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PROTECTING WOMEN AND CHILDREN IN AFGHANISTAN UNDER INTERNATIONAL HUMANITARIAN LAW: THE ADDITIONAL PROTOCOLS, CUSTOMARY RULES AND THE POST-2021 LEGAL GAP

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Abstract

This article examines how international humanitarian law (IHL) protects women and children in Afghanistan and how that protection changed after August 2021. It identifies four distinct gaps: a threshold gap where Additional Protocol II does not apply to the post-2021 non-international armed conflicts classified by the Geneva Academy's War WATCH project; a scope gap where governance policies lack the required connection to hostilities; a content gap where the applicable IHL rules contain no equivalent to Protocol II's specific education guarantee; and an enforcement gap between legal standards and effective remedies. Afghanistan's accession to Additional Protocols I and II took effect on 10 May 2010. Protocol II was a meaningful source of protection during the earlier government–Taliban conflict, subject to a continuing dispute over its reach to foreign forces. Article 2(2) preserves Articles 5 and 6 protections for people detained for reasons connected with that earlier conflict. Since 2021, the exclusion of girls from education and women from work and public life is addressed principally by international human rights law. International criminal law provides a narrower route through the ICC's 2025 arrest warrants, unsealed in October 2026, alleging gender persecution. The warrants are not convictions and persecution requires a connection to other criminal acts. A separate international armed conflict between Afghanistan and Pakistan, identified by War WATCH, is outside this article's scope. The article argues that effective protection requires each legal regime to be applied according to its own trigger, content and enforcement mechanisms.

1. INTRODUCTION

Women and children in Afghanistan have experienced direct violence, displacement, attacks on schools, recruitment by armed groups, sexual violence and abuse in detention. Since the Taliban returned to power on 15 August 2021, the legal problem has also included nationwide restrictions on girls' education and women's employment, movement and public participation. UNESCO reported in August 2026 that approximately 2.4 million girls remained excluded from secondary education. These harms overlap in their effects, but they do not necessarily fall within the same legal regime.

The article asks two linked questions: to what extent did the Additional Protocols of 1977 and customary IHL protect women and children before and after August 2021; and when harm results from governance policy rather than conduct connected with hostilities, what can IHL contribute and where must human rights

law and international criminal law provide the principal standards? The article is doctrinal, not an empirical assessment of every abuse documented in Afghanistan.

The argument is that treaty coverage changed over time. Afghanistan's accession to Additional Protocols I and II took effect on 10 May 2010, and War WATCH assesses Protocol II as applicable to the government–Taliban conflict until August 2021. For the post-2021 non-international armed conflicts it identifies, War WATCH finds that the territorial-control threshold in Article 1(1) is not met. This does not mean that all IHL protections disappear: Common Article 3 and customary rules remain relevant, and Protocol II Articles 5 and 6 continue to protect certain people detained for reasons connected with the earlier conflict. The article then distinguishes IHL's regulation of conflict-related conduct from its more limited reach over nationwide governance policies, before assessing the complementary roles of human rights law and international criminal law.

The article's contribution is a practical framework that separates threshold, scope, content and enforcement gaps rather than treating them as a single absence of law. It tests that framework against the ICC's Afghanistan warrants and the UN accountability mechanisms created or advanced since 2025. Section 2 explains the method and terminology; Sections 3–5 address classification, IHL rules and post-2021 harms; Sections 6–8 assess human rights law, international criminal law and accountability; Sections 9–11 draw out the implications and limitations.

2. Method, Scope and Terms

The article uses doctrinal legal analysis of treaty texts, depositary records, customary IHL, international judicial decisions, ICC records, United Nations documents and relevant scholarship. The review is current to 29 October 2026. Official sources are preferred for treaty status, court decisions and monitoring data; press reports are used only where the underlying source is unavailable or where they report a statement not otherwise published. No interviews, fieldwork or systematic collection of pre-2021 incident data were undertaken.

The analysis distinguishes binding law from expert classification and factual reporting. Where a claim rests on War WATCH, the article identifies it as an expert assessment rather than a binding determination. The ICC warrant analysis relies on the public redacted decision, the public versions of the warrants and official Court statements; it does not infer facts from the sealed portions of the record.

War WATCH, maintained by the Geneva Academy of International Humanitarian Law and Human Rights, is the principal public source used to classify the post-2021 conflicts. Its assessment is based on desk research and is not binding on a court. It identifies non-international armed conflicts involving the Taliban and the National Resistance Front, Afghanistan Freedom Front and Islamic State–Khorasan Province, and separately identifies an international armed conflict between Afghanistan and Pakistan. The article uses that assessment as its working classification while acknowledging that classifications may change as facts and evidence develop.

The focus is on women and children as civilians and as persons deprived of liberty, not only on sexual violence or child recruitment. A gender perspective helps identify differentiated risks and effects, but does not replace proof of the elements of a legal rule. The article does not attempt a comprehensive account of every violation or every conflict in Afghanistan.

"Legal gap" refers to four different problems: the threshold for a rule's application; the scope of conduct it regulates; the content of the applicable rule; and the availability of effective enforcement or remedies. These categories require different legal responses and are summarised in Table 1.

