogens* principle of equality, the ICC would affirm that the prohibition of structural domination—whether grounded in race or gender—is a universal precept of international criminal justice.⁸⁶

In sum, Article 7's current formulation leaves international criminal law ill-equipped to confront one of the most pervasive forms of systemic oppression in the modern world. The persecution provision is too narrow, and the apartheid provision too limited in scope. This doctrinal gap not only constrains prosecutorial practice but also signals a deeper jurisprudential inconsistency: the selective recognition of some systems of domination as crimes against humanity while leaving others unnamed. Bridging that gap through the recognition of gender apartheid is not a matter of progressive expansion but of restoring the Statute's internal logic and moral coherence.

III. Interpreting the Rome Statute Consistently with International Human Rights Norms (Article 21 (3))

At the heart of the Rome Statute lies a command that distinguishes it from earlier instruments of international criminal law: the requirement, under Article 21(3), that "*the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3.*"⁸⁷ This interpretive clause was not an aspirational statement; it was intended as a constitutional safeguard for the Court,⁸⁸ ensuring that its

⁸⁶ See International Law Commission, *supra* note 12, ch. V (emphasizing that aligning Article 7 with the *jus cogens* principle of equality reinforces the universal prohibition of structural domination in international criminal law).

⁸⁷ See *Rome Statute*, *supra* note 2, art. 21(3) (stressing that Article 21(3) mandates interpretation of the *Rome Statute* in conformity with internationally recognized human rights and without discrimination, including on gender grounds).

⁸⁸ Daniel Sheppard, The International Criminal Court and "Internationally Recognised Human Rights": Understanding Article 21(3) of the Rome Statute, 10 *Int'l Crim. L. Rev.* 43 (2010) (arguing that Article 21(3) was intended as a constitutional safeguard for the Court).

jurisprudence evolves in harmony with broader developments in international human rights law.

Despite its brevity, Article 21(3)⁸⁹ carries transformative potential. Properly applied, it requires that the Statute's provisions—particularly those governing crimes against humanity—be interpreted in a manner that gives full effect to the principle of equality and to the prohibition of discrimination as a *peremptory norm (jus cogens)* of international law.⁹⁰ Where the Statute's definitions generate distinctions without principled justification—such as protecting groups from racial domination but not gender-based domination—Article 21(3)⁹¹ functions as a corrective interpretive mechanism, restoring doctrinal coherence and normative consistency.⁹²

A. Article 21(3) as a Dynamic Interpretive Mandate

Article 21(3)⁹³ establishes a dual interpretive obligation. First, it binds the Court to apply its provisions in conformity with *internationally recognized human rights*. Second, it prohibits interpretations that produce adverse distinctions on grounds such as gender, race, or religion.⁹⁴ This dual structure makes the clause both normative (requiring alignment with human rights principles) and anti-discriminatory (requiring equality in application).

The inclusion of Article 21(3)⁹⁵ was a deliberate response to concerns expressed during the Statute's drafting that international criminal law might lag behind the evolution of international human rights norms.⁹⁶ The drafters intended the ICC to function not as an isolated tribunal but as part

⁸⁹ See *Rome Statute*, *supra* note 2, art. 21(3) (highlighting that, though concise, Article 21(3) establishes a binding interpretive mandate for the *Rome Statute*).

⁹⁰ See International Law Commission, *supra* note 12, ch. V (stressing that proper application of Article 21(3) ensures that crimes against humanity are interpreted in line with the *jus cogens* norms of equality and non-discrimination).

⁹¹ See *Rome Statute*, *supra* note 2, art. 21(3) (underscoring that Article 21(3) addresses inconsistencies in the Statute by requiring interpretation that protects all groups equally, including against gender-based domination).

⁹² Emma Irving, *The Other Side of the Article 21(3) Coin: Human Rights in the Rome Statute and the Limits of Article 21(3)*, 32 *Leiden J. Int'l L.* 837 (2019) (arguing that Article 21(3) functions as a corrective interpretive mechanism, restoring doctrinal coherence and normative consistency).

⁹³ See *Rome Statute*, *supra* note 2, art. 21(3) (noting that Article 21(3) obliges the Court to interpret and apply the *Rome Statute* consistently with internationally recognized human rights).

⁹⁴ *Id.* art. 21(3).

⁹⁵ *Id.* art. 21(3).

⁹⁶ Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results* (The Hague, London & Boston: Kluwer Law International 1999) (noting that Article 21(3) was a deliberate response to concerns that international criminal law might lag behind evolving human rights norms).

of a continuum of international law—interpreting its mandate in light of contemporary legal and moral understandings. This interpretive method aligns with the broader principle, codified in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT),⁹⁷ that treaties must be interpreted in harmony with “any relevant rules of international law applicable between the parties.”

Under this framework, the ICC’s interpretive task extends beyond textual literalism. Where the Statute’s language is ambiguous—or where it produces distinctions inconsistent with jus cogens norms—the Court must interpret its provisions to give effect to equality and non-discrimination.⁹⁸

B. The Equality Principle as Jus Cogens

The prohibitions of racial discrimination and apartheid are widely recognized as jus cogens norms from which no derogation is permitted.⁹⁹ More broadly, the principle of equality and non-discrimination is a foundational norm that informs the interpretation of all international human rights instruments.¹⁰⁰ It is enshrined in the UN Charter (Articles 1 and 55),¹⁰¹ the Universal Declaration of Human Rights (Articles 1 and 2),¹⁰² the International Covenant on Civil and Political Rights (Articles 2, 3, and 26),¹⁰³ and the Convention on the Elimination of All Forms of Discrimination against Women (Articles 2 and 5).¹⁰⁴ Together, these instruments form a coherent normative framework affirming that all persons are equal before the law and entitled to equal protection.¹⁰⁵

⁹⁷ *Vienna Convention on the Law of Treaties*, arts. 31(3)(c), 32, 1155 U.N.T.S. 331 (entered into force Jan. 27 1980) (providing that interpretation of a treaty must take into account, together with context, any relevant rules of international law applicable in the relations between the parties).

