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DRAFT

Q & A Factsheet:

LGBTQI+ Inclusion and the Definition of the Crime of Gender Apartheid[1]

This is a pivotal moment in the discourse on gender crimes accountability—one that offers a new opportunity to create the tools needed to ensure recognition for all victims.[2] The proposed draft crimes against humanity (CAH) treaty, currently circulating among legal experts, civil society, and states, will impact victims' access to justice for years to come. Its years-long drafting process invariably includes edits and language revisions which offer a chance to codify progressive understandings of international customary law. Codification of gender apartheid as a crime against humanity in the treaty would contribute to the progressive development of international law, and should be fully supported with a contemporary definition. By contrast, if codified with an outdated definition that erases developments in customary international law, the treaty could negatively impact decades of hard-won rights for women, girls and LGBTQI+ persons, and lead to the exclusion of victims.

This factsheet offers strategies for ensuring that the definition of a proposed crime against humanity of gender apartheid is inclusive of all victims, including LGBTQI+ persons. It was created to equip advocates from an array of disciplines with tools to respond to questions about how to promote an inclusive definition of gender apartheid while maintaining momentum towards its recognition as a crime.

1. Will we deter states from supporting gender apartheid's codification as a crime against humanity if we advocate for a definition that is inclusive of all victims?

No. In fact, the opposite is true. A definition that risks exclusion will hamper the movement for legal recognition of gender apartheid, and possibly risk alienating key allies, ultimately undermining the broad support necessary to achieve codification. History has shown that progress and justice are denied when social movements accommodate prevailing forms of exclusion. This was true, for example, when prominent white women suffragettes in the United States rejected Black people's struggle for voting rights. It has also been true when trans persons' rights have been excluded from prominent LGBTQI+ platforms for equality. This contrasts with the US disability justice movement which insisted on including every form of disability creating a broad base of

[1] This "Q & A Factsheet" is based on the draft academic working paper by Lisa Davis and JM Kirby, *Ensuring an LGTBQI+ Inclusive Definition of Gender Apartheid: Understanding "Groups" under Persecution, Apartheid and Genocide*, Nov. 2023. Please do not cite without author approval.

[2] This "Q & A Factsheet" uses the term "victim" and acknowledges that persons who experience crimes or harms may identify with the term "victim" or with the term "survivor."

support to win expansive legal protections. Overcoming division and disunity along identity lines only strengthens movements.

While it has important momentum, the struggle for recognition of gender apartheid faces hurdles, making unified movement building ever more crucial. States historically de-prioritize gender justice. However, by ensuring LGBTQI+ inclusion, states that have taken public stances to protect LGBTQI+ rights may be further induced to support codification of gender apartheid as a crime. Furthermore, if apartheid's definition recognizes the social construction of both gender and race, states that support the recognition of intractable apartheid in other contexts may also back the language change. Intersectional and inclusive movement building could therefore lead not only to a larger base of support, but to a winning strategy for garnering states' buy-in to codification of gender apartheid as a crime against humanity. (See example in question eight). Including diverse civil society input can also lead to a better informed treaty that enhances access to justice. (See example in question seven).

2. How are LGBTQI+ persons at risk of exclusion as victims under an outdated definition of gender apartheid?

Crimes must be defined in order to hold perpetrators accountable. As new crimes in international law are contemplated, it is typical to begin by turning to previous definitions of crimes. This is because the recognition of rights (and the prohibitions of acts that violate them) must be grounded in understandings that have evolved in international law.

Examining the one codified form of apartheid—racial apartheid—can help inform a definition of the crime of gender apartheid. Racial apartheid's definition under international criminal law comes from the Rome Statute (which governs the International Criminal Court (ICC)). Under the Rome Statute, apartheid is: inhumane acts "committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."[3] If we exchange the word "racial" for "gender," the definition reads: "an institutionalized regime of systematic oppression and domination by one gender group over any other gender group or groups."