Table 1. Four senses of "legal gap"

Gap	Meaning	Afghan illustration	Principal response
Threshold	A treaty's conditions of application are not met	Protocol II, Art 1(1), is not met for the post-2021 NIACs in War WATCH's assessment; a separate IAC with Pakistan is outside scope	Common Article 3 and customary rules; Art 2(2) preserves AP II Arts 5–6 for earlier-conflict detainees
Scope	The conduct is not sufficiently connected to an armed conflict	Nationwide restrictions on girls' schooling and women's work and public participation	Human rights law; international criminal law where its elements are met
Content	The applicable rule does not address the harm	No specific AP II education guarantee for the post-2021 NIACs; general child-protection rules remain	CEDAW Art 10; CRC Arts 28 and 29; ICESCR
Enforcement	A rule applies but no effective mechanism secures compliance	ICC warrants not executed as of cutoff; investigative mechanism still being operationalised; remedies remain limited	State cooperation with ICC; investigative mechanism; CEDAW dispute-settlement procedure; monitoring

Each example is assessed by identifying the conduct and actor; establishing the relevant conflict and parties; identifying the applicable treaty and customary rules; and testing the rule's personal, material and temporal scope, including any required connection to the conflict. If a rule does not apply, the analysis then asks which other legal regime remains available.

3. Conflict Classification and Treaty Applicability

3.1 The intervention and the shifting character of the conflict

The conflict after October 2001 cannot be treated as one legally unchanged war. The initial US-led intervention involved an international armed conflict. The legal characterisation of later periods varied with the actors, territorial control and nature of foreign involvement; occupation must be assessed by reference to effective control over territory and the relevant period, not inferred merely from the presence of foreign forces. Later fighting between Afghan government forces and the Taliban was treated as a non-international armed conflict. Afghanistan had ratified the four Geneva Conventions in 1956, so the Conventions applied throughout, but the treaty rules governing each phase differed.

Additional Protocol I regulates international armed conflicts, while Additional Protocol II supplements Common Article 3 for a narrower class of non-international armed conflicts. Neither Protocol was in force for Afghanistan at the start of the 2001 intervention. Their provisions therefore cannot be applied uniformly to all conduct between 2001 and 2021.

3.2 Accession and the Protocol II period, 2010 to 2021

Afghanistan deposited its instruments of accession to Additional Protocols I and II on 10 November 2009. Under their final provisions, both Protocols entered into force for Afghanistan six months later, on 10 May 2010. The depositary record is the primary source and is followed here. Some secondary accounts give different dates, including December 2009 or an earlier entry into force. That discrepancy does not change the analysis of the period after May 2010, but it matters for conduct in the intervening months and should not be concealed.

Article 1(1) of Protocol II applies only to a non-international armed conflict between a State's

armed forces and dissident armed forces or other organised armed groups under responsible command that exercise territorial control sufficient to conduct sustained and concerted military operations and implement the Protocol. War WATCH concludes that this threshold was met in the government–Taliban conflict from Protocol II's entry into force because the Taliban controlled territory in parts of Afghanistan. On that assessment, Protocol II was a meaningful treaty source from 10 May 2010 until the Taliban takeover, rather than a regime that contributed little.

The Protocol II threshold must also be distinguished from the general NIAC test. A NIAC under Common Article 3 requires sufficiently organised parties and violence of sufficient intensity; Protocol II adds the territorial-control requirement and the ability to implement the Protocol. A group may therefore be party to a NIAC for Common Article 3 purposes without satisfying Article 1(1). This difference is central to the post-2021 analysis: the absence of territorial control does not make violence legally irrelevant, but it can determine whether the more detailed Protocol II protections apply. The classification is also conflict-specific. A finding about the NRF or AFF cannot automatically be transferred to IS-K, and the assessment must remain open to changes in intensity, organisation and control.

Whether Protocol II also governs operations conducted by foreign forces supporting the territorial State remains contested. One interpretation confines the treaty's application to the conflict described in Article 1(1); another, adopted by War WATCH and supported by McDougall's analysis, reads the Protocol as regulating conduct by foreign forces assisting a State in a qualifying conflict. The literature is limited and divided. This article records the dispute without resolving it, because the broader reading would extend the relevance of Protocol II's child-protection guarantees to some foreign-force operations, while the narrower reading would not.

Protocol I is relevant to international armed conflict, not as a general code for every confrontation between a State and an insurgent group. Its protections, including Articles 75–78, must be applied only where its material and temporal conditions are met. The Fourth Geneva Convention's protections also depend on the relevant legal relationship, including protected-person status and, where occupation is alleged, the applicable occupation rules.

3.3 The position after August 2021

The Taliban takeover changed the parties and legal relationships but did not terminate Afghanistan's treaty obligations or every armed conflict. War WATCH identifies post-2021 non-international armed conflicts involving the Taliban and the National Resistance Front, Afghanistan Freedom Front and Islamic State–Khorasan Province. It assesses that none meets Protocol II's Article 1(1) territorial-control threshold. Common Article 3 and customary IHL therefore remain the principal IHL framework for those conflicts. War WATCH separately identifies an international armed conflict between Afghanistan and Pakistan. That distinct conflict may engage Protocol I and is expressly outside this article's substantive analysis; conclusions about Protocol II's threshold apply only to the post-2021 non-international armed conflicts discussed here.

Classification remains fact-sensitive and may change if the intensity of violence, organisation of an armed group or territorial control changes. The article therefore treats War WATCH's classification as a reasoned working assessment, not a final legal determination. A future classification by a court or a materially changed factual record could alter which treaty rules apply.

