

# Rescuing the Afghan Women Judges

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## Introduction

With all the other events happening in the world, including the wars in Ukraine and Gaza, the situation in Afghanistan risks fading from the consciousness of the world. And yet Afghanistan is in the grips of a major humanitarian crisis, there continue to be terrorist attacks and egregious human rights abuses; the Taliban, on a systematic and unprecedented basis, are engaged in eliminating women from all aspects of public life.

The story of the rescue of the Afghan women judges begins on a date indelibly engraved on my memory and no doubt even more on the memories of my Afghan colleagues: the 15th of August 2021. This was when the Taliban reached Kabul and placed the 250 Afghan women judges in mortal danger.

## Historical overview

People are often surprised at the number of women judges in Afghanistan as they usually think of Afghanistan as a country where women's rights have always been curtailed. In fact, there have been extensive periods in Afghanistan's history where women have enjoyed rights and relative freedom, although progress has been uneven and rural women have always had more difficulty enjoying the same rights as women in cities.

To give a quick history, from 1919 to 1929 child marriages were banned and women were given the right to choose their own marriage partners.<sup>1</sup> Schools were opened to girls.<sup>2</sup> Importantly, Afghan women were given voting rights in 1919 ahead of several western nations, including the United States.<sup>3</sup> In 1929 there was a brief reversal but from 1933, reforms started to be re-instituted.<sup>4</sup> Women were guaranteed equality, including full suffrage rights, under the 1964 and 1976 constitutions.<sup>5</sup>

In the 1965 election, four women were elected to Parliament

and two others were elected as senators in the upper house.<sup>6</sup> The first women judge was appointed in 1969. In the 1960s and 1970s Kabul became known as the 'Paris of Central Asia'.<sup>8</sup> Women attended university and it was not uncommon to see them wearing miniskirts and no headscarves.

The invasion by foreign forces in 1979 meant progress on gender equality was reversed and women were subjected to gross human rights abuses during the conflict.<sup>10</sup> These continued during the civil war following the withdrawal of the invasion forces in 1989<sup>11</sup> and, during the first Taliban regime from 1996 to 2001, women continued to face serious restrictions on their rights and freedoms.<sup>12</sup>

As a result, after the Taliban fell in 2001 following the United States invasion, Western backed reconstruction and modernisation efforts focused heavily on developing opportunities for and improving the lives of women and girls.<sup>13</sup>

An important part of the reconstruction efforts was the reform of the justice sector, including increasing women's involvement in the legal profession and the judiciary and introducing laws and policies to address some of the biggest issues faced by Afghan women. Laws were introduced<sup>14</sup> for example that outlawed acts of violence against women. Courts were established that focused solely on combatting domestic abuse and women's

<sup>1</sup> Ruhi Khan, 'Afghanistan and the colonial project of feminism: dismantling the binary lens' (2 Sep 2021), The London School of Economics and Political Science, [blogs.lse.ac.uk](https://blogs.lse.ac.uk); and Nargis Nehan 'The Rise and Fall of Women Rights in Afghanistan' (2022) 2(3) *LSE Public Policy Review* 1 at 3.

<sup>2</sup> Amnesty International UK, 'Women in Afghanistan: The Back Story', [www.amnesty.org.uk](https://www.amnesty.org.uk).

<sup>3</sup> Ibid, n 3.

<sup>4</sup> Gabija Leclerc and Rosamund Shreeve, *Women's rights in Afghanistan: An ongoing battle* (European Parliamentary Research Service, April 2023) at 3.

<sup>5</sup> Central Asia Institute, 'The Fight for Women's Voting Rights' (7 Nov 2017), [centralasiainstitute.org](https://centralasiainstitute.org); and Arts 27 and 29 of the Afghanistan Constitution (1976), Afghanistan Online, [www.afghan-web.com](https://www.afghan-web.com).

<sup>6</sup> Hafizullah Emadi, 'Establishment of Afghanistan's Parliament and the Role of Women Parliamentarians: Retrospect and Prospects' (2008) 39 *Internationales Asienforum* 5 at 9.

<sup>7</sup> Antonio De Lauri, 'Women Judges in Afghanistan: An Interview with Anisa Rasooli' (2020) 4 *CMI Insight* 1 at 2.

<sup>8</sup> Elisabeth Bumiller, 'Remembering Afghanistan's Golden Age', *The New York Times* (online ed, New York, 17 Oct 2009).

<sup>9</sup> Bumiller, *ibid*, n 9; and Thomas Barfield, *Afghanistan: A Cultural and Political History* (Princeton University Press, Princeton, 2010) at 156.

<sup>10</sup> *Situation of Women and Girls in Afghanistan: Report of the Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls* UN Doc A/HRC/53/21 (20 June 2023) [UN Report of 20 Jun 2023] at [5]; and Aisha Ahmad, 'Afghan Women: The State of Legal Rights and Security' (2006) 3 *Policy Perspectives* 25 at 29.

<sup>11</sup> UN Report of 20 Jun 2023, above, at [6]; and Ahmad, above, at 30–31.

<sup>12</sup> UN Report of 20 Jun 2023, above n 11, at [7]. See, also, Meri Melissi Hartley-Bleic 'The Invisible Women: The Taliban's oppression of Women in Afghanistan' (2001) 7 *ILSAJ Int'l & Comp L* 553; and A Widney Brown and Laura Grenfell, 'The International Crime of Gender-Based Persecution and the Taliban' (2003) 4 *MJIL* 347.

<sup>13</sup> Special Inspector General for Afghanistan *Support for Gender Equality: Lessons from the US Experience in Afghanistan* (Feb 2021).

<sup>14</sup> Fereshta Abbasi and Patricia Gossman, 'I Thought Our Life Might Get Better': *Implementing Afghanistan's Elimination of Violence against Women Law* (Human Rights Watch, 5 Aug 2021).

shelters provided survivors with a safe path out of violence.<sup>15</sup>

### Afghan women judges and the IAWJ

To return to 15 August 2021 and the second Taliban takeover. At that time, I was President of the International Association of Women Judges (IAWJ). The IAWJ is an organisation of judges around the world dedicated to the promotion of the rule of law, equal access to justice and gender equality. Our main means of working towards these goals have been through education programmes and more generally, providing support and inspiration to each other.<sup>16</sup> To explain why the IAWJ found itself involved in a major humanitarian rescue effort requires a bit of history.