The critical question with this definition version is how the legal term "gender groups" will be understood under international criminal law. This is of utmost importance because a prosecutor will have to define and prove the existence of "gender groups" when bringing charges of gender apartheid. Like any new term, if not properly defined, the introduction of "gender groups" under apartheid will open the door to debates about its meaning. These could include questions about what a legally defined "gender group" is and "how many" exist. If "gender" under apartheid is not defined based on a broad understanding, some women, girls and other LGBTQI+ persons will be left out. This may also invite regressive arguments in favor of limiting "gender" to an outdated binary or biological understanding. Such regressive interpretations would counter decades of legal advances regarding recognition of discrimination based on gender, and could undermine hard-fought wins for women's, girls' and LGBTQI+ persons' rights. The good news is, as drafts of new laws are revised, there are opportunities to cure for such problems and to ensure that all victims of such crimes are recognized under law.

[3] Rome Statute Art. 7(2)(h) (2003).

3. ***Why are courts more likely to turn to international criminal law to define "gender groups" instead of international human rights law?***

While international human rights law, which reflects contemporary understandings of discrimination, can be an interpretive aid for international criminal law, it cannot be transposed onto it. The rule of strict construction (requiring a law's language to be interpreted within its terms' reasonable meaning and the spirit and scope of the treaty), and the principle of liability in international criminal law weigh against an international court utilizing a broader definition of, for example, racial discrimination, like that under human rights law.

There are exceptions to this general principle, such as where a treaty makes clear that its articles should be interpreted in accordance with international human rights law. For example, the Rome Statute contains article 21, which states that for the International Criminal Court "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights…." While the draft Crimes against Humanity (CAH) Treaty borrowed much of its language from the Rome Statute, it omits this provision.[4] Thus prosecutors and courts may likely turn to existing criminal law understandings of "groups." This is one reason it is important that a newly created treaty reflect contemporary language from customary international law.

4. How would the legal term "gender groups" under the crime of apartheid likely be understood under international criminal law?

When defining "gender groups" the key word for legal definition is the subject "groups," whereas "gender" is the adjective that describes "groups." While over the last few decades the terms "race" and "gender" have come to be understood broadly and as social constructs under international law,[5] at issue here is how protected "groups" are understood under international criminal law specifically. For example, "racial groups" protected from the crime of genocide are defined more narrowly, and are based in part on outdated definitions of race, whereas groups targeted on racial grounds (racial groups) under persecution, are understood as broad and based on social constructs. The interpretation of "racial groups" under genocide has led to problems in achieving justice for victims. Broadening the understanding of apartheid to include all persons targeted based on their race or gender, would help bolster movements for both racial and gender justice.

We find protected "groups" in three crimes under international criminal law: persecution, apartheid and genocide—crimes that explicitly address discrimination. The understanding and application of crimes derive from two primary sources: the *travaux préparatoires* (the negotiations, discussions, and drafting of a final treaty text) and jurisprudence (case law produced by courts). Since racial apartheid has yet to be tried, there is no formal jurisprudence available to interpret how protected "groups" are legally understood under the crime of apartheid. There are, however, *travaux préparatoires* and accountability mechanisms that have either discussed or applied an understanding of racial apartheid. In both of those contexts, "racial groups" has been understood to follow the meaning posed by genocide—not persecution. This means that when trying people

[4] As of April 2023, the draft Crimes against Humanity treaty holds that each state "undertakes to prevent crimes against humanity, in conformity with international law." Treaty drafters should retain the original language codified under article 21 of the Rome Statute and direct judicial actors to stay in compliance with human rights law.
[5] "Gender," for instance, includes sexual orientation, gender identity, gender expression, and sex characteristics.

accused of apartheid, prosecutors and courts will be inclined to follow the outdated understanding of "groups" under genocide as opposed to the broad understanding of "groups" under persecution. This would risk the exclusion of some women and other LGTBQI+ groups.

a. How are protected "groups" defined under genocide?

