

“A bird may sing in Kabul, but a girl may not.”

Confronting Gender Persecution in Afghanistan at the ICJ.

By Eva Leliveld

This blog examines the groundbreaking move by Australia, Canada, Germany and the Netherlands to seek to hold Afghanistan accountable at the International Court of Justice (ICJ) for violations of the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW). This marks the first attempt where States use CEDAW to challenge gender persecution at the ICJ. The case raises complex legal questions about jurisdiction, state representation and enforcement while also advancing global discussions on gender persecution and apartheid as an international crime. Its outcome could set a historic precedent.

Gender Persecution in Afghanistan

“A female cat has more freedom than a woman. A cat may go sit on her front stoop and feel the sun on her face. She may chase a squirrel into the park. A squirrel has more rights than a girl in

Afghanistan today because the public parks have been closed to women and girls by the Taliban. A bird may sing in Kabul, but a girl may not.”¹ These words lingered as actress Meryl Streep gave a speech at a United Nations Women’s Rights event in September last year. Gender discrimination and the extreme oppression of women have been pressing issues in Afghanistan for decades, intensifying since the Taliban regained power.

Just a month prior to the event, the Taliban introduced new laws mandating that women must remain fully covered when leaving their homes and prohibiting them from singing or raising their voices in public. More recently, in December 2024, the Taliban announced they will close (access to) all NGOs in Afghanistan employing women.² Furthermore, the Taliban’s supreme leader has decreed a ban on constructing windows in residential buildings that overlook spaces used by Afghan women. The government’s spokesperson stated on X that “seeing women working in kitchens, in courtyards or collecting water from wells can lead to obscene acts.”³

¹ Meryl Streep, quoted in Patrick Wintour, ‘Taliban to Be Taken to International Court over Gender Discrimination’ *The Guardian* (25 September 2024).

https://www.theguardian.com/world/2024/sep/25/taliban-to-be-taken-to-international-court-over-gender-discrimination?CMP=share_btn_url

² AP News, ‘The Taliban say they will close all NGOs employing Afghan women’ *AP News* (31 December 2024).

<https://apnews.com/article/afghanistan-taliban-ngo-women-closure-1fde989369785f8df0e83c81d48626f1>.

³ Maya Oppenheim, ‘Taliban bans windows to stop women from being seen at home’ *Independent* (1 January 2025).

<https://www.independent.co.uk/asia/south-asia/taliban-afghanistan-ban-windows-women-b2672332.html>.

These are just a few of the examples exposing the grim reality for women in Afghanistan, where life under Taliban rule has spiraled into a full-blown humanitarian crisis, worsening by the day. With brutal restrictions stripping away even the most basic freedoms, the growing oppression of women in Afghanistan has hit a breaking point, prompting global action.

Global Action: Challenging Gender Persecution in Afghanistan at the ICJ

Asila Wardak, a leader of the Women's Forum on Afghanistan, stated that the system described as *gender apartheid* imposed on women and girls in Afghanistan is not merely an Afghan issue, but a key aspect of the "global fight against extremism".⁴ In a groundbreaking move, Australia, Canada, Germany and the Netherlands have declared their intent to bring Afghanistan before the International Court of Justice (ICJ) for gender discrimination in response to the Taliban's harsh repression of women and girls.

This marks the first instance ever of (a group of) States aiming to use the ICJ to challenge another State under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Adopted by the United Nations General Assembly (UNGA) in 1979, CEDAW has never been used as a basis for ICJ jurisdiction – until now. The

initiating countries are attempting to establish the ICJ's jurisdiction through the Convention, which Afghanistan ratified in 2003, before the Taliban's return to power.

Yet, this legal move is only the beginning of a complex process. Under Article 29 of CEDAW, the States bringing the case must first attempt to resolve the issue through negotiation. If negotiations fail, they can pursue ad hoc arbitration, and only if that also fails can the case be brought before the ICJ.⁵ Currently, it is unsure whether the countries are in the negotiation or the arbitration stage.⁶

Navigating Complexities on the Path to the ICJ

This case is compelling as it involves countries that are not directly harmed but seek to invoke Afghanistan's state responsibility based on the *erga omnes* principle. This principle of international law suggests that some violations are so severe that the obligations are owed to the international community as a whole. The effectiveness of *erga omnes* cases, compared to more traditional disputes between two (or more) parties, raises questions. While this principle has been invoked in other contexts, its effectiveness remains debated when applied outside traditional state-to-state disputes.