⁹⁸ International Law Commission, *Report on the Work of Its Seventy-Third Session*, U.N. Doc. A/77/10 (2022), ch. IV (noting that where the Statute’s language is ambiguous, the Court must interpret its provisions to give effect to equality and non-discrimination).

⁹⁹ Vienna Convention.

¹⁰⁰ G.A. Res. 2200A (XXI), Preamble (Mar. 23, 1976).

¹⁰¹ U.N. Charter art. 1, 55.

¹⁰² G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

¹⁰³ International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

¹⁰⁴ Convention on the Elimination of All Forms of Discrimination against Women, opened for signature Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981)

¹⁰⁵ U.N. Charter art. 43, ¶ 1; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Convention on the

International courts and tribunals have repeatedly affirmed the peremptory character of the equality principle. The International Court of Justice, in *Barcelona Traction (1970)*, recognized the prohibition of discrimination—particularly racial discrimination—as an *obligation erga omnes*.¹⁰⁶ The Human Rights Committee, interpreting Article 26 of the ICCPR, has emphasized that equality must be substantive, requiring states to dismantle laws and practices that sustain structural inequality.¹⁰⁷ The Committee on the Elimination of Discrimination against Women has likewise clarified that discrimination includes *gender-based hierarchies and systems of domination* that perpetuate inequality.¹⁰⁸

Given this status, the ICC is legally bound—under Article 21(3) of the *Rome Statute*—to interpret its provisions in a manner consistent with the principle of substantive equality.¹⁰⁹ To the extent that Article 7(1)(j) confines apartheid to racial hierarchies, it stands in tension with this overarching norm by denying equal protection to victims of gender-based systems of domination. Accordingly, Article 21(3) provides the interpretive basis for a corrective reading: apartheid, as a legal category, *should be understood* to encompass institutionalized regimes of gender-based oppression.

C. Consistency, Not Expansion

Interpreting apartheid to encompass gender-based regimes does not expand the Statute's reach; it fulfills its existing mandate.¹¹⁰ Article 21(3) is not a vehicle for progressive policy-making but a rule of *interpretive consistency*.¹¹¹ The ICC has applied this principle in multiple contexts, reading the Statute in light of external human rights norms to ensure coherence with the international legal order.¹¹²

Elimination of All Forms of Discrimination against Women, opened for signature Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981); Convention on the Rights of Persons with Disabilities, opened for signature Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008).

¹⁰⁶ *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. Rep. 3 (Feb. 5).

¹⁰⁷ Human Rights Committee, General Comment No. 18: Non-discrimination, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (1989).

¹⁰⁸ Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of CEDAW, U.N. Doc. CEDAW/C/GC/28 (2010).

¹⁰⁹ *Rome Statute*, *supra* note 2; Grover, *supra* note 88.

¹¹⁰ Grover, *supra* note 88.

¹¹¹ *Id.*

¹¹² *Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court*

For instance, in *Prosecutor v. Lubanga*, the Appeals Chamber interpreted the child-soldier provisions with reference to external child-rights instruments (including the Convention on the Rights of the Child), reinforcing a protection-oriented reading of “use to participate actively in hostilities.”¹¹³ In *Prosecutor v. Ntaganda*, the Appeals Chamber confirmed that international humanitarian law does not categorically exclude members of the same armed group from protection against rape and sexual slavery—an approach consistent with Article 21(3)’s requirement to align interpretation with internationally recognized human rights.¹¹⁴

Together these decisions show the Court employing Article 21(3) as a living interpretive principle to ensure the Statute coheres with evolving legal norms.¹¹⁵

Under this interpretive tradition, recognizing gender apartheid falls squarely within the Court’s mandate. It does not create new law but ensures that existing law is applied without adverse distinction. To continue to treat racial domination as a crime while excluding gender domination would amount to precisely the kind of “adverse distinction” that Article 21(3) prohibits.

D. The Principle of Effectiveness

The principle of effectiveness (*ut res magis valeat quam pereat*) requires that treaties be interpreted so as to give effect to their object and purpose rather than to render their provisions inoperative.¹¹⁶ Under Article 31(1) of the *Vienna Convention on the Law of Treaties*, this canon directs interpreters to favor readings that preserve a treaty’s efficacy.¹¹⁷ The Rome Statute’s Preamble expresses its central object and purpose: *to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole*.¹¹⁸ These crimes, by definition, derive their gravity from their impact on humanity itself—a standard that guides the Statute’s evolving interpretation in response to new forms of systemic harm.¹¹⁹

pursuant to Article 19(2)(a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, Appeals Chamber, 14 December 2006, para. 37; *Prosecutor v. Ntaganda*, Judgment, ICC-01/04-02/06-2359, Appeals Chamber (Nov. 7, 2019).

¹¹³ *Id.*

¹¹⁴ *Prosecutor v. Ntaganda*, Judgment, ICC-01/04-02/06-2359, Appeals Chamber (Nov. 7, 2019).

¹¹⁵ Grover, *supra* note 88.

¹¹⁶ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

¹¹⁷ *Id.*

¹¹⁸ Rome Statute, *supra* note 2, preamble.

¹¹⁹ Rome Statute, *supra* note 2, preamble.