Recognition of a government and application of IHL are separate questions. The existence of an armed conflict and the rules binding its parties do not depend on diplomatic recognition of the Taliban. Afghanistan remains the State party to its human-rights treaties, while the obligations of a non-state armed group before the takeover must be analysed separately from the State's treaty obligations. After the takeover, the de facto authorities exercise governmental power and are responsible for implementing Afghanistan's continuing obligations.

3.4 What the periodisation yields

Table 2 summarises the position. Two points deserve emphasis because they shape the rest of the analysis.

Table 2. Conflict classification and treaty rules by period

Period	Classification	Treaty rules most relevant to women and children	Other sources
From October 2001: changing phases	Initial IAC; later legal characterisation depends on period, parties and effective control	Geneva Conventions; Protocols I and II not yet in force for Afghanistan before 10 May 2010	Customary IHL; occupation rules only where the legal test is met
Later non-international violence, before 10 May 2010	Non-international armed conflict	Common Article 3	Customary IHL
10 May 2010 to August 2021	Non-international armed conflict between the government and the Taliban; Protocol II applicable on War WATCH's assessment	Common Article 3; Protocol II Arts 4 to 6	Customary IHL. Reach over foreign forces contested
After August 2021	NIACs involving the Taliban, NRF, AFF and IS-K; War WATCH assesses AP II Art 1(1) threshold is not met	Common Article 3 and customary IHL; AP II Arts 5–6 survive for earlier-conflict detainees under Art 2(2)	War WATCH separately identifies an IAC with Pakistan; that conflict is outside this article's scope

The periodisation has an important consequence. The Taliban's consolidation of territorial control reduced the possibility that opposing groups could satisfy Protocol II's demanding territorial-control condition, even while some violence continued to meet the lower threshold for a non-international armed conflict. That produces a threshold gap, not an absence of IHL: Common Article 3 and customary rules continue to apply, while Protocol II's additional guarantees do not apply to those new conflicts. Article 2(2), however, preserves Articles 5 and 6 protections for people whose detention remains connected with the earlier conflict.

4. Substantive IHL Protection for Women and Children

4.1 Common Article 3 and customary rules

Common Article 3 establishes minimum guarantees for persons taking no active part in hostilities, including those placed hors de combat by detention. It prohibits murder, mutilation, cruel treatment, torture, hostage-taking, outrages upon personal dignity and sentencing without a regularly constituted court. Its protections apply without discrimination and do not depend on reciprocity. Customary IHL supplements these guarantees through rules on humane treatment, distinction, the prohibition of sexual violence, detention and the protection of children.

Customary Rule 88 prohibits adverse distinction in the application of IHL, including on grounds of sex, while Rule 93 prohibits rape and other forms of sexual violence. Rules 119 and 120 address accommodation for women and the separation of children from adults in detention. Rules 134–137 concern women and children affected by armed conflict, child recruitment and participation in hostilities. These rules protect women and children as rights-holders; they do not make every discriminatory measure or every harmful act an IHL violation regardless of its connection to conflict.

The customary rules matter for two further reasons. First, they are not dependent on Afghanistan's accession date in the way treaty provisions are, although the existence and

content of a customary rule must be established from State practice and opinio juris. Second, customary IHL binds the parties to an armed conflict, including organised armed groups, within the rules applicable to them. This is especially important where a treaty threshold is not met: Common Article 3 and customary rules continue to prohibit serious mistreatment, sexual violence and child recruitment. It does not follow, however, that every right found in human-rights treaties has an equivalent customary IHL rule or that a general rule on special protection creates the same detailed obligation as Protocol II Article 4(3)(a).

A gender-sensitive analysis asks how hostilities, displacement and detention create different risks for women, men, girls and boys. The ICRC's 2024 guidance is useful for identifying those differences, although it is directed primarily to military practitioners. Gender analysis must remain tied to the applicable rule and evidence: it helps explain foreseeable effects and unequal treatment, but cannot replace the legal elements of a violation.

4.2 Additional Protocol II: fundamental guarantees and the education provision

Where Protocol II applies, Article 4 protects persons who do not take a direct part, or have ceased to take part, in hostilities. It requires humane treatment and prohibits violence to life, health and physical or mental well-being, collective punishments, hostage-taking, acts of terrorism, outrages upon personal dignity, rape, enforced prostitution and indecent assault. Article 4(3) requires special care for children and includes an express education provision in Article 4(3)(a). These guarantees are additional to Common Article 3, but they are available only when Protocol II's threshold and other conditions are met.

Article 4(3)(a) is important because it expressly requires that children receive education, including religious and moral education, in keeping with the wishes of their parents or guardians. It does not automatically convert every nationwide education policy into a violation of IHL: the analyst must first establish that Protocol II applies and that the relevant conduct falls within its scope. For the post-2021 non-international armed conflicts classified by War WATCH, Article 1(1)'s threshold is not met, so this specific treaty guarantee is not available for conduct connected with those conflicts. The CRC and other human-rights instruments provide a broader and more direct basis for challenging exclusion from education.

Article 5 sets minimum conditions for persons deprived of liberty for reasons related to the conflict, including adequate food, water, hygiene, protection from the rigours of the climate and the dangers of the armed conflict, and separation of women and men except where families are accommodated together. Article 6 regulates penal prosecutions and punishment. Under Article 2(2), Articles 5 and 6 continue to protect persons deprived of liberty, or whose liberty is restricted, for reasons related to the earlier conflict, including detention imposed after the conflict for the same reasons, until that deprivation or restriction ends. This limited survival rule does not extend every Protocol II guarantee to all people detained after 2021.