The IAWJ has had a long relationship with the Afghan women judges and their national women judges' association. Afghan women judges attended the IAWJ's biennial and regional conferences and, for a number of years, starting in 2003, the IAWJ ran an exchange programme where small groups of Afghan women judges visited both Washington DC and Vermont.

Washington seems relatively obvious as a destination. Vermont perhaps less so. That venue choice was due to the energy and commitment of a judge from Vermont, Judge Patricia Whalen, who is still very involved with the Afghan rescue effort.<sup>17</sup> It was also related to the nature of Vermont as a rural state and at the time with courts that were not particularly technology oriented and thus more on a par with the conditions in the Afghan courts. The programme in Vermont covered not only legal and court issues but also more general topics and cultural visits.

As part of the exchange programme, judges and staff from the IAWJ visited Afghanistan to learn about the Afghan legal system and collaborate with the Afghan women judges on outreach initiatives, such as visiting schools to discuss human rights and to encourage young girls to go into careers in the law.

Long lasting friendships were formed between the United States and Afghan judges in the course of this exchange programme. The judges found that they had a lot in common, including the significant gender barriers both groups of women judges had to face throughout their careers. There were, however, also some very substantial differences, the starkest being that, unlike the judges in the United States, the Afghan women judges worked in a state of extreme insecurity. Between 2015 and 2020, for example, it is estimated that "more than 300 judges, prosecutors, prison personnel, and other justice sector workers were killed, injured, or abducted" in Afghanistan.<sup>18</sup>

The Taliban<sup>19</sup> are believed to have been responsible for many of these attacks.

Women judges and other women public figures were particularly targeted in a concerted campaign to intimidate women in public office and to send a message generally about the role of women in society. In January 2021, two Afghan women judges, Judge Zakia Herawi and Judge Qadria Yasini, were shot and killed on their way to work.<sup>20</sup> It was an immense personal tragedy for their families, friends and colleagues, and a stark reminder of just how much danger the Afghan women judges were in. One of the judges had been a participant in the IAWJ's exchange programme a few years earlier so this assassination was a very personal loss for the IAWJ.

The next significant event was the biennial conference of the IAWJ which was held in May 2021 in Auckland.<sup>21</sup> Because of covid restrictions, overseas participation was mostly virtual, although three Australian judges took advantage of a brief window of travel freedom to attend in person. Many of our Afghan colleagues attended virtually and two of them spoke to us about the major security threats that they were facing. Despite this, the Afghan women judges continued to go to work each morning, not knowing if they would return to their families in the evening. They were motivated by a commitment to their country, to access to justice, to the rule of law and to the fair treatment of women in the Afghan legal system. Their courage was breath taking.

The Afghan women judges who presented at the conference asked the IAWJ to assist in publicising the insecure conditions they were working under and to provide educational support. We were more than happy to do so. This was well within the ambit of the IAWJ's usual activities. We set up a small committee tasked with undertaking this support role.

Everything changed on the 15th of August 2021. Our committee looked on, horrified, as the Taliban reached Kabul. We knew what that meant for our colleagues and friends in Afghanistan. The Taliban had made it very clear that the idea of women as judges simply did not fit within their worldview. Some of the women judges were also from a minority ethnic and religious group, the Hazara, that had long been discriminated against and a group that had been particularly targeted by the

<sup>15</sup> Ibid, n 15.

<sup>16</sup> See, International Association of Women Judges, [www.ianwj.org](http://www.ianwj.org).

<sup>17</sup> For more information about Judge Patricia Whalen, see 'War Crimes Research Office: Hon Patricia Whalen' American University: Washington College of Law, [www.wcl.american.edu](http://www.wcl.american.edu).

<sup>18</sup> United States Department of State *Afghanistan 2020 Human Rights Report* at 33.

<sup>19</sup> See, for example, Joel Gunter, 'Afghanistan: A year of violence on the road to peace', 28 Feb 2021, BBC News. [www.bbc.com](http://www.bbc.com).

<sup>20</sup> See, 'Killings of Women Judges in Afghanistan – Statement of the IAWJ', 25 Feb 2021, New Zealand Bar Association, [www.nzbar.org.nz](http://www.nzbar.org.nz).

<sup>21</sup> See, generally, New Zealand Association of Women Judges, 'International Association of Women Judges (IAWJ) biennial conference: 7–9 May 2021', [www.nzanj.nz](http://www.nzanj.nz).

## Rescuing the Afghan Women Judges

Taliban.<sup>22</sup> Many of the women judges sat on courts, such as domestic violence and anti-terrorism courts, that the Taliban viewed as being hostile agents of the Western agenda.

And, to make matters worse, the Taliban emptied the prisons of even the worst criminals, who were now out for revenge against the judges who sentenced them. Disgruntled family court litigants also felt emboldened to carry out revenge attacks. These individuals were able to gain access to the judges' personal information, including their contact details and addresses, through records at the court houses and were able to use this to try to hunt the judges down.<sup>23</sup>

Our committee knew that we had to act. We would not have been true to our values if we did not do whatever we could to help our sister judges escape this danger. Overnight, our small Afghan support committee became committed to a rescue mission.<sup>24</sup> Our involvement can be split into three phases.

### Phase one

The first phase involved working to get our sister judges on official evacuation flights out of the country before the final withdrawal of foreign troops. Once the Taliban took over, all commercial flights stopped. This meant that the only way of getting the women judges to safety was by getting them seats on military flights out of Kabul airport, which was still under the control of the United States. We naively assumed this would be relatively straightforward. Given the danger that the women judges were facing and the critical role they had placed in the West's democracy-building effort in Afghanistan, we thought they would be all but guaranteed a place on these flights. We could not have been more wrong. Instead of women and children first, it seemed to us to be women and children last, or not at all.