Gender apartheid, as a system of legally organized domination, satisfies the Statute's gravity concerns and mirrors the institutional character codified for apartheid in Article 7(2)(h).¹²⁰ Its persistence threatens the values the Statute is designed to protect—most clearly peace, security and well-being (Preamble)—and, under Article 21(3), must be assessed consistently with internationally recognized human-rights guarantees of equality and non-discrimination.¹²¹ Interpreting the Statute to categorically exclude gender-based regimes of domination would undermine its object and purpose.¹²² In light of the principle of effectiveness (VCLT 31(1)), Article 7 should be read—consistent with Article 21(3)—to address institutionalized systems of domination that negate equal status, including gender-based regimes; alternatively, the same result can be secured through Article 121 amendment.¹²³

E. Addressing Legality Concerns

One potential objection is that broadening the definition of apartheid through interpretation might violate the principle of *nullum crimen sine lege*—no crime without law.¹²⁴ This concern, though legitimate, is misplaced. The interpretive approach advanced here does not retroactively create new obligations; it operates within the Statute's existing framework and aligns its provisions with higher-order norms—such as equality and non-discrimination—that were already binding on all states when the Statute was adopted. Under Article 21(3), such alignment is not legislative innovation but interpretive consistency.¹²⁵

The prohibition of discrimination and the principle of equality predate the Rome Statute and were universally recognized as part of customary international law.¹²⁶ By 1998, these norms were firmly embedded in the UN Charter, the Universal Declaration of Human Rights, the ICCPR, and CEDAW, and had attained the status of general

¹²⁰ Grover, *supra* note 88.

¹²¹ Rome Statute, *supra* note 2, art. 21(3).

¹²² *Id.*

¹²³ Vienna Convention, *supra* note 118; Rome Statute, *supra* note 2; Grover, *supra* note 88.

¹²⁴ Rome Statute, *supra* note 2; *Rome Statute Article 22: Nullum Crimen Sine Lege*, PUB. L., https://www.public.law/world/rome_statute/article_22_nullum_crimen_sine_lege.

¹²⁵ Rome Statute, *supra* note 2; Grover, *supra* note 88.

¹²⁶ William A. Schabas, *Equality* in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS, 161 (2021); *Equality and Non-Discrimination*, UNITED NATIONS, <https://www.un.org/ruleoflaw/thematic-areas/human-rights/equality-and-non-discrimination>.

principles—if not *jus cogens* norms—binding on all states.¹²⁷ Moreover, Article 21(3) explicitly authorizes interpretations consistent with these obligations.¹²⁸ Reading “racial” apartheid to encompass analogous regimes of gender-based domination therefore does not violate the principle of legality; it gives effect to it. The law cannot compel the Court to perpetuate discrimination in the very name of preventing it.

F. The Structural Role of Article 21(3)

The interpretive mandate of Article 21(3) extends beyond any single provision.¹²⁹ As affirmed by the ICC Appeals Chamber, it permeates every aspect of the Court’s work, requiring that the Statute be applied consistently with internationally recognized human rights.¹³⁰ Functionally, Article 21(3) operates as a constitutional compass for the entire Statute, guiding interpretation toward coherence with the broader corpus of international law in accordance with Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*.¹³¹ Through this mechanism, the Statute functions not as a static codification but as a living instrument capable of adapting its reach to emerging forms of systemic harm.

Gender apartheid presents precisely the kind of harm the drafters of Article 21(3) foresaw: an emergent, systemic form of domination that the text of the Statute, written in 1998, could not yet anticipate.¹³² Applying Article 21(3) to recognize gender apartheid as encompassed within Article 7(1)(j) therefore represents not an

¹²⁷ U.N. Charter art. 43, ¶ 1; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Convention on the Elimination of All Forms of Discrimination against Women, opened for signature Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981); Convention on the Rights of Persons with Disabilities, opened for signature Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008).

¹²⁸ *Symposium: In Pursuit of Intersectional Justice at the International Criminal Court: Group Four: Applying a Gender Analysis to the Defence of Duress and to Sexual Violence Evidence in the ICC Ongwen Case*, OPINIO JURIS (May 4, 2022), <https://opiniojuris.org/2022/05/04/symposium-in-pursuit-of-intersectional-justice-at-the-international-criminal-court-group-four-applying-a-gender-analysis-to-the-defence-of-duress-and-to-sexual-violence-evidence-in-the-icc-ongwen-c>.

¹²⁹ Grover, *supra* note 88; Prosecutor v. Lubanga, *supra* note 114.

¹³⁰ Prosecutor v. Lubanga, *supra* note 114.; REDRESS, Application for Leave to File Amicus Curiae Observations in the Ntaganda Case (Feb. 2018).

¹³¹ Rome Statute, *supra* note 2 art. 31(3)(c); Vienna Convention, *supra* note 118.

¹³² Grover, *supra* note 88.

act of judicial activism, but of fidelity to the Statute's interpretive design.

G. Implications for the ICC and States Parties

Interpreting apartheid in this manner would have practical and jurisprudential effects. For the ICC, it would provide a clear doctrinal basis for charging systemic gender-based oppression as a standalone crime against humanity, eliminating the need to stretch the persecution framework beyond its doctrinal limits.¹³³ For States Parties, it would signal the need to align domestic legislation with this interpretation—ensuring that national legal systems can prosecute gender apartheid under the complementarity regime.¹³⁴

Moreover, this interpretive development would enhance the legitimacy of the ICC itself. By embracing Article 21(3) as a mechanism of interpretive evolution, the Court would reaffirm its capacity to adapt to the moral and legal challenges of its time—just as earlier tribunals evolved the law of genocide, aggression, and command responsibility.¹³⁵

In sum, Article 21(3) provides the textual and normative foundation for recognizing gender apartheid within the existing structure of the Rome Statute.¹³⁶ The provision binds the ICC to apply its law consistently with the equality principle and prohibits interpretations that sustain unjustifiable distinctions.¹³⁷ Far from creating new crimes, this approach restores the Statute's internal coherence, harmonizes it with the broader fabric of international law, and ensures that the Court's jurisprudence reflects the indivisible dignity of all human beings.¹³⁸

¹³³ *Global: Gender Apartheid*, *supra* note 21; Grover, *supra* note 88.

¹³⁴ Heather Barr, *supra* note 41.

¹³⁵ Grover, *supra* note 88.

¹³⁶ *Symposium*, *supra* note 130.

¹³⁷ *Id.*

¹³⁸ U.N. Charter art. 43, ¶ 1; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Convention on the Elimination of All Forms of Discrimination against Women, opened for signature Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981); Convention on the Rights of Persons with Disabilities, opened for signature Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008).