4.3 Additional Protocol I and the Fourth Geneva Convention

In international armed conflict, Additional Protocol I provides fundamental guarantees in Article 75, protection for women in Article 76 and safeguards for children in Article 77, including restrictions on recruitment and participation in hostilities. The Fourth Geneva Convention also protects civilians who meet its criteria, including through Article 27 and, in occupied territory, provisions concerning children and education. These rules may be relevant to an international armed conflict or occupation, but they should not be imported into the analysis of a non-international armed conflict without a legal basis. The separate Afghanistan–Pakistan conflict is outside the scope of this article.

4.4 The connection requirement

The boundary between IHL's application and its regulation of particular conduct requires two separate inquiries. In Tadić, the ICTY held that IHL applies beyond the exact time and place of fighting where the conflict extends across territory and time. Kunarac, by contrast, explains the nexus required for a war crime: the armed conflict must have played a substantial part in the perpetrator's ability, decision, manner or purpose of the conduct. These

propositions are related but not interchangeable. The existence of a conflict does not make every act by a party an act governed by IHL for every purpose.

Tadić concerns the territorial and temporal reach of IHL; Kunarac concerns whether particular conduct is sufficiently connected to the conflict to qualify as a war crime. The first prevents an unduly narrow view that IHL applies only at the frontline. The second prevents the opposite error of treating every act by an authority or armed-group member as conflict-related. The required connection depends on the legal rule being applied, so the nexus analysis should not be presented as a universal threshold for every IHL obligation.

The education ban presents two distinct difficulties for an IHL claim. First, the nationwide policy is not shown, on the available record, to be sufficiently connected to the conduct of hostilities for the war-crime nexus test. Second, the specific education guarantee in Protocol II Article 4(3)(a) is unavailable for the post-2021 non-international armed conflicts under War WATCH's classification. The second point is a content and treaty-applicability problem, not simply a failure to prove nexus. Neither point diminishes the seriousness of the restriction or the obligations arising under human-rights law.

The distinction also guards against an overbroad claim that IHL is irrelevant to the lives of girls after 2021. An attack on a school, threats against children in connection with hostilities, recruitment, sexual violence or conflict-related detention may still fall within IHL and international criminal law. A policy that excludes girls from education across the country is different in character and must be assessed under the applicable human-rights obligations, unless evidence establishes a specific conflict nexus or another applicable IHL rule. This is not a hierarchy of harms. It is a method for identifying the correct legal basis and avoiding the mistaken inference that the absence of one treaty guarantee removes all protection.

Before August 2021, War WATCH assessed Protocol II as applicable to the government–Taliban conflict, making Article 4(3)(a) and the Protocol's other protections legally relevant where their conditions were met. The post-2021 position is different because the opposing groups lack the territorial control required by Article 1(1). The change illustrates why the applicable treaty must be identified for each conflict and period instead of assuming that the same Protocol rules apply throughout Afghanistan's recent history.

4.5 What the post-2021 shift removes

For the post-2021 non-international armed conflicts, the threshold finding means that Protocol II's additional guarantees, including Article 4(3)(a), do not apply as treaty rules to those conflicts. Common Article 3 and customary IHL remain applicable. Article 2(2) separately preserves Protocol II Articles 5 and 6 for people whose detention is connected with the earlier government–Taliban conflict. The result is uneven protection: some conflict-related violence and detention remain governed by IHL, while a general education ban is more directly addressed through human-rights law. The separate international armed conflict with Pakistan must be analysed under its own treaty framework.

5. Post-2021 Governance Policies and the Boundary of IHL

5.1 The documented harms

The post-2021 record includes formal restrictions on girls' access to secondary and higher education and on women's employment, movement and public life. UNESCO's August 2026 statement estimates that 2.4 million girls remain excluded from secondary school. UNAMA's quarterly human-rights updates document restrictions and enforcement practices, while the Secretary-General's reporting addresses conflict-related violations, including against children and sexual violence. These sources establish a factual context; the legal classification of each incident still requires separate analysis.

The Secretary-General's 2025 and 2026 reports on conflict-related sexual violence provide official United Nations documentation, and UNAMA's July–September 2026 update records recent human-rights concerns, including arrests and detention of women and girls. The 2026 report should be cited directly rather than through a news summary. Monitoring reports differ in scope and verification methods, so their figures should not be treated as a complete count

of all violations or as proof that a crime's legal elements have been met.

The factual record and the legal conclusion must remain distinct. A report of arbitrary detention does not by itself establish that the detention was conflict-related; evidence of sexual violence does not by itself prove a war crime or crime against humanity. Each claim must be assessed against the relevant actor, context, connection, mental element and other legal requirements.

5.2 Mapping harms to regimes

Table 3 applies the four-step method to the main categories of harm. It is a guide to the primary regime and not a ranking of seriousness. A single event can engage more than one regime, and the table records where the main legal limit lies.