The IAWJ committee did all we could to get our women

judges onto those flights. We did countless international media interviews to raise awareness, contacted governments all around the world and prepared endless lists for officials, all in different formats and requiring different information. Despite all of this, we only managed to get about 30 of the 250 women judges out of the country during this time. The little success we did have was mainly due to the mammoth efforts of one particularly determined intellectual property lawyer from Poland, Anna Kruszczyńska, who heard about the plight of the women judges and campaigned for her government to give them spare places on the Polish evacuation flights.

It was one thing securing spaces on flights—it was another thing entirely to get our judges into Kabul airport. Roads in and out of the airport were closed apart from for military vehicles. Very few of our judges secured places on such vehicles and the majority had to make their way on foot, often with young children in tow. On average, the journey took 30 hours, through searing heat and crushes of people, with little food or water.

On the way there were two armed checkpoints where, despite having the proper paperwork, a number of our judges were turned away. Tear gas was administered, rifles were shot (usually up in the air as a crowd control measure) and people (including one of our judges) were beaten with plastic hoses. The husband of one of our judges had a rifle pointed at his head. And another judge got separated from her four year old child in the crowd for a very worrying half hour before he was found, luckily safe and well.

If the judges did manage to get near the airport gates, they then had to wade through what had effectively become a sewer before they were close enough for the Polish soldiers to identify them in the crowds.

While our judges tried to make their way to the airport, our small Afghan committee and our wonderful team of interpreters were in constant communication with the judges via 24-hour Zoom and What's App groups, liaising with the Polish and United States authorities, and supporting the judges and helping them navigate (including on one memorable occasion through using Google Maps). It was fortunate that the members of our group lived all over the world, so there was always someone awake and available and usually this meant, because of<sup>25</sup> time zones, Justice Mona Lynch from Nova Scotia, Canada,<sup>26</sup> Judge Robyn Tupman from Australia and myself. In reality though, we all got very little sleep during this time, with all of us anxiously monitoring the chat to ensure our sister judges got out safely.

<sup>22</sup> See, generally, Sitarah Mohammadi and Sajjad Askary, 'Afghanistan: The Hazara dread', 24 Sept 2021, *The Interpreter*, [www.lowyinstitute.org](http://www.lowyinstitute.org). The Hazara people have also been targeted by the Islamic State (ISIS) and between Aug 2021 and Sep 2022 alone ISIS claimed responsibility for 13 attacks targeting Hazaras which injured more than 700 people: Human Rights Watch, 'Afghanistan: ISIS Group Targets Religious Minorities', 6 Sep 2022, [www.hrw.org](http://www.hrw.org).

<sup>23</sup> See, generally, Sam Hurley, 'Fall of Afghanistan: Supreme Court Justice calls on NZ Govt to help provide safe passage for female judges fearing Taliban reprisal', *New Zealand Herald* (online ed, Auckland, 18 Aug 2021); Paula Penfold and Louisa Cleave, 'Justice For All: A Stuff Circuit Interview', Sep 2021, *Stuff*, [interactives.stuff.co.nz](https://interactives.stuff.co.nz); and Liz Gooch "If you give someone \$1000, he can kill anybody": Why judge Nellab fled Kabul", *The Sydney Morning Herald* (online ed, Sydney, 10 Sep 2022).

<sup>24</sup> Our committee consisted of Justice Mona Lynch, Judges Robyn Tupman, Patricia Whalen, Vanessa Ruiz, Anisa Dhanji and Gloria Poyatos Matos, and myself. For a fuller account of all those involved in the rescue effort, see Justice Susan Glazebrook, 'Bolch Award Keynote Address' (Duke University School of Law, 1 May 2023), [www.courts.govt.nz](http://www.courts.govt.nz). The IAWJ is immensely grateful to everyone who played a role in the evacuation and resettlement and without whom none of this would have been possible.

<sup>25</sup> Justice Mona Lynch is a judge of the Supreme Court of Nova Scotia and a member of the Board of the IAWJ. She is the International Director and former President of the Canadian Chapter of the IAWJ. She won the Aurum Award in 2023 for her work as a member of the IAWJ Afghan Support Committee: See, Allison Barss, 'Aurum Award winner Justice Mona Lynch helps female Afghan judges find freedom', Dalhousie University, 26 May 2023, [alumni.dal.ca](http://alumni.dal.ca).

<sup>26</sup> Judge Robyn Tupman is a judge of the District Court of New South Wales, the immediate past president of the Australian Association of Women Judges (AAWJ) and the current Secretary/Treasurer of the IAWJ.

This all came to an end on the 26th of August, where a suicide bomb went off at the airport entrance used by Poland, killing almost 200 people.<sup>27</sup> Several of our judges were making their way to the airport that day. Much to our relief, none of the judges and their families were harmed. However, this attack effectively put an end to the official evacuation flights.<sup>28</sup> The United States and its allies officially left Afghanistan at the end of August. And then began the second phase.

### Phase two

The only real option for getting the judges out of Afghanistan during this phase was through privately chartered flights as most governments around the world had virtually ceased to provide any assistance. This meant that civil society had to shoulder the enormous burden of evacuating those remaining in danger in Afghanistan. It is truly a matter of great international shame that so many people, who worked so hard towards the democracy-building initiatives in Afghanistan, were abandoned in this way.

The IAWJ partnered with other non-governmental organisations to try and rescue the remaining 220 judges and their families. These included the International Bar Association, the International Commission of Jurists Australia and the Jewish Humanitarian Response. We are immensely grateful for their support. We would not have been able to mount any sort of rescue without them as they managed both the logistics and raised the major part of the funding.

Operating these flights was not only enormously expensive but also a logistical nightmare. Landing rights, both in Afghanistan and transit countries like Greece and the United Arab Emirates, had to be obtained. Our judges had to spend significant lengths of time in these transit countries, their lives put on hold before receiving visas for final destinations. Not all have been resettled yet.

Obtaining visas for final destinations was a particularly complex process involving much lobbying. This was in part because the Afghanistan view of family is much broader than that in most Western countries and is therefore not reflected in those countries' immigration policies. The Afghan view of family is of course also shared by the Taliban, placing the judges' wider family members in grave danger; if the Taliban cannot find the judge, they will target her family. And the judges were not willing to leave their families behind and in danger.