I. Codification through Amendment under Article 121

Even if interpretive development under Article 21(3) provides a valid legal pathway, formal codification remains the most authoritative and durable means of recognizing *gender apartheid* within the Rome Statute.¹³⁹ Article 121 of the Statute establishes the mechanism by which amendments may be proposed, adopted, and ratified.¹⁴⁰ Its deliberate design reflects the drafters' intent to preserve the Statute's flexibility without compromising its legitimacy.¹⁴¹ In this sense, codification through amendment is not an alternative to interpretation—it is the *institutional realization* of interpretation's normative direction.¹⁴²

A. The Function and Structure of Article 121

Article 121 delineates three sequential stages in the amendment process. First, any State Party may propose an amendment to the Statute.¹⁴³ Second, the proposal must be adopted by a two-thirds majority of the Assembly of States Parties (ASP) or, if consensus is achieved, without a vote.¹⁴⁴ Third, for the amendment to enter into force, it must be ratified by seven-eighths of the States Parties—except that amendments to Articles 5–8 (the core crimes) enter into force only for those States Parties that ratify them, one year after the deposit of their instruments of ratification.¹⁴⁵

This three-tiered structure balances stability with adaptability.¹⁴⁶ It limits politicization of amendments to the core crimes while allowing the Statute to evolve in response to new or insufficiently addressed international harms. The Kampala Amendments on the crime of aggression, adopted by consensus in 2010, demonstrated that this mechanism—though procedurally demanding—is capable of delivering substantive reform when supported by legal consensus and normative urgency.¹⁴⁷

¹³⁹ Grover, *supra* note 88; Rome Statute, *supra* note 2.

¹⁴⁰ Rome Statute, *supra* note 2 art. 121.

¹⁴¹ William Schabas, *supra* note 128.

¹⁴² Grover, *supra* note 88.

¹⁴³ Rome Statute, *supra* note 2, art. 121.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ William Schabas, *supra* note 128.

¹⁴⁷ Kampala Amendments, *supra* note 35.

Gender apartheid meets both conditions. The normative foundations for its recognition are already well established in international law, and its absence in the *Rome Statute* has produced a marked doctrinal and moral asymmetry.¹⁴⁸ Codification through Article 121 would therefore not introduce a novel principle but would instead complete an unfinished legal architecture—bringing the Statute’s treatment of systemic domination into coherence with the universally recognized norms of equality and non-discrimination.¹⁴⁹

B. Drafting a Textually Coherent Amendment

Codification requires textual precision. A proposed amendment should preserve the *Rome Statute*’s internal consistency and linguistic symmetry with existing provisions.¹⁵⁰ One drafting option is to amend Article 7(1)(j) 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 or gender over any other group or groups and committed with the intention of maintaining that regime.”¹⁵¹

This approach integrates gender into the existing apartheid provision, emphasizing continuity between racial and gender-based regimes of domination.¹⁵² It minimizes textual disruption and reinforces the parity between comparable harms.

Addition of a New Subparagraph (Article 7(1) (j bis))

“The crime of gender apartheid means inhumane acts ... committed in the context of an institutionalized regime of systematic oppression and domination by one gender over another, committed with the intention of maintaining that regime.”

This formulation follows the drafting convention established by the Kampala Amendments (2010), which introduced new *bis* provisions (e.g., Article 8 bis) to codify the *crime of aggression*.¹⁵³ By

¹⁴⁸ Grover, *supra* note 88; *Global: Gender*, *supra* note 21.

¹⁴⁹ William Schabas, *supra* note 128.

¹⁵⁰ William Schabas, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* (2nd ed., 2016).

¹⁵¹ Rome Statute, *supra* note 2 art. 7(1)(j).

¹⁵² *Global: Gender*, *supra* note 21.

¹⁵³ Kampala Amendments, *supra* note 35.

isolating the new offense, this option provides interpretive clarity and avoids unintended implications for racial-apartheid jurisprudence.

Both approaches would be accompanied by an explanatory note, consistent with Assembly of States Parties practice, clarifying that the amendment reflects the evolving recognition of institutionalized gender-based domination as a crime against humanity.¹⁵⁴ Such codification would be consistent with Article 21(3) of the *Rome Statute* and with existing jus cogens norms prohibiting discrimination.¹⁵⁵

C. Procedural Feasibility and Precedent

The procedural history of the Kampala Amendments provides a practical blueprint for advancing codification. That process involved three essential components: (1) sustained expert consultation; (2) the establishment of a working group within the Assembly of States Parties (ASP); and (3) incremental consensus-building through diplomatic engagement and civil society advocacy.¹⁵⁶

A similar process could be initiated through the creation of an Expert Working Group on Gender Apartheid, convened under the auspices of the ASP's Bureau. The group could draw on comparative jurisprudence, the practice of human rights bodies, and submissions by states and non-governmental organizations. Its mandate would be to prepare a technical report outlining the definitional contours of gender apartheid, the evidentiary thresholds for its prosecution, and the implications for complementarity.¹⁵⁷

Once completed, the report would serve as the basis for a draft resolution to be tabled at the Assembly of States Parties (ASP), where it could be debated in plenary or referred to the Working Group on Amendments for procedural guidance, following the model previously used by the *Special Working Group on the Crime of Aggression*. Adoption could follow the Kampala model: consensus among States Parties, followed by ratification and a

¹⁵⁴ See e.g., Kampala Amendments, *supra* note 35.

¹⁵⁵ Rome Statute, *supra* note 2 preamble.

¹⁵⁶ Kampala Amendments, *supra* note 35; Vijay Padmanabhan, *From Rome to Kampala: The U.S. Approach to the 2010 International Criminal Court Review Conference*, 55 COUNCIL SPECIAL REPORT (Council on Foreign Relations 2010).