Table 3. Harms, primary regimes and principal limits

Harm	Primary regime	Key provisions	Principal limit
Attack on a school or on civilians in hostilities	IHL on the conduct of hostilities; international criminal law	Common Article 3; customary rules on distinction and protection of civilian objects; Rome Statute Art 8(2)(e)(iv) for attacks on buildings dedicated to education	Requires an armed conflict, a party and proof of intent
Recruitment or use of children by armed actors	Customary IHL; treaty law on children in armed conflict; international criminal law	Rules 136 and 137; Optional Protocol to the CRC; Rome Statute Art 8(2)(e)(vii) (under fifteen)	Different age thresholds across instruments
Sexual violence against detained women	IHL where detention is conflict-related; human rights law; international criminal law	Common Article 3; Rule 93; Protocol II Art 4(2)(e) where it applies	Proof; connection to the conflict for war crimes
Conflict-related detention of women and children	IHL	Common Article 3; Rules 119 and 120; Protocol II Arts 5 and 6 through Art 2(2) for earlier-conflict detainees	AP II Arts 5–6 do not apply to new-conflict detainees under the current classification; Common Article 3 and customary rules remain
Exclusion of girls from education	Human rights law	CEDAW Art 10; CRC Arts 28 and 29; ICESCR	IHL: connection and content gaps. Enforcement
Restrictions on women's work, movement and public life	Human rights law	CEDAW Arts 2, 3, 11 and 15; ICCPR	IHL: connection and content gaps. Enforcement
Violence against women protesters and in detention outside conflict-related detention	Human rights law; international criminal law if part of an attack	ICCPR; CEDAW and General Recommendation 35; Rome Statute Art 7	Classification of the reason for detention

Harm	Primary regime	Key provisions	Principal limit
Systematic deprivation of rights on grounds of gender	International criminal law	Rome Statute Art 7(1)(h), 7(2)(g) and 7(3)	Contextual elements; link to other acts; individual responsibility

5.3 Hard cases

A woman detained after a street protest illustrates the importance of evidence about the reason for detention. If she is detained for exercising public protest, human-rights law is the principal framework, and international criminal law may apply if the conduct forms part of a widespread or systematic attack and all elements are proved. If she is detained because she is suspected of supporting an armed opposition group, the detention may be conflict-related, bringing Common Article 3 and applicable customary detention rules into play. A monitoring record that reports only the detention, without its stated grounds or context, may be insufficient to decide the classification.

A person detained because of former service with the Islamic Republic's forces may fall within Article 2(2) of Protocol II if the detention is for reasons connected with the earlier conflict. In that case, Articles 5 and 6 continue to apply until release, including the relevant safeguards for women detainees and penal proceedings. A person detained for suspected links to a current opposition group presents a different question: if the relevant conflict does not meet Protocol II's threshold, Common Article 3 and customary IHL remain the principal IHL protections.

An armed group's attack on a school or its recruitment of a child raises different rules from a general education ban. A school is ordinarily a civilian object unless and for such time as it becomes a military objective; an intentional attack may constitute a war crime where the relevant statutory elements are met. Customary IHL prohibits recruiting children and using them to participate in hostilities, while the Rome Statute uses an under-fifteen threshold for the relevant war crimes. The applicable instrument and age threshold must be identified precisely.

A nationwide ban on girls' education is primarily assessed under human-rights law. The fact that the policy operates while armed conflicts continue does not, without more, make it a war crime. IHL may still govern particular attacks, detention or recruitment connected with those conflicts, but it does not provide a general substitute for the right to education under the CRC, CEDAW and the ICESCR.

5.4 Why the distinction matters

The distinction does not minimize the restrictions imposed on women and girls. It makes the legal argument more defensible in both directions: applying IHL outside its scope obscures the stronger human-rights basis, while understating IHL would erase protections for detainees, victims of conflict-related sexual violence and children at risk of recruitment. The regimes complement one another, but they have different triggers, standards, remedies and enforcement mechanisms.

6. International Human Rights Law as the Continuing Framework

Afghanistan remains a party to CEDAW, the Convention on the Rights of the Child (CRC), the ICCPR and the ICESCR. A change of government or the absence of diplomatic recognition does not terminate the State's treaty obligations. These instruments are central to assessing restrictions on education, employment, movement, expression, health and public participation, especially where the conduct is not sufficiently connected to hostilities to be governed by IHL.

CEDAW is particularly relevant to discriminatory restrictions affecting women and girls. Articles 2 and 3 require the elimination of discrimination and measures to secure women's advancement; Article 10 addresses equality in education, Article 11 employment, Article 12 health and Article 15 equality before the law. General Recommendation No 30 addresses women in conflict and post-conflict situations, while General Recommendation No 35 treats gender-based violence against women as a form of discrimination. These standards speak

directly to systematic exclusion from education, work and public life.

The CRC provides the principal treaty framework for children. Article 2 prohibits discrimination, Article 3 makes the child's best interests a primary consideration, Article 6 concerns survival and development, Article 19 protection from violence, Articles 28 and 29 education, and Article 38 children in armed conflict. The Optional Protocol on the involvement of children in armed conflict adds protections against recruitment and use. The CRC's education guarantees are not limited to periods when Additional Protocol II applies.

The CRC and CEDAW also require attention to the cumulative effect of restrictions. A single rule may affect education, employment, movement, health and family life at once, and the combined pattern may deepen discrimination beyond the effect of any one measure considered in isolation. The legal analysis should nevertheless identify the specific rights engaged, the State's obligations and any limitation or justification that might be legally available. In the present context, the breadth and systematic nature of the restrictions raise serious questions under several treaties at once.

Human-rights law is not merely a fallback when IHL is unavailable; it is an independent framework that continues to apply alongside IHL where the relevant obligations overlap.