We did have more success in this second evacuation phase than the first. Around 130 judges and their families were evacuated and eventually the vast majority received visas for final destinations.

Unfortunately, the second phase of evacuations came to an abrupt end with a failed evacuation flight at the end of 2021.

<sup>27</sup> Al Jazeera, 'Kabul airport bombing: What we know', 9 Apr 2023, [www.aljazeera.com](http://www.aljazeera.com).

<sup>28</sup> See, for example, Aubrey Allegretti, Helen Sullivan and Peter Beaumont, 'Western countries begin to pull out of Kabul airlift amid terror threat', *The Guardian*, 26 August 2021, [www.theguardian.com](http://www.theguardian.com).

Some of our judges and their family members were detained and interrogated for 24 hours before being released. Our committee members were beyond anxious during this time, waiting desperately for news that they were safe. Thankfully, none were harmed, although the conditions in which they were held were less than ideal, especially for children. But there have been no more private evacuation flights since that failed flight and we are onto phase three.

### Phase three

The early part of phase three involved evacuating judges and their families overland to Pakistan. This required judges to have both passports and Pakistan visas which were very difficult to obtain and so numbers were very limited. Pakistan was not an easy option for the judges as evacuation to the United States was still uncertain and processing can take up to two years. During this period the judges are unable to work and need funding to sustain them. Raising funds is now very difficult given all the other competing crises around the world.

The Pakistan government has also recently instituted a policy of returning Afghans who do not have the appropriate documentation but, even with the proper documentation, there have been arrests and money usually has to change hands before release. So far none of our judges or their families have been deported from Pakistan but they are obviously very frightened and their position remains insecure.

I am pleased to report, however, that finally at the end of last year some of the judges who had been in Pakistan the longest have been transferred from Pakistan to the United States and we are hoping that the remaining judges there will be transferred soon.

But the funding and security difficulties mean that we have advised the judges left behind in Afghanistan not to move to Pakistan. This leaves very few evacuation options available. Some of the judges in Afghanistan have been accepted by Germany and hopefully will be moving there soon. We are also hoping that the United States will find places for our judges and their families on the flights it has been operating from Kabul to processing centres outside Afghanistan.

We, again somewhat naively, promised that we would not abandon any of the judges but tragically this is a promise that is becoming more and more difficult to keep. We will keep trying. As our Spanish committee member, Judge Gloria Poyatos Matos, says: "We continue...".

### Current situation in Afghanistan

Meanwhile, the situation in Afghanistan has become more and more dangerous. The Taliban have been conducting systematic searches in the main centres, looking for weapons and proof of involvement with the previous government. There has been sustained questioning in the course of these searches and this has been very frightening. So far none of our judges have been killed or identified as Government workers but we remain of course very concerned that this could change.

## Rescuing the Afghan Women Judges

In general, the Taliban regime has little respect for the rule of law and human rights. There have been reports of arbitrary detention, torture,<sup>29</sup> extrajudicial killings, as well as the return of public whippings.<sup>29</sup> Human rights activists, former government workers and journalists have been particularly<sup>30</sup> targeted. Terrorist attacks by other groups are increasing.<sup>31</sup> And the threat of civil war looms.

As if all this were not bad enough, the people of Afghanistan are also suffering because of natural disasters<sup>32</sup> and the dire economic situation.<sup>33</sup> Extreme poverty is forcing families to make desperate choices in an effort to beat off starvation, including sending children as young as three or four to work and selling their young daughters into marriage in exchange for dowries.<sup>34</sup> A recent report says that in 2023 a staggering 69 per cent of Afghans do not have adequate resources for subsistence living, although this was a reduction from the 85

per cent in 2022.<sup>35</sup> Women are disproportionately affected by the socio-economic crisis.<sup>36</sup>

This is all in the context of rapidly deteriorating conditions for women's rights more generally. When the Taliban retook power in 2021, they claimed that they had changed and that they would not bring back the harsh restrictions of the 90s.<sup>37</sup> We, along with many other commentators, were highly sceptical of these statements and, unfortunately, we have been proved right.

It will come as no surprise that there are no women in the country's leadership positions, which are dominated by Taliban members and sympathisers.<sup>38</sup> As one Taliban spokesperson put it, a "woman can't be a minister, it is like you put something on her neck that she can't carry. It is not necessary for women to be in the cabinet – they should give birth."<sup>39</sup>

The right to education for women has been severely compromised. Secondary school and university education are no longer available for women and girls.<sup>40</sup> And, even though<sup>41</sup> boys continue to be educated, the curriculum is very restricted.

Freedom of movement is severely curtailed as well. Women are forbidden from travelling more than 72 km without a male chaperone and, in reality,<sup>42</sup> are in danger every time they leave the house without a man. Women have been banned from almost all public places including gyms, parks, amusement grounds and cemeteries. Last year all beauty salons were<sup>43</sup> shut down, one of the few remaining safe spaces for women.<sup>44</sup>

Women are required to wear full face and body coverings

<sup>29</sup> Amnesty International, *The Rule of Taliban: A Year of Violence, Impunity and False Promises* (Aug 2022); United Nations Assistance Mission in Afghanistan, *A barrier to securing peace: Human rights violations against former government officials and former armed force members in Afghanistan: 15 August 2021 – 30 June 2023* (Aug 2023); and Benjamin Parkin, 'Taliban carry out hundreds of floggings as grip tightens on Afghanistan', 30 Nov 2023, *Financial Times*, [www.ft.com](http://www.ft.com).

<sup>30</sup> Amnesty International, *ibid*; United Nations Assistance Mission in Afghanistan *Human Rights in Afghanistan: 15 August 2021 – 15 June 2022* (Jul 2022) at 13; United Nations Assistance Mission in Afghanistan, *ibid*, and *Situation of human rights in Afghanistan: Report of the Office of the High Commissioner for Human Rights UN Doc A/HRC/54/21* (11 Sep 2023) at [48]–[49], [55]–[58].