Four groups are protected from genocide: "national, ethnical, racial or religious group[s]." The Genocide Convention's *travaux préparatoires* reflect an understanding of these groups as retaining the key features of "permanence" or "immutability." When writing the Genocide Convention, drafters believed that group members had a certain inevitability to be in their group; that most were born into it and thus membership identity was beyond their control. For example, drafters who understood race as biologically determined (a stance that has since been scientifically debunked), believed that members of "racial groups" could be determined by characteristics such as skin color or other physical features. Nationality and religion, however, were less clear to them. While drafters determined that a person's nationality or religion were less immutable, they assumed that such change would be highly challenging and thus unlikely, based on the idea that people were not, for example, easily able to leave or change the faith they were raised in. Drafters also discussed the inclusion of political groups, but those group members were seen as having the ability to choose whether to leave or join such groups. Thus, political groups were not considered "stable" or "permanent", which led to their exclusion as protected "groups" under genocide, as opposed to persecution (which does protect political groups).

While the definition of persecution was available, drafters made apparent their intent to differentiate standards under genocide and persecution: "Genocide is the deliberate destruction of a human group. This literal definition must be rigidly adhered to; otherwise there is a danger of the idea of genocide being expanded indefinitely to include the law of war, the right of peoples to self-determination, the protection of minorities, the respect of human rights, etc."[6]

The 1948 definition of the crime of genocide eventually made its way into the statutes for the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as other tribunals. The ICTR's *Akayesu* Court produced the first genocide conviction by an international tribunal, applying an "objective evaluation" to determine groups protected from genocide. The Court held that it was "particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group."[7] In other words, the Court decided that members should "belong to [the group] automatically, by birth, in a continuous and often irremediable manner."[8] Applying this scope, the Court laid out its "objective criteria" for determining group membership. For example, racial groups were "based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national, or religious factors."[9]

[6] 4 U.N. ESCOR, U.N. Doc. E/447 (1947).
[7] Prosecutor v. Akayesu, Case No. ICTR-96-4- T (ICTR Trial Chamber Sept. 2, 1998) para. 516.
[8] *Id*. at para. 511.
[9] *Id*. at para. 514.

Because of the problematic nature of applying "objective criteria" to social constructs, international courts started moving away from *Akayesu's* pure "objective approach," and towards subjective criteria, which look to the perpetrator's understanding of the victim group. The ICTY *Jelisić* Court for example, relied exclusively on the perpetrator's perception for group determination. "[T]o attempt to define a … racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a … racial group from the point of view of those persons who wish to single that group out from the rest of the community."[10] *Jelisić*, however, is an outlier. The overwhelming majority of more recent genocide cases under the *ad hoc* tribunals have not exclusively relied on a subjective approach. Instead, courts have relied on a mix of subjective and objective elements. They posit that determination of the relevant protected group should be made on a case-by-case basis, and include both objective and subjective criteria. An objective-subjective approach would risk excluding LGBTQI+ victims. (See question five, below).

Despite decades of scholarly literature examining the deeply problematic nature of the outdated definition of "groups" under genocide, it was not amended when genocide was codified again in 2003 under the Rome Statute. Instead, drafters once more relied on the *travaux préparatoires* for the Genocide Convention as the principal source. Like the drafters of the ICTY and the ICTR statutes, the Rome Statute drafting committee included the definition of genocide adopted from the 1948 Convention without modification.

b. How are protected "groups" defined under persecution?

Persecution is defined as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."[11] The Rome Statute prohibits persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined by the Statute, or other grounds that are universally recognized as impermissible under international law.

To determine who is a group member, we look at the perpetrator's perceptions of the victim. It does not matter if the victims were "objectively" members of the group. What matters is that the perpetrator targeted them with the intent to discriminate (based on a protected ground). For example, let's say a perpetrator beats two victims because they are not wearing clothing that the perpetrator considers is proper dress for women. Here the victims are targeted with the intent to discriminate based on gender (because the perpetrator perceives the victims as being out of a discriminatory, gendered dress code). It is irrelevant whether the victims identify as women, and there is no need to apply any sort of objective criteria to determine their membership in the targeted group.[12] The ICC Policy on the Crime of Gender Persecution underscores this, noting when a "perpetrator targets a person for being perceived as a gay man or lesbian, it is irrelevant that the person does not personally identify as homosexual. That the perpetrator wrongly perceived the

[10] Prosecutor v Jelisić, Case No IT-95–10-T (14 December 1999), para. 70.
[11] Rome Statute Art. 7(2)(g)
[12] ICC Policy on the Crime of Persecution, para. 44 (2022). "If a perpetrator targets a person he perceives as a gay man, and the person also personally identifies as gay, this may provide evidence of the perpetrator's targeting of gay men. However, such an overlap is not required." *Id*. at n. 57.

person as belonging to the targeted group, does not deprive such conduct of its discriminatory character."[13] This means that persecution maintains a broad and inclusive understanding of "targeted groups", and centers this understanding from the perception of the perpetrator.