The International Court of Justice has affirmed that human-rights protections do not cease during armed conflict, subject to the relevant rules on derogation and the relationship between IHL and human-rights law. The consequence is not that the two regimes are identical. IHL provides rules tailored to warfare and detention in armed conflict; human-rights law continues to govern State conduct and is especially important for restrictions arising from general governance policy.

The identity of the duty-bearer requires care. Before August 2021, the Taliban was an organised armed group; the extent to which non-state armed groups bear direct human-rights obligations remains debated, while their IHL obligations arise from the law applicable to the conflict. After the takeover, Afghanistan remains the State party to CEDAW and other treaties, and the de facto authorities exercise governmental power. In September 2024, Australia, Canada, Germany and the Netherlands initiated steps under CEDAW's dispute-settlement clause. Their action is directed at Afghanistan's State responsibility and does not itself amount to diplomatic recognition of the Taliban.

UNAMA continues to monitor and report on human-rights conditions, and the Human Rights Council has maintained the Special Rapporteur's mandate while establishing an independent investigative mechanism for Afghanistan. These mechanisms support documentation and accountability but do not themselves guarantee compliance or provide individual remedies. The absence of effective remedies does not make the restrictions unregulated. Human-rights law remains central to governance policies, while IHL continues to govern conflict-related conduct where its conditions are met.

7. International Criminal Law, Gender Persecution and the ICC

7.1 The legal framework

Article 7(1)(h) of the Rome Statute includes persecution as a crime against humanity. It covers the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of a group or collectivity, on specified grounds including gender, where the required connection to another act listed in Article 7(1) or another crime within the Court's jurisdiction is established. The conduct must also form part of a widespread or systematic attack directed against a civilian population, pursuant to or in furtherance of a State or organisational policy, with knowledge of the attack. The crime does not require an armed-conflict nexus, but its contextual and individual-responsibility elements remain demanding.

Persecution can encompass a system of decrees and administrative measures, not only physical violence. It is therefore relevant to governance policies that may fall outside IHL's scope. Yet a discriminatory policy is not automatically a crime against humanity: the prosecution must prove the severe deprivation, discriminatory intent, contextual elements, connection to other criminal acts and the accused's mode of responsibility. This makes international criminal law a partial route to accountability, not

a substitute for human-rights obligations owed to the population as a whole.

The ICC's jurisdiction should not be confused with a guarantee that a case will proceed. Afghanistan accepted the Rome Statute's jurisdiction over crimes committed on its territory from 1 May 2003, but the Court must still satisfy the Statute's jurisdictional and admissibility requirements, including complementarity. The warrants represent a judicial finding of reasonable grounds to believe that the suspects committed the alleged crimes; they do not establish guilt beyond reasonable doubt. The practical consequences depend on arrest, transfer, disclosure of evidence and a fair trial. This procedural distance between legal characterisation and enforcement supports the article's argument that accountability is the deepest gap, even where the substantive legal framework is comparatively clear.

The legal debate predates the current proceedings. Brown and Grenfell argued in 2003 that the Taliban's treatment of women could amount to gender-based persecution. Later scholarship has examined Article 7(3)'s definition of gender, with Grey and others arguing that the concept captures the social aspects of gender and Gauld analysing how persecution is litigated before the ICC. The Afghanistan proceedings now provide an important test of this framework, but the Court's warrant-stage findings must not be treated as final judgments.

7.2 The Afghanistan warrants

Pre-Trial Chamber II issued warrants on 8 July 2025 for Haibatullah Akhundzada and Abdul Hakim Haqqani, and on 9 September 2025 for Habibullah Agha and Neda Mohammad Nadim. The Chamber unsealed all four on 5 October 2026, publishing redacted versions. The unsealing made public the grounds for warrants that had already been issued; it did not amount to a new conviction or a final determination of guilt.

The Chamber found reasonable grounds to believe that the four suspects were criminally responsible for ordering, inducing or soliciting gender persecution against girls, women and other persons who did not conform to Taliban policies on gender, gender identity or expression. For Akhundzada and Haqqani, the Chamber also found reasonable grounds concerning persecution on political grounds against persons perceived as allies of women and girls. The public record describes deprivations involving education, privacy, family life, movement, expression, thought, conscience and religion.

The warrants treat the education restrictions as part of an alleged persecutory system linked to other criminal acts, rather than as a freestanding crime. That is consistent with Article 7(1)(h), which requires a connection to another act or crime within the Court's jurisdiction. It also demonstrates why international criminal law can reach some governance harms that IHL does not directly regulate, while remaining narrower than the human-rights framework.

The inclusion of the acting education and higher-education ministers makes the education restrictions central to the allegations. The Chamber's reliance on ordering, inducing or soliciting reflects the alleged role of senior officials in directing policy. Those findings remain allegations supported at the warrant stage by the "reasonable grounds to believe" standard; trial would require proof beyond reasonable doubt and a determination of each accused's responsibility.

The Chamber interpreted "gender" in Article 7(3) as requiring attention to socially constructed roles, behaviours, expectations and hierarchies associated with sex. This is significant but should not be described as a final ruling on the merits: it is part of the reasoning at the warrant stage, and a trial chamber must assess the applicable law and evidence in any later proceedings.

The warrants are not convictions. They were issued on the Article 58 standard of reasonable grounds to believe, and the suspects have not been tried. As of 29 October 2026, the ICC's public record listed all four as at large. The Court has no independent police force, so execution depends on cooperation by States.