¹⁵⁷ Vijay Padmanabhan, *supra* note 158.

subsequent activation decision once sufficient support has been achieved.¹⁵⁸

Importantly, codification through Article 121 need not be immediate or universal to be effective. The Statute's architecture allows for differential entry into force, enabling early adopters to signal normative commitment while allowing time for broader ratification. In practice, even a limited initial ratification would suffice to establish gender apartheid as a recognized category within the Rome Statute framework, catalyzing broader recognition and harmonization across domestic systems.¹⁵⁹

D. Doctrinal and Jurisprudential Implications

Codification through amendment would yield significant doctrinal benefits. First, it would provide prosecutors with a coherent charge structure for regime-level gender oppression, avoiding the artificial fragmentation of harms across multiple provisions.¹⁶⁰ Second, it would clarify evidentiary parameters, focusing on legal decrees, institutionalized control, and the intent to maintain systemic subordination.¹⁶¹ Third, it would enable judicial economy by consolidating systemic gender-based offenses under a single rubric rather than dispersing them across persecution, enslavement, or other inhumane acts.¹⁶²

From a jurisprudential standpoint, codification would reaffirm the Rome Statute's foundational commitment to universality.¹⁶³ The Statute's *Preamble* declares that the most serious crimes "must not go unpunished," and that their prosecution "must be ensured by taking measures at the national level and by enhancing international cooperation."¹⁶⁴ Recognizing gender apartheid as a distinct crime advances this mandate by acknowledging that

¹⁵⁸ Kampala Amendments, *supra* note 35.

¹⁵⁹ David Scheffer, *Staying the Course with the International Criminal Court* (Council on Foreign Relations, 2010), https://cdn.cfr.org/sites/default/files/pdf/2010/04/CSR55_ICC.pdf; *Amendments to the Rome Statute*, PARLIAMENTARIANS GLOBAL ACTION, <https://www.pgaction.org/ilhr/rome-statute/amendments.html> ; Kampala Amendments, *supra* note 35; Rome Statute, *supra* note 2.

¹⁶⁰ *Gender Apartheid – Policy Brief*, *supra* note 29.

¹⁶¹ *Id.*

¹⁶² *Legal Brief on Gender Apartheid*, END GENDER APARTHEID (2023), <https://endgenderapartheid.today/legal-brief.php>.

¹⁶³ Rome Statute, *supra* note 2.

¹⁶⁴ Rome Statute, *supra* note 2 preamble.

systemic gender domination—like racial domination or genocide—threatens the collective conscience of humanity.

E. Addressing Objections to Codification

Scholarly and diplomatic objections to codification are likely to fall into three categories: redundancy, dilution, and politicization.

1. Redundancy:

Some may argue that existing provisions on persecution and other inhumane acts already encompass gender-based systems of oppression.¹⁶⁵ However, as demonstrated earlier, these provisions target discrete acts rather than the institutional regime itself. Codification is necessary to bridge that structural gap and to provide prosecutorial clarity.

2. Dilution:

Others may fear that expanding the definition of apartheid risks diluting its historical association with racial oppression.¹⁶⁶ This concern, though understandable, misconstrues the nature of codification. The purpose of recognizing gender apartheid is not to diminish the gravity of racial apartheid but to uphold the principle that all institutionalized systems of domination merit equal condemnation.¹⁶⁷ The normative essence of apartheid lies not in its racial dimension but in its structural logic of organized subjugation.

3. Politicization:

Finally, some states may view codification as a politically charged endeavor, given the sensitivity of gender norms across legal traditions.¹⁶⁸ Yet the success of the Kampala Amendments

¹⁶⁵ International Service for Human Rights, *Gender Apartheid* (Mar. 6, 2023), <https://ishr.ch/wp-content/uploads/2023/06/Gender-apartheid.-Final-2023-03-06-1.pdf>.

¹⁶⁶ Azadah Raz Mohammad & Akila Radhakrishnan, *supra* note 20 (“Some have raised the challenge that expanding the concept of apartheid to include gender divorces the idea from the racial context of its origins and does not give due respect to the experiences of those who suffered under the regimes in Southern Africa”).

¹⁶⁷ *Id.*; *Gender Apartheid Must Be Recognised*, *supra* note 26.

¹⁶⁸ Cheshmak Farhoumand-Sims, *Unfolding Gender Apartheid in Afghanistan*, *CONTENDING MODERNITIES* (date not visible on page), <https://contendingmodernities.nd.edu/global-currents/gender-apartheid-afghanistan> (“Without careful safeguards, the legal recognition of gender apartheid could be used to selectively exert political pressure aligned with the goals of powerful nations, while overlooking other instances of systemic gender oppression.”).

demonstrates that consensus is achievable when reform is framed as a technical correction grounded in existing principles rather than as an ideological expansion. Framing gender apartheid as the logical completion of Article 7's regime-crime framework—rather than as a moral innovation—can mitigate political resistance and attract broad-based support.¹⁶⁹

F. Harmonization with Domestic Jurisdictions

Codification would also generate a harmonizing effect across national legal systems.¹⁷⁰ Under the principle of complementarity, domestic jurisdictions bear the primary responsibility for prosecuting crimes within the Statute's scope.¹⁷¹ Once gender apartheid is codified, States Parties that ratify the amendment would be required to incorporate it into domestic criminal codes, thereby embedding the norm across multiple legal orders.¹⁷²

This harmonization would have tangible benefits. It would enhance the capacity of domestic prosecutors to address systemic gender-based repression, facilitate mutual legal assistance, and strengthen the global network of accountability mechanisms.¹⁷³ It would also expand the evidentiary record available to the ICC, creating a feedback loop between national and international jurisprudence.¹⁷⁴

G. The Legitimacy of Law's Evolution

Finally, codification through Article 121 would reaffirm the legitimacy of international criminal law as a living system of accountability.¹⁷⁵ The law's authority does not derive from its immutability but from its capacity to respond coherently to new forms of injustice.¹⁷⁶ The drafters of the Rome Statute envisioned this dynamism.¹⁷⁷ The very existence of the amendment procedure

¹⁶⁹ *Legal Brief*, *supra* note 164.