Unlike the understanding of groups under genocide, the understanding of targeted groups under persecution does not provoke questions regarding whether and what objective criteria may be needed to identify group members. Importantly, criteria required for targeted groups under persecution is subjective, meaning it is understood from the point of view of the perpetrator. It is sufficient that the perpetrator perceives the victim as a member of the targeted group or as a sympathizer or affiliate of the targeted group. Under persecution, the groups are broad and inclusive, and because of the language "based on" a protected "ground," group determination does not require that a group member meet "objective" criteria.

c. How are protected "groups" defined under apartheid?

Under the Rome Statute, the Crime of Apartheid is defined as "inhumane acts … committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."[14] Prosecutors must prove the "racial group" and membership to the group in order to demonstrate apartheid. Since racial apartheid has yet to be tried, there is no formal jurisprudence available to interpret how protected "groups" are legally understood under the crime of apartheid. There are, however, *travaux préparatoires* and accountability mechanisms that have either discussed or applied an understanding of racial apartheid. In both of those contexts, "racial groups" has been understood to follow the meaning posed by genocide—not persecution.

Applying a subjective definition like that under persecution to the crime of apartheid would reflect the social construction of race. This risk is that prosecutors and courts may instead apply the definition of "racial groups" under genocide, requiring at least some "objective" characteristics to define group membership. The Rome Statute drafters relied on Apartheid Convention to define the crime against humanity of apartheid. Drafters of the Apartheid Convention looked to the Genocide Convention for certain language and components. The *travaux préparatoires* for the Apartheid Convention demonstrate this link, which means that the term "racial groups" runs the risk of being understood as it is under the Genocide Convention.

A subjective and broad understanding of "racial groups" like that derived from the definition of "racial discrimination" in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[15] could better ensure justice for victims of apartheid. However, the rule of strict construction (requiring a law's language to be interpreted within its terms' reasonable meaning and the spirit and scope of the treaty), and the principle of liability in international criminal law weigh against courts utilizing human rights interpretations. While international

[13] *Id*. at para. 44.
[14] Rome Statute Art. 7(2)(h) (2003). This definition is also found in the draft CAH treaty (as of April 2023).
[15] International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965). ICERD does not define race, but instead defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin," thus placing "race" alongside other categories that may be subject to racial discrimination.

human rights law, including ICERD, can be an interpretive aid for international criminal law, it cannot be transposed onto it. However, if we draft apartheid's language to ensure that like persecution, it has an explicitly subjective definition of "groups," a broad understanding of "racial groups" (and "gender groups" under gender apartheid) would apply under the crime of apartheid.

The Independent International Fact-Finding Mission on Myanmar (IFFMM) provides a detailed examination of the crimes of genocide, apartheid and persecution. When discussing the crime of persecution, the IFFMM applies "subjective criteria" to define the targeted group, relying on factors such as attitudes and behaviors of the perpetrators. When discussing the scope and application of the term "racial groups" under apartheid, the IFFMM elects not to refer to the understanding of targeted "groups" under persecution. Instead, it refers to the understanding of racial "groups" as it applies the term under its examination of genocide, which requires both objective and subjective factors.

The UN Special Rapporteur on Palestine has sought to overcome these strictures on the meaning of "racial groups" to apply the crime of apartheid to Israel's actions against Palestinians. The Rapporteur points to advances in the understanding of race as a social construct, and to ICERD to argue that "racial group" under the Apartheid Convention and the Rome Statute should be understood as a social construct. ICERD does not define race (or apartheid) but instead defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin," thus placing "race" alongside other categories that may be subject to racial discrimination. While the Special Rapporteur's mandate does not include international criminal law liability, this analysis can be helpful in arguing that "racial groups" should be understood as a social construct.