<sup>31</sup> Eliza Mackintosh and others, "No one feels safe": The Taliban promised to provide security to Afghans. New data shows threat from ISIS is growing", 19 May 2023, CNN, [edition.cnn.com](http://edition.cnn.com), and Fidel Rahmati, 'A Glance at Afghanistan's Security Situation in 2023', 1 Jan 2024, The Khaama Press News Agency, [www.khaama.com](http://www.khaama.com); 'Afghanistan ranks first on the Vision of Humanity's 2022 Global Terrorism Index: Vision of Humanity', *Overall Terrorism Index Score* (2023), [www.visionofhumanity.org](http://www.visionofhumanity.org). See, generally, Jeff Seldin, 'UN Report Warns Al-Qaida, Islamic State Growing in Afghanistan', 14 Jun 2023, VOA, [www.voanews.com](http://www.voanews.com).

<sup>32</sup> During 2021 and 2022, Afghanistan experienced its worst year-round drought in 30 years and drought conditions are ongoing: Amu TV, 'Afghanistan faces severe climate crisis amid ongoing economic, social challenges, reports OCHA', 8 Jan 2024, [amu.tv](http://amu.tv). There were also several serious and devastating flood events in 2022 and 2023: United Nations Office for the Coordination of Humanitarian Affairs, 'Afghanistan: Flash Floods – May 2022', [reliefweb.int](http://reliefweb.int); and United Nations Office for the Coordination of Humanitarian Affairs, 'Afghanistan: Floods – Jul 2023', [reliefweb.int](http://reliefweb.int). Three 6.3 magnitude earthquakes in the province of Herat in 2023 resulted in an estimated death toll of around 1,500: United Nations Office for the Coordination of Humanitarian Affairs, 'Afghanistan: Earthquakes – Oct 2023', [reliefweb.int](http://reliefweb.int).

<sup>33</sup> Belquis Ahmadi, William Byrd and Scott Worden, 'Afghanistan's Economy Once Again Nears the Precipice', 17 Nov 2023, United States Institute of Peace, [www.usip.org](http://www.usip.org).

<sup>34</sup> Samantha Mort, 'One Year On: An update on the situation in Afghanistan' (discussion at the Australian International Development Network Webinar, 27 Sep 2022); and Stephanie Sinclair, 'Opinion: In the new Afghanistan, it's sell your daughter or starve', online ed, Washington DC, 15 Jan 2024.

<sup>35</sup> Ali Cufadar, Violetta Dalla and Muhammad Nassim Attahi, *Two Years in Review: Changes in Afghan Economy, Households and Cross-Cutting Sectors (August 2021 to August 2023)* (United Nations Development Programme, Dec 2023) at 11.

<sup>36</sup> At 11. See, also, Yogita Limaye 'Afghanistan: 'I have to sedate my hungry baby due to aid cuts'', 18 Dec 2023, BBC News, [www.bbc.com](http://www.bbc.com).

<sup>37</sup> See, generally, John R Allen and Vanda Felbab-Brown, 'The fate of women's rights in Afghanistan', September 2020, Brookings, [www.brookings.edu](http://www.brookings.edu), and Al Jazeera, 'Taliban says will respect women's rights, press freedom', 17 Aug 2021, [www.aljazeera.com](http://www.aljazeera.com).

<sup>38</sup> UN Report of 20 June 2023, above n 11, at [30]; and Weeda Mehran, 'The Taliban's Islamic Emirate: An Exclusive Mullah Government', 16 August 2022, *The Diplomat*, [thediplomat.com](http://thediplomat.com).

<sup>39</sup> Amnesty International, above n 29, at 14.

<sup>40</sup> UNESCO, 'Let girls and women in Afghanistan learn!', (18 January 2023) <[www.unesco.org](http://www.unesco.org)>. Online learning is one potential solution to increase girls' access to education but there are significant barriers, including the limited internet access across Afghanistan: Maryam Ahmadi "I teach in secret, defying the Taliban ban and fighting despair" (1 January 2024) Al Jazeera <[www.aljazeera.com](http://www.aljazeera.com)>; and Jurist "Afghanistan's Education Crisis: A Plea for Global Policy Measures Against Taliban Indoctrination" (10 January 2024) <[www.jurist.org](http://www.jurist.org)>.

<sup>41</sup> Sola Mahfouz, 'The youth of Afghanistan are trapped in the Taliban's darkness', 22 Dec 2023, *The Hill*, [thehill.com](http://thehill.com).

<sup>42</sup> Amnesty International, *Death in Slow Motion: Women and Girls Under Taliban Rule* (Jul 2022) at 33-34.

<sup>43</sup> UN Report of 20 Jun 2023, above n 11, at [17].

<sup>44</sup> *Situation of human rights in Afghanistan: Note by the Secretary-General UN Doc A/78/338* (1 Sep 2023) at [18].

in the form of a burqa when they do appear in public.<sup>45</sup> The Taliban have recently started detaining women who they view as failing to comply with this rule, and there have been reports of women and their male relatives being beaten as punishment.<sup>46</sup>

There are very few opportunities for women to work, which is a real issue for those who do not have male family members to support them.<sup>47</sup> Women are explicitly barred from certain workplaces. For example, they cannot work for national or international NGOs which has meant a severe restriction on the delivery of humanitarian aid.<sup>48</sup> Women civil servants in most sectors have been told not to return to work (or, in some cases, to send a male family member to do the job for them)<sup>49</sup> and 80 per cent of women journalists have lost their jobs.<sup>50</sup>

Women also have severely limited access to healthcare.<sup>51</sup> Since March 2022 women must be accompanied by a mahram (male guardian) to access health care centres.<sup>52</sup> The ban on women working for NGOs from September 2022 was supposed to exempt health workers but it has still had an effect as the ambit of the exemption is unclear.<sup>53</sup> The exclusion of girls from education will also have a long term effect on the availability of female health workers.<sup>54</sup> Childbirth is particularly dangerous. Afghanistan is in the worst 10 countries in the world for

maternal mortality,<sup>55</sup> with one woman dying in childbirth every two hours.<sup>57</sup>