¹⁷⁰ Rome Statute, *supra* note 2.

¹⁷¹ *Handbook on the International Criminal Court's Principle of Complementarity*, INTL CTR. TRANSITIONAL JUST. (2016), https://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Grover, *supra* note 88.

¹⁷⁶ *Id.*; Rome Statute, *supra* note 2 art. 121.

¹⁷⁷ Grover, *supra* note 88.

signals that the Statute was never meant to be static—it was meant to *grow with humanity's conscience*.¹⁷⁸

Recognizing gender apartheid through amendment would exemplify that vision. It would not stretch the boundaries of law but fortify them, confirming that the Statute's promise of equality applies to all who suffer systematic domination.¹⁷⁹ By completing the legal architecture of crimes against humanity, codification would align the Statute with its moral foundation: that law's silence in the face of structural oppression is itself a form of complicity.¹⁸⁰

In sum, codification under Article 121 represents the most definitive and legitimate means of addressing the Rome Statute's gender gap.¹⁸¹ It translates interpretive principle into institutional reform, harmonizing the Statute with jus cogens norms and ensuring its durability across generations.¹⁸² Far from altering the Statute's spirit, this amendment would fulfill it—by affirming that the systematic subjugation of half of humanity is not a cultural anomaly, but a crime against all humanity.¹⁸³

IV. Operational Implications for Prosecutor, States, and Victims

The recognition and codification of gender apartheid would not merely fill a doctrinal gap; it would reorient how international criminal law conceptualizes and responds to systemic oppression. For the ICC, States Parties, and affected communities, this evolution carries concrete operational implications. It would shape prosecutorial strategy, evidentiary methodology, cooperation frameworks, and the symbolic architecture of international justice.

A. Implications for the Office of the Prosecutor

1. Establishing a Coherent Charging Framework

Under the current regime, prosecutors must charge gender-based systems of exclusion through a combination of persecution, enslavement, or other

¹⁷⁸ *Id.*; Rome Statute, *supra* note 2.

¹⁷⁹ *Id.*; Rome Statute, *supra* note 2.

¹⁸⁰ *Global: Gender Apartheid*, *supra* note 21; Grover, *supra* note 88.

¹⁸¹ *Legal Brief*, *supra* note 164.

¹⁸² *Id.*

¹⁸³ *Id.*

inhumane acts—each addressing only fragments of a larger structure.¹⁸⁴ Recognizing gender apartheid as a standalone crime would consolidate these elements into a unified framework.

Such codification would enable prosecutors to structure indictments that mirror the architecture of the regime itself. The focus would shift from individual episodes of abuse to the systemic machinery sustaining domination: legislative decrees, administrative orders, enforcement directives, and the bureaucratic infrastructure that maintains subjugation.¹⁸⁵

By treating the regime as the criminal enterprise, the prosecution could better capture the intent and participation of high-level officials—lawmakers, judges, and ministers—whose role in designing and perpetuating legal inequality currently evades adequate characterization under existing crimes.¹⁸⁶

2. *Evidentiary Advantages*

Codification would also provide clearer evidentiary criteria. The actus reus of gender apartheid would include:

- The existence of a legal or administrative framework that enforces differential status by gender.
- The systematic and institutionalized implementation of such measures; and
- The intent to maintain domination or exclusion.

Evidence would thus encompass legislative texts, decrees, official correspondence, minutes of ministerial meetings, and enforcement statistics—materials already used in human rights fact-finding but rarely contextualized within a criminal framework.

This structural approach would align with how the ICC has historically proven organizational policy in cases of persecution or deportation, as seen

¹⁸⁴ Yvonne M. Dutton & Milena Sterio, *Beyond Policy: Overcoming Challenges in Prosecuting Gender Persecution at the International Criminal Court*, 19 *FORDHAM INTL L.J.* 520 (2025), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2863&context=ilj>; Rosemary Grey & Valerie Oosterveld, *supra* note 17.

¹⁸⁵ End Gender Apartheid, *END GENDER APARTHEID*, <https://endgenderapartheid.today>; Azadah Raz Mohammad & Akila Radhakrishnan, *supra* note 20.

¹⁸⁶ Grover, *supra* note 88.

in *Bemba* and *Ntaganda*.¹⁸⁷ By emphasizing institutional continuity rather than isolated incidents, prosecutors could construct more robust cases of state-led criminality.¹⁸⁸

3. *Complementarity and Preliminary Examinations*

Codification would enhance the Prosecutor's ability to evaluate complementarity—whether national authorities are genuinely investigating or prosecuting the same conduct. Presently, persecution-based frameworks make this assessment difficult because national laws seldom criminalize discrimination as a standalone offense.¹⁸⁹ Once gender apartheid is codified, the absence of domestic analogues would itself demonstrate unwillingness or inability, strengthening the ICC's jurisdictional claim.¹⁹⁰

Moreover, recognizing gender apartheid as a discrete offense would enable the Office of the Prosecutor to initiate preliminary examinations earlier, on the basis of structural indicators such as discriminatory decrees or systematic exclusion from education and employment.¹⁹¹ This preventive dimension—detecting regimes of domination before they escalate into mass atrocities—would transform the ICC's role from reactive to anticipatory.

B. Implications for States Parties

1. *Legislative Harmonization and Domestic Incorporation*

States Parties would be obliged to incorporate gender apartheid into domestic criminal codes as part of their implementation of the Rome Statute. Doing so would not only expand national capacity for prosecution but also strengthen preventive frameworks by embedding the prohibition of structural gender domination into domestic law.¹⁹²

This harmonization would likely follow the model established by the Kampala Amendments. States could ratify and domesticate the amendment individually, creating a patchwork of early adopters whose national practices gradually coalesce into a universal standard.¹⁹³ Such phased adoption is

¹⁸⁷ Prosecutor v. Bemba, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo of 15 June 2009; Prosecutor v. Bemba, ICC-01/05-01/08-3636-Red, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's Judgment of June 8, 2018; Prosecutor v. Lubanga, *supra* note 114.