This speaks to a need for adequate legal language that would make clear the understanding of "race" as a social construct under the crime of apartheid. It also underscores the barriers to justice that may be posed by creating the legal term "gender groups" under apartheid if explicit language demonstrating that "gender groups" is understood as a social construct is not included.

5. What would happen if the objective-subjective approach to defining protected "gender groups" is applied to LGBTQI+ victims?

Under the objective-subjective approach, "gender groups" runs the risk of being defined as including only two categories: "women" and "men" (or "male" and "female"). "Objective criteria" for "women" or "men" may lead to the exclusion or degrading categorization of trans persons in a way that denies their true identity. For example, "objective criteria" such as physical or biological characteristics, applied to the "women" group, would likely lead to the exclusion of trans women. Similar challenges also arise in applying "objective" criteria to define other LGBTQI+ groups (or LGBTQI+ persons as a whole group).

The "objectivized-subjective" (a subset of "objective-subjective") approach would also lead to the exclusion of LGBTQI+ persons. The objectivized-subjective approach takes the victim's perspective into consideration, with the view that subjective beliefs over time may become "objectivized," in that both the perpetrators and the victims believe the distinctions between the groups have always existed. This approach is also problematic for LGBTQI+ persons who may

not want to be (or do not feel safe being) publicly identified as members of such groups. Families may also not want their deceased loved ones identified as LGBTQI+ persons for a variety of reasons. In any case, a small number of accountability mechanisms examining the issue of genocide or apartheid have applied the "objectivized-subjective" approach, and it is not representative of the trend in "objective-subjective" evaluations used by courts.

Most problematic, any degree of "objective" criteria would reinforce outdated understandings of "gender" as "binary" and "biological" and feed fundamentalist tropes about gender that fuel attacks on the LGBTQI+ community. Proponents of these tropes conflate sex characteristics and social constructs, selectively labeling some as objective characteristics and calling those who articulate the difference "gender ideologists." Fundamentalists argue that "objective criteria" defines the term "gender," and dictate the existence of only two gender categories, "male" and "female." They further argue that objective criteria assigned to men and women are also biologically determined, conflating social constructs with physical traits. For example, some fundamentalists believe that men are more capable decision makers than women and that this is biologically dictated. This argument, based on the belief that selective physical characteristics and social constructs "objectively" determine "gender groups" mischaracterizes "sex" and "gender" while simultaneously conflating them. Fundamentalist organizations continue to argue against the subjective understanding of "gender." Some of these organizations are actively calling for the reinstatement of the outdated definition of gender that was removed from the draft CAH treaty.

While both scientifically and legally erroneous, mischaracterizations like these could receive unmerited weight in a debate determining "gender groups" under apartheid. It therefore would better serve justice to recognize from the outset of the development of gender apartheid's legal definition that inhumane acts committed in the context of an institutionalized regime of systematic oppression and domination are committed on the *basis of gender*. This will ensure the application of broad and inclusive language on targeted groups recognized under gender persecution, and reflect the understanding of "gender" under customary international law.

6. Even if the objective-subjective approach is applied, could LGBTQI+ victims be recognized if they are victims of inhumane acts that amount to gender apartheid?

Anyone who is subjected to "inhumane acts" that amount to gender apartheid may be included as a victim, regardless of how the gender group is defined (as long as all elements are met). However, such victims are not necessarily considered part of the gender "group." Recognition of the group is what reflects the context of an institutionalized regime of systematic domination and oppression. Including LGBTQI+ persons as victims of inhumane acts, but excluding them as members of the targeted group (victims targeted for gender discrimination) is highly problematic.

One of the great values of recognizing gender apartheid is that it will help visibilize systems of oppression and domination based on gender and hold perpetrators accountable for them. The narrowing of "gender groups" under apartheid to "men" and "women" would reinforce binary and debunked biological framings of "gender" that extremists utilize to enforce gender oppression. Failing to criminalize systems that oppress all women, girls and/including LGBTQI+ persons, reinforces the already entrenched invisibility of many of these victims. This in turn would risk reinforcing the idea that only some—not all—women and girls face gender discrimination and that

other LGBTQI+ persons should be excluded altogether. This could lead to a rollback of hard-fought achievements in the gender justice movement.