7.3 From Al Hassan to Abd-Al-Rahman

In Al Hassan, the Trial Chamber convicted the accused in June 2024 of war crimes and crimes against humanity, including persecution on religious grounds, but did not convict him of gender persecution. The judges differed on the evidence and individual responsibility, and the

defence and prosecution discontinued their appeals against the conviction in December 2024. The judgment illustrates that the existence of a discriminatory system does not by itself establish an individual defendant's criminal responsibility for gender persecution.

On 6 October 2025, the Trial Chamber in Abd-Al-Rahman convicted a senior Janjaweed commander of 27 counts, including two counts of gender-based persecution, the ICC's first conviction for that crime. The defence filed a notice of appeal against the conviction on 8 January 2026, while the prosecution filed a notice of appeal concerning the sentence on 9 January 2026. The first-instance judgment was therefore not final as of the article's cutoff date. The case shows that gender persecution can be established at trial, but it does not predict the outcome of the Afghanistan proceedings, which concern different evidence and alleged modes of responsibility.

7.4 Children and the limits of the criminal law

The Afghanistan warrants include girls among the alleged victims, but international criminal law is not a complete system of protection for children. The Rome Statute criminalises specified forms of conscripting, enlisting or using children under fifteen in hostilities and, in non-international armed conflict, intentional attacks on buildings dedicated to education where the statutory elements are met. A general ban on schooling does not become a war crime solely because it occurs during a period of armed conflict. ICC prosecutorial policies guide practice but do not create offences beyond the Statute.

7.5 What international criminal law cannot do

International criminal law is retrospective, selective and dependent on jurisdiction, evidence and State cooperation. It addresses individual responsibility for crimes within the Court's jurisdiction; it cannot itself secure education, healthcare or equality for the whole population, nor can it substitute for human-rights remedies. Its strongest role is to complement IHL for conflict-related crimes and human-rights law for systematic governance restrictions where the criminal elements can be proved.

8. The Accountability Architecture and the Enforcement Gap

The accountability problem is institutional as well as doctrinal. By October 2026, four ICC warrants had been unsealed, the Human Rights Council's independent investigative mechanism was moving through operationalisation, and the CEDAW initiative remained an inter-State accountability route rather than a published ICJ judgment. Table 4 summarises these routes as at 29 October 2026.

Table 4. Accountability routes as at 29 October 2026

Route	Status	What it can do	Principal limit
International Criminal Court	Four warrants issued in 2025 and unsealed on 5 October 2026; all four suspects remained at large at the cutoff. Abd-Al-Rahman's first-instance gender-persecution conviction is under appeal.	Individual criminal responsibility, including for persecution without an armed-conflict nexus	Depends on State cooperation for arrest and transfer; warrants are not convictions
Independent Investigative Mechanism for Afghanistan	Established by HRC resolution 60/2 (2025); resolution 63/1 (2026) notes operationalisation progress and deployment of a start-up team	Collect, consolidate, preserve and analyse evidence of international crimes and serious violations; cooperate with the ICC	No prosecutorial powers; dependent on funding in a constrained UN budget
Inter-state litigation under CEDAW	Article 29 procedure initiated in September 2024; negotiations and arbitration are procedural steps before any potential ICJ proceedings	A judicial finding on State responsibility for breach of CEDAW	Requires negotiation and arbitration steps first; recognition and compliance questions; does not address individuals
UN monitoring and reporting	UNAMA quarterly updates; Special Rapporteur; Human Rights Council resolutions; the investigative mechanism	Document harms, support later proceedings	Contested by the authorities; no binding outcome

Note. Sources: official ICC warrants and case records; Human Rights Council resolutions A/HRC/RES/60/2 and A/HRC/RES/63/1; official State statements on the CEDAW initiative; UNAMA monitoring updates.

The Human Rights Council established the Independent Investigative Mechanism for Afghanistan in resolution 60/2 of 6 October 2025 to collect, consolidate, preserve and analyse evidence of international crimes and the most serious violations of international law and to prepare files for potential proceedings in competent courts. Resolution 63/1 in 2026 noted progress in operationalisation and deployment of a start-up team, while calling for staffing and resources. The mechanism is not a prosecutor or court. Separately, the CEDAW initiative began through Article 29 procedures in September 2024; negotiations and arbitration are procedural steps before any potential ICJ proceedings, and no published ICJ application was identified by the article's cutoff date.

The mechanism and the CEDAW initiative serve different purposes and should not be treated as interchangeable. The mechanism is evidence-focused: its mandate is to preserve and analyse material and prepare files for possible proceedings in courts that have jurisdiction. It does not determine State responsibility or issue arrest warrants. The CEDAW route, by contrast, concerns Afghanistan's responsibility as a State party and must follow the Convention's dispute-settlement requirements. The ICC proceedings concern individual criminal responsibility and require proof of crimes within the Court's jurisdiction. Coordination can reduce duplication and improve the preservation of evidence, but it must respect confidentiality, informed consent, witness protection and the different standards and purposes of each process.

Enforcement is the most serious gap because the existence of a legal rule does not ensure an effective remedy. The ICC can determine individual criminal responsibility, but arrest

depends on State cooperation. The investigative mechanism can preserve evidence and prepare case files but cannot prosecute. The CEDAW initiative concerns State responsibility and must pass through the Convention's dispute-settlement procedure. UN monitoring documents conduct but does not compel compliance. These routes are complementary, yet none alone guarantees immediate protection or redress for Afghan women and children.