¹⁸⁸ *Gender Apartheid Must Be Recognised*, *supra* note 26.

¹⁸⁹ *Codifying Gender Apartheid*, *supra* note 32.

¹⁹⁰ *Symposium*, *supra* note 130.

¹⁹¹ Azadah Raz Mohammad & Akila Radhakrishnan, *supra* note 20.

¹⁹² Grover, *supra* note 88.

¹⁹³ Kampala Amendments, *supra* note 35.

consistent with the Statute's structure and with prior patterns of treaty evolution in international criminal law.¹⁹⁴

2. Diplomatic Engagement and International Cooperation

Codification would also reshape the diplomatic responsibilities of States Parties. Under Part 9 of the Statute, states are required to cooperate in arrest, evidence collection, and enforcement of sentences.¹⁹⁵ Recognizing gender apartheid as a crime would enable States Parties to cooperate through mutual legal assistance and targeted sanctions aimed at dismantling the institutional apparatus of oppression—such as blocking the enforcement of discriminatory decrees or supporting investigative mechanisms.¹⁹⁶

Beyond cooperation with the Court, codification would have expressive value in international relations. It would allow states to frame their foreign policy, sanctions, and development assistance in alignment with the international criminal prohibition of gender apartheid, embedding accountability into broader global governance.¹⁹⁷

C. Implications for Victims and Civil Society

1. Recognition and Representation

For victims, recognition of gender apartheid would provide a *legal vocabulary* that finally matches lived reality. Current legal categories—sexual violence, persecution, discrimination—describe consequences, not systems. Codification would recognize subordination itself as harm, affirming that women and girls subjected to exclusionary regimes are not merely victims of discrete abuses but survivors of a criminal system.¹⁹⁸

This recognition carries procedural implications as well. Under Article 68(3) of the Statute, victims have the right to present their views and concerns during proceedings.¹⁹⁹ A defined crime of gender apartheid would enable

¹⁹⁴ Permanent Mission of the Principality of Liechtenstein to the United Nations, Global Inst. for the Prevention of Aggression, Inst. for Int'l Peace & Sec. L. & Liechtenstein Inst. on Self-Determination at Princeton Univ., *HANDBOOK ON THE RATIFICATION AND IMPLEMENTATION OF THE KAMPALA AMENDMENTS ON THE CRIME OF AGGRESSION TO THE ROME STATUTE OF THE ICC* (3d ed. 2019).

¹⁹⁵ Rome Statute, *supra* note 2.

¹⁹⁶ *Legal Brief on Gender Apartheid*, *supra* note 164.

¹⁹⁷ Grover, *supra* note 88.

¹⁹⁸ *Gender Apartheid Must Be Recognised*, *supra* note 26.

¹⁹⁹ Rome Statute, *supra* note 2 art. 68(3).

collective representation of victims who experience structural oppression, rather than atomizing their claims across multiple offenses.

Such aggregation would, in turn, strengthen the evidentiary record by integrating testimony across different sectors—education, employment, movement, political participation—into a unified narrative of systemic domination.

2. *Reparations and Restorative Justice*

Codification would also expand the reparative reach of international criminal law. Under Article 75, the Court may order reparations for harm resulting from crimes within its jurisdiction.²⁰⁰ Recognizing gender apartheid would allow reparations orders to target structural causes of inequality—such as discriminatory legal frameworks, denial of access to education, or exclusion from public life—rather than limiting relief to individualized harm.²⁰¹

Such systemic reparations could include measures like the repeal of discriminatory laws, restoration of political rights, and institutional reform of justice or education systems. By addressing the architecture of domination itself, reparations would move beyond compensation toward genuine transformation—a hallmark of restorative justice in the international context.

3. *Civil Society and Norm Diffusion*

Civil society organizations would play a crucial role in operationalizing the new norm. Their documentation, advocacy, and strategic litigation efforts would form the evidentiary backbone of future cases. Codification would empower them to frame advocacy in terms of international criminal liability, increasing leverage on both national and international actors.²⁰²

In turn, this interaction between law and civil society would facilitate **norm diffusion**—the process by which international legal concepts permeate political and social discourse. As the recognition of gender apartheid enters domestic and global vocabulary, it would recalibrate how international institutions, donors, and development agencies assess compliance with gender equality obligations.

D. Broader Systemic Effects

²⁰⁰ Rome Statute, *supra* note 2 art. 75.

²⁰¹ Hannah Sweeney, *Gender Equality and State Responsibility: Enforcing CEDAW through the ICJ*, 38 HARV. HUM. RTS. J. 287 (2025).

²⁰² Azadah Raz Mohammad & Akila Radhakrishnan, *supra* note 20; Grover, *supra* note 88.

The recognition of gender apartheid would also reinforce the integrity and legitimacy of the Rome Statute system. Critics often charge that international criminal law is reactive, selective, and disconnected from structural injustice.²⁰³ By addressing a form of systemic domination that operates through law itself, the ICC would demonstrate its capacity to confront not only violent conflict but also legal architectures of oppression.

This expansion of scope would not undermine the Statute's neutrality; rather, it would restore it. International criminal law was conceived as a response to the most serious threats to human dignity.²⁰⁴ When law itself becomes the instrument of subjugation, silence is complicity.²⁰⁵ Codifying gender apartheid would thus reaffirm the Statute's foundational principle: that *no system of power is beyond the reach of accountability*.

E. A New Paradigm of Structural Justice

Ultimately, the operational significance of codifying gender apartheid lies not only in the prosecutions it would enable but in the conceptual shift it would produce. International criminal law would evolve from a system preoccupied with the *symptoms* of violence to one capable of confronting its *structures*.