The Taliban have also shut down women's shelters and domestic violence victims have had little choice but to go back to their abusers.<sup>56</sup> A recent United Nations report recorded instances of the Taliban sending women abuse survivors to prison, allegedly for the survivors' "protection".<sup>57</sup> Some abused women have also had their divorces annulled.<sup>58</sup> The lack of women judges and lawyers means that domestic violence victims are even less likely to report assaults.<sup>59</sup>

All these restrictions have led to a serious increase in women and girls committing suicide. Afghanistan is one of the few countries in the world where women suicide victims now outnumber male victims.<sup>60</sup>

There is resistance but this is not tolerated. Women human rights offenders have been arbitrarily arrested and detained for speaking out against the Taliban.<sup>61</sup>

### Position at international law

The actions of the Taliban are clearly in violation of the various human rights treaties to which Afghanistan is a party, including the Convention on the Elimination of All Forms of Discrimination Against Women (or CEDAW),<sup>62</sup> the Convention on the Rights of the Child<sup>63</sup> and the International Covenant on Civil and Political Rights.<sup>64</sup> These include the right to equality and non-discrimination on the basis of sex or gender,<sup>65</sup> freedom

<sup>45</sup> UN Report of 20 Jun 2023, above n 11, at [17].

<sup>46</sup> Zuhail Ahad, 'Afghan girls detained and lashed by Taliban for violating hijab rules', 10 Jan 2024, *The Guardian*, [www.theguardian.com](http://www.theguardian.com); and Al Jazeera, "UN 'concerned' Taliban detaining Afghan women for dress code violations", 11 Jan 2024, [www.aljazeera.com](http://www.aljazeera.com).

<sup>47</sup> Women's share of employment has fallen from 11 per cent in 2022 to 6 per cent in 2023. Over that same time period, men's employment has increased by 11 per cent. This suggests a "gender-based labour substitution": Cufadar, Dalla and Attahi, above n 35, at 11–12. Female-headed households undertake extra work in order to earn a similar income to male-headed households: at 12.

<sup>48</sup> UN Report of 20 Jun 2023, above n 11, at [47].

<sup>49</sup> At [27]; and Belquis Ahmadi and Matthew Parkes, "After a Year of Taliban Rule, Advances for Afghan Women and Youth Have All but Evaporated", 25 Aug 2022, United States Institute of Peace, [www.usip.org](http://www.usip.org).

<sup>50</sup> UN Report of 20 Jun 2023, above n 11, at [46].

<sup>51</sup> See, generally, Chantelle Lee, 'What's the Status of Healthcare for Women in Afghanistan Under the Taliban?', 9 Aug 2022, PBS, [www.pbs.org](http://www.pbs.org).

<sup>52</sup> Naheed Farid and Rangita de Silva de Alwis, *Afghanistan under the Taliban: A State of "Gender Apartheid"?* (Princeton School of Public and International Affairs: Afghanistan Policy Lab, Jan 2023) at 18.

<sup>53</sup> Hosain Barati and others, 'Health Challenges After a Ban on Women Working in Non-governmental Organizations in Afghanistan', (2023) 15(6) *Cureus*.

<sup>54</sup> Nancy Glass and others, 'The crisis of maternal and child health in Afghanistan' (2023) 17(28) *Conflict and Health* 1 at 7. As the authors of this article explain, Taliban decrees have meant that male doctors cannot care for women patients and vice versa: at 8. This is particularly concerning considering the barriers facing current female healthcare workers and the total absence of any future female workers in training: see, generally, at 4–7.

<sup>55</sup> Ahmad Hanayish, Sahar Lewal and Michael Scollon, "Every Midwife Is Afraid": Worrying Signs Over Maternal Deaths In Afghanistan", 20 May 2023, Radio Free Europe/Radio Liberty, [www.rferl.org](http://www.rferl.org).

<sup>56</sup> Amnesty International, above n 42, at 42; and United Nations Assistance Mission in Afghanistan *Divergence of Practice: The Handling of Complaints of Gender-Based Violence against Women and Girls by Afghanistan's de facto Authorities* (Dec 2023) at 16.

<sup>57</sup> United Nations Assistance Mission in Afghanistan, *ibid*, n 58, at 16 and 18.

<sup>58</sup> France 24, 'Divorced Afghan women fear being forced back to abusive ex-husbands', 30 Mar 2023, [www.france24.com](http://www.france24.com).

<sup>59</sup> Ahmadi and Parkes, above n 49.

<sup>60</sup> Zahra Nader and Zan Times reporters, "Despair is settling in: female suicides on rise in Taliban's Afghanistan", 28 Aug 2023, *The Guardian*, [www.theguardian.com](http://www.theguardian.com).

<sup>61</sup> Amnesty International, "Afghanistan: Stop punishing women protesters", 7 Dec 2023, [www.amnesty.org](http://www.amnesty.org).

<sup>62</sup> Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 1 (opened for signature 1 Mar 1980, entered into force 3 Sep 1981) [CEDAW]. Afghanistan signed CEDAW on 14 Aug 1980 but did not ratify it until 5 Mar 2003.

<sup>63</sup> Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 10 Nov 1989, entered into force 2 Sep 1990) [UNCROC]. Afghanistan signed UNCROC on 27 Sep 1990 and ratified the Convention on 28 Mar 1994.

<sup>64</sup> International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 Dec 1966, entered into force 23 Mar 1976) [ICCPR]. Afghanistan acceded to the ICCPR on 24 Jan 1983.

<sup>65</sup> See ICCPR, art 26; CEDAW, art 2; and UNCROC, art 2.

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of expression,<sup>66</sup> freedom of movement<sup>67</sup> and freedom from arbitrary arrest.