Another key challenge is determining who would represent Afghanistan in court.

⁴ Meryl Streep, quoted in Patrick Wintour, 'Taliban to Be Taken to International Court over Gender Discrimination' *The Guardian* (25 September 2024).

https://www.theguardian.com/world/2024/sep/25/taliban-to-be-taken-to-international-court-over-gender-discrimination?CMP=share_btn_url

⁵ Convention on the Elimination of all Forms of Discrimination Against Women (adopted 18

December 1976, entered into force 3 September 1981) (CEDAW) art. 29.

⁶ Kyra Wigard, 'A Groundbreaking Move: Challenging Gender Persecution in Afghanistan at the ICJ' EJIL Talk! (13 September 2024).

<https://www.ejiltalk.org/a-groundbreaking-move-challenging-gender-persecution-in-afghanistan-at-the-icj/>

Legally, the case would be brought against the State of Afghanistan, not the Taliban. However, many countries claimed they do not recognize the Taliban as the legitimate government.⁷ Complex issues of attribution and representation arise. It is uncertain how these questions would be handled in ICJ proceedings and only time will reveal the answers. Ultimately, the issue of enforcement and whether Afghanistan will appear add new layers of complexity, raising questions about the case's potential for success. This raises complex issues of attribution and representation in ICJ proceedings. Furthermore, questions of enforcement loom large, as the Taliban may simply ignore any ruling against them.

Gender Apartheid as an International Crime

International organizations like Amnesty International have advocated for the legal recognition of gender apartheid, which involves the systemic and institutionalized oppression based on gender, highlighting a significant gap in international law. They claim that the closest parallel within the current legal framework is gender persecution, which international law recognizes as a crime against humanity. However, the intent and scope of that crime differ substantially from apartheid. While both crimes may target specific groups, persecution alone does not adequately reflect the scale or

institutionalized nature of systemic domination that occurs under apartheid.⁸ Experts cautioned that the Taliban's policies in Afghanistan create such an institutionalized system of discrimination, oppression, and domination of women and girls, that the situation amounts to gender apartheid.⁹ The initiative led by Australia, Canada, Germany and the Netherlands can play a key role in advancing such advocacy and paving the way for stronger legislation on gender persecution, and potentially eventually gender apartheid.

The Future of the Case

If advanced, the initiative not only highlights the international community's acknowledgement for gender discrimination in Afghanistan but also establishes a significant precedent for addressing gender persecution – a crime against humanity – within the framework of international law at its highest level. If this initiative moves forward, it will not only underscore the international community's condemnation of gender discrimination in Afghanistan but also set a precedent for addressing gender persecution as a crime against humanity at the highest levels of international law.

This initiative could also open the door for other countries or international organizations to join the efforts, increasing pressure on the Taliban. Since the announcement, over 20 countries have shown their support. If successful, the case

⁷ Ibid.

⁸ Amnesty International, 'Global: Gender apartheid must be recognized as a crime under international law' (*Amnesty International*, 17 June 2024). <https://www.amnesty.org/en/latest/news/2024/06/gender-apartheid-must-be-recognized-international-law/>.

⁹ OHCHR, 'Gender apartheid must be recognised as a crime against humanity, UN experts say' *OHCHR* (20 February 2024). <https://www.ohchr.org/en/press-releases/2024/02/gender-apartheid-must-be-recognised-crime-against-humanity-un-experts-say>.

could serve as a model for addressing gender persecution and Gender Apartheid or similar abuses in other countries and oppressive regimes.

For Afghan women, this represents a crucial step toward global recognition of the systemic violations of their rights and freedoms. While an ICJ ruling alone may not compel the Taliban to change its harsh treatment against women and girls, it would mark a significant legal and symbolic victory. It sets an important precedent for holding oppressive regimes accountable for gender-based persecution.¹⁰

Only time will tell, but the international community will be watching closely to see if the ICJ can pave the way for justice for Afghan women and girls, and allow the girls in Kabul to one day, hopefully, sing along with the birds again.

¹⁰ FMF Staff, 'Four countries Take Taliban to the International Court of Justice Over Gender Apartheid' (*Feminist Majority Foundation*, 30

September 2024). <https://feminist.org/news/four-countries-to-take-taliban-to-the-international-court-of-justice-over-gender-apartheid/>.