For example, as part of their regime of systematic gender oppression and domination, the Taliban have committed rape, torture, murder and other inhumane acts against women, girls and/including LGBTQI+ persons because of their gender, including sexual orientation, gender identity and/or gender expression. The UN Special Rapporteur on the situation of human rights in Afghanistan has noted this, stating that "[l]esbian, gay, bisexual, trans and other gender-diverse persons and intersex Afghans continue to be persecuted for not conforming to gender stereotypes and have no safe spaces,"[16] and that "[t]hey live in fear of being identified as queer persons, which can result in extreme violence and death."[17]

7. How do we ensure a legal definition that is inclusive of all women, girls and/including LGBTQI+ persons?

Any draft definition of gender apartheid should be workshopped with a broad global swath of women's, girls' and LGBTQI+ groups. There is great value in civil society groups being able to weigh in on policies that may impact them. They have the expertise that comes from living the reality of conflict or atrocities. They can offer solutions to overcome the practical and academic challenges to ensuring justice. For example, when the ICC Office of the Prosecutor announced that it was going to draft a Policy on the Crime of Persecution, in a novel approach, the Prosecutor called for comments before the drafting process began. Instead of only opening a technical draft for comments, the OTP asked for civil society input on what should be included in the policy. Over 500 organizations, institutions, states, UN experts, independent experts, activists, scholars and academics, representing over 100 countries and territories, submitted input, helping to ensure a stronger, more inclusive policy.

Unfortunately, it is more common for drafters of pivotal international legal language like that in the proposed CAH treaty to issue drafts before soliciting civil society input. Once drafts are produced, experts have often negotiated their wording and such drafts reflect little change in their final product. At this moment, there is no gender apartheid definition in the draft CAH treaty. If and when gender apartheid is added to the treaty, civil society will lose the space to workshop it. This is why civil society movements need to work together now, while negotiations are underway—not just to rally support for gender apartheid's codification, but to discuss its provisions and ensure its inclusivity via a strong definition in the draft treaty.

Bringing together key stakeholders to discuss simple language revisions for the definition of gender apartheid can help ensure that all victims are included. For example, the definition of gender apartheid could read: "… inhumane acts … committed in the context of an institutionalized regime of systematic oppression and domination by one **group** over any other **group** or **groups based on gender** …". This would mirror historical statutory language that broadly defines the legal understanding of "groups" under international criminal law.

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[16] Richard Bennett, Situation of human rights in Afghanistan, A/78/338 (Sept. 1, 2023), para. 55.
[17] Richard Bennett, Report of the Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls, UN Doc. A/HRC/53/21 (June 20, 2023), para. 91.

Another option would be to edit this definition of gender apartheid to read: "…inhumane acts … committed in the context of an institutionalized regime of systematic oppression and domination **based on gender**…". This definition avoids the need to define "groups" in the draft definition. These draft definitions are two examples that demonstrate possible language changes that may ensure better adherence to customary international law's recognition of gender as a social construct and should be discussed with key stakeholders.[18]

Furthermore, the recognition of women, girls and LGBTQI+ persons who are victims of gender apartheid requires an examination of other forms of discrimination in regimes of systematic oppression and domination. It should account for compounding forms of gender discrimination as well as intersecting forms of discrimination, based on, for example, race, ethnicity, religion, age, disability and health status. The CAH treaty drafters should therefore consult a broad range of civil society groups as they review the language of apartheid, such as women's, girls' and LGBTQI+ groups, as well as disability, Indigenous, aboriginal, youth, caste, racial and ethnic minority rights organizations and organizations working to end conflict-related sexual violence.

8. Would calling for the recognition of additional forms of apartheid diminish the momentum for the recognition of gender apartheid?