But it is arguable that the Taliban's actions in fact constitute a crime against humanity in terms of art 7(1) of the Rome Statute of the International Criminal Court.<sup>69</sup> Art 7 lists a number of acts which constitute crimes against humanity where they are "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".<sup>70</sup> Persecution is listed in para (h) as one such act, being persecution against any identifiable group or collectivity on various grounds including gender. Given the extent of the deprivation of rights for women and girls in Afghanistan, many commentators consider that requirements are met for the Taliban to be guilty of the crime against humanity of persecution.<sup>71</sup>

In the June 2023 report of the United Nations Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls, serious concerns were expressed about gender persecution occurring in Afghanistan. They recognised that the Taliban's severe rights violations and the punishments women face for refusing to comply with the Taliban's rights-violating measures suggest that women are being targeted because of their sex characteristics and because of the social constructs used to define gender roles.<sup>72</sup>

The actions of<sup>73</sup> the Taliban have also been dubbed "gender apartheid", although currently there is no treaty or international customary law basis for such a crime.<sup>74</sup> Currently, the crime of apartheid in the Rome Statute is framed in racial terms only: it consists of "inhumane acts ... committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group ... and committed with the intention of maintaining that

regime".<sup>75</sup>

There have, however, been calls to extend the definition of apartheid to include gender apartheid, including in the Draft Articles on the Prevention and Punishment of Crimes Against Humanity currently under consideration by the Sixth Committee of the United Nations General Assembly.<sup>78</sup> International human rights law expert, Karima Bennouna, recently addressed the United Nations Security Council on the situation in Afghanistan and urged the Security Council to recognise this as gender apartheid as well as include a reference to gender apartheid in the Crimes Against Humanity treaty.<sup>76</sup> Naheed Farid and Rangita de Silva de Alwis also make a compelling case for labelling the actions of the Taliban regime as a gender apartheid in their January 2023 report.<sup>77</sup>

There is not universal support for extending the definition of apartheid to include gender. Some have criticised this as a distraction or "virtue signalling", stating that international law already enshrines the equal treatment of human beings and that the proposed new crime would add nothing to that of gender persecution.<sup>78</sup> Others have pointed to the difficulties in the definition of such a crime,<sup>79</sup> particularly in light of different cultural and religious traditions.

The international community<sup>80</sup> has generally condemned the actions of the Taliban and so far has made it clear that any recognition of the Taliban as a legitimate government<sup>81</sup> is dependent on addressing the rights of women. There have been various Security Council resolutions. For example, when the Taliban banned women from working for the United Nations, the Security Council unanimously passed a resolution on 27 April 2023 calling for the "full equal, meaningful and safe

<sup>66</sup> See ICCPR, arts 18–19; and UNCROC, arts 12–14.

<sup>67</sup> See ICCPR, art 12.

<sup>68</sup> See, ICCPR, art 9(1).

<sup>69</sup> Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 Jul 1998, entered into force 1 Jul 2002) [Rome Statute]. Afghanistan acceded to the Rome Statute on 10 Feb 2003.

<sup>70</sup> This "knowledge" requirement does not mean that the perpetrator must have known about all the details of the attack. It is sufficient if the perpetrator intended to advance the attack: see International Criminal Court *Elements of Crimes* (2013) at 3.

<sup>71</sup> See, for example, International Commission of Jurists, 'The Taliban's War on Women: The crime against humanity of gender persecution in Afghanistan', Amnesty International, March 2023, at 44–45; Gordon Brown, 'The Taliban's Gender Crimes Against Humanity', 11 August 2023, *Project Syndicate*, [www.project-syndicate.org](http://www.project-syndicate.org); Human Rights Watch, *Afghanistan Under the Taliban: The Crime Against Humanity of Gender Persecution*, 8 Sep 2023, at 3–7; and Marzia Marastoni and Mohibullah Taib, 'The UN Human Rights Council and the ICC Can Do More for Afghanistan', 2 Oct 2023, *Just Security*, [www.justsecurity.org](http://www.justsecurity.org).

<sup>72</sup> UN Report of 20 Jun 2023, above n 11, at [92].

<sup>73</sup> Alison Macdonald KC and others *RE: Crime of Gender Apartheid*, International Service for Human Rights, 6 Mar 2023, at [4].

<sup>74</sup> Rome Statute, art 7.1(h).

<sup>75</sup> See, for example, Gissou Nia "Gender apartheid is a horror. Now the United Nations can make it a crime against humanity", 5 Oct 2023, Atlantic Council, [www.atlanticcouncil.org](http://www.atlanticcouncil.org); and Letter from Mahnaz Afkhami and others to Distinguished Representatives of Member States of the United Nations regarding the Joint Call to Amend the Draft Crimes Against Humanity Convention to Encompass Gender Apartheid, 5 Oct 2023.

<sup>76</sup> Karima Bennouna, 'UN Security Council Briefing on Afghanistan', 26 Sep 2023. See also Karima Bennouna, 'The International Obligation to Counter Gender Apartheid in Afghanistan', (2022) 54 *Colum Hum Rts L Rev* 1.

<sup>77</sup> Farid and de Silva de Alwis, above n 52.

<sup>78</sup> Arshad Mehmood, "'Gender Apartheid' Is Virtue Signaling: Legal Expert Criticizes UN's Approach on Afghan Women's Rights", 23 Jun 2023, *The Media Line*, [themedialine.org](http://themedialine.org).

<sup>79</sup> But see the rejection of this justification in Brown and Grenfell, above n 12, at 374–375.

<sup>80</sup> This includes other Muslim nations, such as Saudi Arabia, Turkey and the United Arab Emirates. All have strongly criticised the Taliban's position on women's education: Akmal Dawi, 'Muslim Countries Blast Taliban for University Ban for Afghan Women', 22 Dec 2022, VOA <[www.voanews.com](http://www.voanews.com)>.