9. Discussion: A Sequence for Legal Analysis

Legal analysis should proceed in sequence. First identify the conduct and actor: a decree, an assault in detention, an attack on a school and child recruitment raise different questions. Second establish the relevant conflict and parties. Third, identify the applicable treaty and customary rules, including entry-into-force dates and any threshold conditions. Fourth test the rule's personal, material and temporal scope and any required connection to the conflict. Only then should the analyst conclude whether the evidence indicates an IHL violation, a human-rights violation, an international crime or overlapping violations.

This sequence avoids two errors. It does not assume that every harmful act by a party to an armed conflict is governed by IHL; the conflict's existence and the nexus for a particular war crime are distinct questions. It also does not assume that conduct outside IHL is unregulated. Human-rights treaties continue to bind Afghanistan, and international criminal law may apply where the elements of a crime against humanity are established.

For women, the combined framework includes IHL protection against sexual violence and ill-treatment in conflict-related detention, rules on accommodation and supervision where applicable, and human-rights scrutiny of discrimination in education, work, movement, health and public life. For children, it includes protection against attacks, recruitment and use in hostilities, Protocol II's education guarantee where that Protocol applies, and the CRC's continuing rights to education and development. One incident may engage more than one regime, but each legal basis must be established independently.

Three practical recommendations follow. First, legal analysis should state the conflict classification, parties, treaty status and any disputed threshold. Second, monitoring should record the context and stated grounds for detention and distinguish conduct during hostilities from conflict-related detention and general governance restrictions. Third, accountability efforts should coordinate evidence preservation, ICC proceedings, human-rights monitoring and any CEDAW dispute-settlement steps while protecting victims and witnesses and respecting confidentiality and informed consent.

The article does not claim that gender and IHL, Afghanistan's conflict classification or gender persecution have been unstudied. Its contribution is to connect treaty applicability across conflict periods with the boundary between conflict-related conduct and governance, distinguish threshold, scope and content gaps, and assess these distinctions alongside the enforcement mechanisms available by October 2026.

10. Limitations

The analysis has limits. Its post-2021 NIAC classification relies principally on War WATCH, an expert desk-based assessment rather than a binding determination; future evidence may change the classification. The reach of Protocol II over foreign forces in support of a territorial State remains contested. The ICC analysis relies on public redacted records and official statements, not sealed materials. Some incident-level claims depend on monitoring reports rather than independently collected evidence. The article does not undertake fieldwork, a systematic survey of Afghan-language scholarship or a full empirical review of harms before 2021. It also excludes the separate international armed conflict between Afghanistan and Pakistan, which requires its own analysis under the applicable IHL framework. Treaty accession dates differ across secondary sources, and the article follows the depositary record.

11. Conclusion

This article has argued that the protection of women and children in Afghanistan cannot be assessed by treating IHL as either a complete answer or an irrelevant regime after August 2021. Treaty coverage changed over time.

Protocol II was a meaningful source of protection in the earlier government–Taliban conflict from 10 May 2010, on War WATCH's assessment, although its reach over foreign forces remains contested. Common Article 3 and customary IHL continue to protect people affected by the post-2021 non-international armed conflicts, while Article 2(2) preserves Protocol II Articles 5 and 6 for people detained for reasons connected with the earlier conflict.

For the post-2021 non-international armed conflicts, War WATCH assesses that Article 1(1)'s threshold for Protocol II is not met. The specific education guarantee in Article 4(3)(a) therefore does not govern those conflicts as a treaty rule. Nationwide restrictions on girls' education and women's work and public participation are addressed principally by Afghanistan's continuing obligations under CEDAW, the CRC, the ICCPR and the ICESCR. The ICC's four warrants identify a further, narrower route through alleged gender persecution, but they remain allegations and depend on proof of the elements of the crime.

The post-2021 legal gap is thus not an absence of law but a combination of threshold, scope, content and enforcement problems. The first three explain why IHL cannot address every governance restriction; the fourth explains why even applicable standards often fail to secure remedies. A defensible response must identify the conflict, the applicable rules and the required connection, then use IHL, human-rights law and international criminal law for the purposes each regime was designed to serve.

Ethical Considerations

This study analyses publicly available legal and documentary sources, including international treaties, customary international humanitarian law materials, international court and tribunal decisions, official United Nations reports, publications by international organisations, academic literature and other published sources relevant to the protection of women and children in Afghanistan. The study involved no human participants, interviews, surveys or collection of private personal data. Accordingly, informed consent was not required, and institutional ethical review was not required for this analysis of publicly available materials. Individuals are discussed in their public or official capacities where relevant to the legal analysis, with claims attributed to the sources cited.

Use of AI Tools Disclosure

The author is not a native English speaker and used ChatGPT (OpenAI) during the preparation of this manuscript to assist with English language editing, grammar, readability, and clarity of expression. ChatGPT was also used to assist with structuring the legal analysis, identifying potentially relevant sources, and reviewing the chronology and bibliographic details of cited materials. It was not used to collect primary empirical data. The author reviewed and edited the AI-assisted text and remains fully responsible for the accuracy of the legal analysis, interpretation, factual claims, citations, and references. Legal authorities and factual claims were checked against original publications and official records wherever available.

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Data Availability Statement

This study is based exclusively on publicly available documentary and legal materials. The sources analysed, including international treaties, judicial decisions, official reports, institutional publications and academic literature, are identified in the footnotes and reference list. No primary empirical data were collected or generated for this study. The analysis and interpretations presented in the article are the author's own responsibility.

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