No. It would have the opposite effect. It would bolster the movement for the recognition of gender apartheid. Calling for codification of gender and other forms of apartheid will not only help ensure recognition of all women, girls and LGBTQI+ persons who are apartheid victims, it would also build greater and more diverse support for the legal recognition of gender apartheid as a crime against humanity.

At the end of 2017, when the draft CAH treaty was in its final stages with the International Law Commission (the Commission), (before it was handed off to the UN General Assembly's 6th Committee), it lacked civil society input and contained an outdated definition of gender. Advocates responded by distributing a toolkit in multiple languages to promote civil society input, not only on the gender definition, but also on other key provisions in the draft CAH treaty.[19] They took an intersectional approach to the work of gender justice by involving a diverse set of civil society actors who would be impacted by the treaty. This meant reaching out to a broad range of women, girls and LGBTQI+ rights stakeholders, as well as other organizations, including racial, ethnic, Indigenous, youth, refugee, migrant and disability rights organizations.

Advocates called on the Commission to not only revise or remove the outdated definition of gender from the draft, but also to expand the grounds for persecution to include additional grounds recognized as protected from discrimination under international law. Advocates organized work-shops and briefings with LGBTQI+ and women's rights activists around the world to determine whether and how to call for a revision or removal of the outdated gender definition. A diverse set of international and grassroots advocates, academics and other experts submitted comments proposing changes for other outdated treaty provisions, in addition to calling for revising or removing the gender definition. Additionally, states made dozens of interventions supporting the

[18] Authors are not proposing a particular definition. They instead are arguing that any definition should ensure inclusivity and offer these as examples of how this may be achieved.
[19] HRGJ, MADRE, OutRight Action Int'l, et al., "The International Crimes Against Humanity Treaty" (2018).

revision or removal of the outdated definition. Dozens of UN Special Rapporteurs and Experts signed on to a submission calling on the Commission to remove the outdated gender definition and made a second submission calling for expanding the list of grounds protected from persecution to include disability, health, Indigenous and refugee status, among others.[20] While the CAH treaty drafters should have expanded the grounds for persecution, removing the definition of gender became more feasible to them in light of these other calls.

Similarly, CAH treaty drafters should also expand the groups protected from apartheid, to include, at minimum, those protected under persecution. If advocates push for this, "gender groups" will no longer stand as a lone call for change. It will enjoy the protection and equal standing with other recognized groups protected under international criminal law. Such calls for inclusion would also bring into coalition a broader set of actors from conflict situations, who are also calling for the recognition of apartheid. Ultimately, while apartheid categories should be expanded, the compromise may end up being the inclusion of gender apartheid with the understanding of "groups" as social constructs (achieved through simple changes to the definition). This could also expand the understanding of racial apartheid, paving the way for its victims to also receive long-awaited recognition.

Proposing a broader scope of protection in this way helped to build an even broader groundswell of submissions to the treaty drafters for the removal of the outdated gender definition. Broad support brought the gender definition struggle over the finish line, leading the ILC to delete the problematic definition from the version it submitted to the 6th Committee.

9. Why is it important to give legal recognition (with an inclusive definition) to the crime of gender apartheid?

As with other hard-fought movement wins, recognition of an inclusive understanding of gender apartheid in the draft CAH treaty would help to demonstrate to the world that targeting all women, girls and/including LGBTQI+ persons because of their gender is a crime against humanity. It would promote a survivor-centered approach (also known as a victim-centered approach) that recognizes a broad range of survivors and their rights to participate in peace and transitional justice mechanisms. It would help build sustainable peace, disrupting the normalization of gender discrimination and violence institutionalized in existing law and practice. If codified as a crime against humanity, gender apartheid could be charged independently or cumulatively with other crimes (such as gender persecution), helping to tell a fuller story of what happens to victims in conflict and atrocity.

We therefore urge crimes against humanity treaty drafters and key stakeholders to support the adoption of gender apartheid with an inclusive definition that ensures better adherence to customary international law and is inclusive of all of its victims. All of us have rights that must be protected, and all of us working together can make a difference.

[20] UN OHCHR, Re: Comments Regarding Persecutory Grounds in the Draft Crimes Against Humanity Convention (Nov. 30, 2018).