This shift would bridge the historical divide between human rights and criminal law—between the monitoring of state conduct and the punishment of individual responsibility.²⁰⁶ By uniting these paradigms, the recognition of gender apartheid would establish a new model of structural justice: one that treats domination itself, when institutionalized by law and coercion, as the gravest threat to humanity's collective peace.

In sum, codifying gender apartheid would have immediate and transformative operational implications. It would furnish prosecutors with a coherent doctrinal tool, enable states to fulfill their obligations under complementarity, provide victims with a framework for recognition and reparation, and restore the ICC's normative coherence with the peremptory principle of equality. The result would be an international legal order that not only condemns injustice but is structurally equipped to dismantle it.

²⁰³ Birju Kotecha, *The International Criminal Court's Selectivity and Procedural Justice*, 18 J. INTL CRIM. JUST. 107, 125 (2020).

²⁰⁴ Rome Statute, *supra* note 2, preamble.

²⁰⁵ Michelle Burgis-Kasthala & Barrie Sander, *Contemporary International Criminal Law After Critique: Towards Decolonial and Abolitionist (Dis-)Engagement in an Era of Anti-Impunity*, 22 J. INTL CRIM. JUST. 127, 135 (2024).

²⁰⁶ Noam Lubell, *The Relationship between International Human Rights Law and Other Branches of International Law*, in INTERNATIONAL HUMAN RIGHTS LAW (Daniel Moeckli et al. eds., 3d ed. 2018).

Conclusion:

The Rome Statute stands as the most ambitious legal instrument ever created to individualize responsibility for systemic evil. Yet, over twenty-five years after its adoption, a profound asymmetry remains at its core: the Statute recognizes racial domination as a crime against humanity but leaves gender domination unnamed.²⁰⁷ The result is not merely a technical omission, but a structural silence that limits the capacity of international criminal law to confront the full spectrum of organized oppression.

This article has argued that the recognition of *gender apartheid*—an institutionalized regime of systematic oppression and domination by one gender over another—is not only doctrinally justified but normatively required. Through the interpretive lens of Article 21(3), the prohibition of discrimination, and the *jus cogens* character of equality, the existing framework of the Statute already contains the seeds of such recognition.²⁰⁸ Article 21(3) obliges the Court to interpret its provisions consistently with human rights and without adverse distinction.²⁰⁹ To continue to treat gender domination differently from racial domination would itself constitute the very inequality that provision was designed to prevent.

Still, interpretation alone is not enough. Codification through Article 121 represents the definitive act of legal recognition—one that transforms moral consensus into juridical permanence.²¹⁰ The amendment process, though procedurally rigorous, was designed precisely for this purpose: to allow the Statute to evolve with humanity's conscience. Just as the *Kampala Amendments* closed the gap on the crime of aggression, so too must the recognition of gender apartheid complete the architecture of crimes against humanity.²¹¹

The implications extend far beyond textual reform. For prosecutors, codification would enable a coherent framework to address the legal machinery of oppression itself—capturing legislative, administrative, and enforcement structures that collectively sustain subjugation. For States Parties, it would harmonize domestic criminal codes with the principle of gender equality, operationalizing the promise of complementarity.²¹² For victims, it would provide the legal vocabulary to describe their lived

²⁰⁷ Grover, *supra* note 88.

²⁰⁸ Rome Statute, *supra* note 2, art. 21(3).

²⁰⁹ *Id.*

²¹⁰ Rome Statute, *supra* note 2 art. 121.

²¹¹ Kampala Amendments, *supra* note 35.

²¹² Heather Barr, *supra* note 41.

experience not as a series of abuses but as participation in a system designed to erase them.²¹³

In recognizing gender apartheid, the international community would affirm that law can no longer distinguish between forms of domination by the identity of those who suffer them. The essence of apartheid—its crime against humanity—lies not in its racial character, but in its structural logic: the deliberate construction of inequality through law.²¹⁴ Gender apartheid, like racial apartheid before it, weaponizes governance to enforce hierarchy. To criminalize one while ignoring the other is to constitutionalize discrimination within the very instrument designed to end it.

Such recognition would not expand international criminal law; it would *restore* it. It would bring the Statute into coherence with its own preamble, which affirms that “the most serious crimes of concern to the international community as a whole must not go unpunished.”²¹⁵ It would align the ICC’s jurisprudence with the universal and peremptory principle of equality recognized in the Charter of the United Nations, the ICCPR, and customary international law.²¹⁶ And it would reaffirm that international criminal law is not static, but a living system that evolves in response to the deepest injuries of humanity.

The codification of gender apartheid would also mark an epistemic shift in how international law conceptualizes violence. It would acknowledge that domination is not always enacted through war or atrocity but often through legal design—the bureaucratic normalization of inequality. In doing so, it would bridge the historic divide between human rights and criminal law, transforming international justice from a reactive instrument of punishment into a proactive guardian of equality.

If the Nuremberg legacy established that individuals can be held accountable for the crimes of states, the recognition of gender apartheid would extend that principle to the crimes of *systems*. It would affirm that the deliberate construction of inequality, when institutionalized through law and coercion, is not merely an injustice—it is a crime against humanity.

²¹³ *Gender Apartheid Must Be Recognised*, *supra* note 26.

²¹⁴ *Id.*, *Gender Apartheid Must Be Recognised*, *supra* note 26.

²¹⁵ Rome Statute, *supra* note 2, preamble.

²¹⁶ U.N. Charter art. 43, ¶ 1; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Human Rights Committee, General Comment No. 18: Non-discrimination, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (1989); Convention on the Elimination of All Forms of

Discrimination against Women, opened for signature Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

The task before the international community is not to innovate but to complete what it began in 1998: a universal legal order in which no person, and no regime, can claim legitimacy through domination. The Rome Statute's promise was to translate moral outrage into legal accountability. Codifying gender apartheid would fulfill that promise. It would ensure that the law, having once recognized the crime of racial domination, now speaks with equal clarity against the subjugation of half of humanity.