<sup>81</sup> See, for example, *Report of the independent assessment pursuant to Security Council resolution 2679 (2023)* UN Doc S/2023/856 (9 Nov 2023) [Independent Assessment of 9 Nov 2023] at [79]–[84]; and United Nations: UN News, "Afghanistan: Taliban's return to 'international norms' is non-negotiable says UN mission chief", 20 Dec 2023, [news.un.org](http://news.un.org).

participation of women and girls in Afghanistan” and for the Taliban “to swiftly reverse the policies and practices that restrict the enjoyment by women and girls of their human rights and fundamental freedoms”.<sup>82</sup> It urged “all States and organizations to use their influence . . .<sup>83</sup> to promote an urgent reversal of these policies and practices”.<sup>84</sup>

There have also been various appointments of individuals and working groups to investigate and report on the situation.<sup>84</sup> For example, at the end of December last year, the United Nations Security Council adopted a resolution requesting the Secretary-General to appoint a Special Envoy for Afghanistan.<sup>85</sup> The role of the Envoy would be to promote the recommendations found in a recent independent assessment on Afghanistan, with a particular focus on addressing gender and human rights issues.<sup>86</sup>

Despite these measures, there has, however, been no meaningful change to the Taliban’s approach. It goes without saying that the Taliban reject the United Nations’ reports of women’s rights violations as “Western propaganda” and maintain that their actions are in fact protective of women in accordance with their interpretation of sharia law.<sup>87</sup>

### Where to from here?

But now to return to my story. First the good news. We now have some 180 judges in final destination countries, including New Zealand, the United Kingdom, Germany, Spain, Ireland, Canada and the United States.<sup>88</sup> Nineteen judges and their families are in Australia.<sup>89</sup> We have some 25 judges and their families in transit destinations including 9 in Pakistan, most of them waiting to go to the US.

And the not so good news. There are still some 40 odd judges left in Afghanistan and as long as they remain there in danger, the work of the IAWJ Afghan Support Committee is not yet done. I should say here that we are very conscious that there are other groups at risk in Afghanistan but we are a very small

group of volunteers and we cannot help everyone. We are a women judges group and we felt an obligation to our sister judges, particularly because of our history with them as long term members of the IAWJ.

I should also acknowledge that we are also very conscious, as are the Afghan women judges themselves, of the tragic loss to Afghanistan of so many educated people who would have been able to do so much for their country. But of course they did not have a choice – they had to leave to save their lives and the lives of their families.

It must also be remembered that arriving in a final destination is not the end of the story. The judges and their families still face many hurdles. They find themselves in a foreign country where they often cannot speak the language. They have lost the career they worked so hard for and they are desperately worried for friends and family left behind in Afghanistan. They have years of retraining ahead of them.<sup>89</sup> Many are highly traumatised by what they have gone through.

But these women are courageous, intelligent and resilient. They want to give back to the communities that have taken them in. We have no doubt that with time and support, our judges will be able to make a valuable difference to their new homes. And I acknowledge the support given by members of national women judges associations,<sup>90</sup> including the Australian Association of Women Judges, in the resettlement process, as well as the many lawyers who have acted pro bono for the judges.

Personally, the last two and a half years have been full of extreme highs and lows, sleepless nights, a lot of anxiety and major relief when judges have made it to safety. It has been a joy getting to know those judges who have settled in New Zealand and Australia and seeing their children (and especially their daughters) flourish in their new countries, knowing that they will have a world of opportunities ahead of them.

### Lessons learned

So, what have we learnt from this experience? One of the key lessons is the power of technology and information. Modern communication methods, including encryption, have been critical in enabling us to keep in contact with the Afghan judges and our evacuation partners safely. And our database has been vital as well, especially in securing visas. Second, the importance of international networks. None of this would have been possible without all those who teamed up, across the globe and across organisations, to make it happen.

A final lesson relates to the importance of the rule of law but also its fragility. It can be compromised suddenly and completely as in Afghanistan, but it can also be compromised by stealth and by stages. We must be ever vigilant and protective. And, just to

<sup>82</sup> SC Res 2681 (2023), art 2.

<sup>83</sup> Art 2.

<sup>84</sup> For example, the United Nations Assistance Mission in Afghanistan led by the Secretary-General’s Special Representative for Afghanistan, the Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls.

<sup>85</sup> SC Res 2721 (2023), art 4.

<sup>86</sup> This assessment was the Independent Assessment of 9 Nov 2023, *ibid*.

<sup>87</sup> See Mehmood, above n 78; and Al Jazeera, “Afghan women being provided ‘comfortable’ lives: Taliban chief”, 25 June 2023, *www.aljazeera.com*.

<sup>88</sup> For more on the experience of the Afghan women judges in Australia, see Ilya Gridneff, “The Taliban want revenge: Afghanistan’s female judges in exile in Australia”, 19 Feb 2022, *The Guardian*, *www.theguardian.com*; Gloria Kalache, ‘Shakila was a judge in Afghanistan. After fleeing Kabul, she’s found friendship with Australia’s women judges’, 3 Apr 2022, SBS News, *www.sbs.com.au*; Gooch, above n 23; and Cat Woods, “Afghan women judges have ‘an ambiguous destiny’”, 19 Dec 2022, *Law Society of NSW Journal*, *lsj.com.au*.

<sup>89</sup> See, generally, Gridneff, *ibid*, n 91; Compassion, ‘Venus, rebuilding life and hope’, *The Voice of Compassion* (online ed, Wellington, Nov 2022); Woods, *ibid*, and ‘Afghanistan to Auckland: Move for Freedom’ *Ingenio* (online ed, Auckland, Spring 2023).

<sup>90</sup> See, ‘AAWJ – Australian Association of Women Judges’, *www.aawj.org*.



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be clear, I am talking about what is commonly called the thick concept of the rule of law whereby, alongside procedurally focussed requirements, related to the manner in which laws are promulgated and ensuring that nobody is above the law, there are substantive requirements including the protection and promotion of human rights, an independent<sup>91</sup> judiciary, respect for international law and access to justice. Without these substantive requirements, any commitment to the rule of law would be sterile indeed.

<sup>91</sup> For more on the “thick” Rule of Law see, Tom Bingham, *The Rule of Law* (Penguin Books, London, 2010) at 67. I also discuss rule of law concepts in Susan Glazebrook, ‘The Rule of Law: Guiding Principle or Catchphrase’ (2021) *Waikato L Rev* 2.

### Final Word

I must end with a tribute to my Afghan colleagues. Their resilience, bravery, dignity and determination have been truly awe-inspiring. It is these women who are the true heroes of this story.

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