

## PRIMERS FOR INTERNATIONAL ACCOUNTABILITY IN ASIA: GENDER AND INTERNATIONAL CRIMINAL LAW

### What Is ‘Gender’ & Why Is It Relevant In International Criminal Law?

Article 7(3) of the [Rome Statute](#) states that ‘gender’ ‘refers to the two sexes, male and female, within the context of society.’ Interpreting this, the December 2023 International Criminal Court (ICC) [Office of the Prosecutor Policy on Gender-Based Crimes](#) (2023 OTP Policy) emphasises the phrase ‘within the context of society’, to define ‘gender’ as ‘a social construct’ which can differ over time and between persons and societies [17]. This primer uses the 2023 OTP Policy understanding of ‘gender’ as the socially constructed ‘criteria about roles, expressions, and behaviours used to define maleness and femaleness in a given context’ [19].<sup>1</sup>

Historically, crimes that were based on, or related to, gender [were often overlooked or treated as secondary in international law](#). However, it is now recognised it is crucial to incorporate an understanding of gender into all considerations of international crimes.

This is because gender often plays a central role in why individuals or groups are targeted for violence (see e.g. [here](#)), with perpetrators exploiting socially constructed gender norms to justify or intensify their actions (e.g. [here](#)). Moreover, even when gender is not the primary reason for targeting, one’s perceived or self-identified gender can compound the harm they experienced (e.g. [here](#)) and [intersect with other forms of discrimination](#) such as race, religion, or ethnicity (2023 OTP Policy, [41]; see e.g. regarding crimes against the Rohingya [here](#)). Finally, the effects on survivors are far-reaching, impacting their freedom of movement and their reproductive choices (see e.g. [here](#) and [here](#)) and exposing them to cultural or societal stigma. Such stigma [contributes to survivor underreporting](#), which can hinder evidence collection and potential prosecution. When such crimes go unpunished, impunity reinforces the structural biases that enabled the harm in the first place (2023 OTP Policy, [24]).

Considering gender in the harms addressed by international criminal law ensures that the law most accurately reflects the lived experiences of victims (2023 OTP Policy [51]). By holding perpetrators accountable for this conduct, international criminal law challenges the structural inequalities that enable such violence, ideally thereby fostering long-term societal change [97].

### How Does Existing International Criminal Law Explicitly Address ‘Gender-Based Crimes’?

It is important to note that *all* crimes under international law can have a gendered element, even if their definitions are not explicitly focused on gender. However, the most recognisable ‘gender-based crimes’ in international criminal law are sometimes grouped into three categories: ‘reproductive violence’, ‘sexual violence’, and ‘other gender-based crimes’.

‘**Reproductive violence**’ includes targeting victims’ reproductive autonomy and is often used to exert control over victims’ bodies and affect demographic changes. Under the Rome Statute, reproductive violence is addressed explicitly in:

- The [crime of genocide](#), including in Article 6(d) which lists as a genocidal act ‘imposing measures intended to prevent births within the group’ (see regarding crimes against the Rohingya [here](#));
- The [crimes against humanity](#) of forced pregnancy and enforced sterilisation (Article 7(1)(g)); and
- The [war crimes](#) of forced pregnancy and enforced sterilisation in an international armed conflict (Article 8(2)(b)(xxii)) or in a non-international armed conflict (Article 8(2)(e)(vi)).

‘**Sexual violence**’ involves the attempt or commission of sexual acts. Under the Rome Statute, sexual violence is addressed explicitly in:

- The [crimes against humanity](#) of rape, sexual slavery, enforced prostitution, and ‘any other form of sexual violence of comparable gravity’ (Article 7(1)(g)); and
- The [war crimes](#) of rape, sexual slavery, enforced prostitution, and ‘any other form of sexual violence also constituting a grave breach of the Geneva Conventions’ where the conduct takes place in an international

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<sup>1</sup> However, this primer recognises that gender expression and gender identity are not binary. Moreover, there continue to be important conceptual and legal issues with the Rome Statute definition of ‘gender’ that require consideration (e.g. see [here](#)).

armed conflict (Article 8(2)(b)(xxii)) or rape, sexual slavery, and ‘any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions’ in a non-international armed conflict (Article 8(2)(b)(vi)).

‘Other forms of gender-based crimes’ includes the [crime against humanity](#) of gender persecution (Article 7(1)(h)). This crime involves the intentional and severe deprivation of fundamental rights of individuals because of their gender; however, it must be ‘in connection with’ another crime under the Rome Statute (see more below).

## Do Existing International Crimes Include Forced Marriage?

While not explicitly defined in the Rome Statute, ‘forced marriage’<sup>2</sup> has been prosecuted as a crime against humanity in various international tribunals under the broader category ‘other inhumane acts’.<sup>3</sup> For example, the Special Court for Sierra Leone [recognised forced marriage as a distinct form of harm](#), acknowledging its specific impact on women and girls. Likewise, the Supreme Court Chamber of the Extraordinary Chambers of the Courts of Cambodia recognised, on appeal, [that the harm of forced intercourse in forced marriage could extend to male victims](#).

## Do Existing International Crimes Include Human Trafficking For Sexual Exploitation?

Human trafficking<sup>4</sup> for sexual exploitation is also not a separate crime under the Rome Statute; however, trafficking is considered in the elements of specific war crimes and crimes against humanity. For example, trafficking is noted in [ICC Elements of Crimes](#) as possibly relevant in the crimes of ‘sexual slavery’ or ‘enforced prostitution’ in the context of international armed conflict (Article 8(2)(b)(xxii)) or in the context of a non-international armed conflict (Article 8(2)(e)(vi)); or as part of a widespread or systematic attack against a civilian population involving ‘enslavement’ (Article 7(1)(c)) or ‘sexual slavery’ or ‘enforced prostitution’ (Article 7(1)(g)).<sup>5</sup>

## What is ‘Gender Apartheid’?

Article II of the [Apartheid Convention](#) defines ‘the crime of apartheid’ as a series of ‘inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them’. Under Article 7(1)(j) of the Rome Statute, ‘the crime of apartheid’ is a crime against humanity.

The term ‘gender apartheid’ [was first articulated](#) in the 1990s by Afghan women’s rights defenders in response to the Taliban’s extreme policies toward women. Sharing similarities with institutionalised discrimination and segregation based on race, the term ‘gender apartheid’ refers to laws, policies, or practices that enforce gender-based hierarchies and limit the rights and freedoms of individuals based on individuals’ gender.

The Rome Statute does not explicitly use the term ‘gender apartheid’. Instead, gender apartheid could be understood as an extreme form of the crime against humanity of ‘persecution’ based on gender (or ‘gender persecution’) under Article 7(1)(h). This is because it involves the severe deprivation of fundamental rights such as denying education, employment, or free movement to a specific gender. However, Article 7(1)(h) requires that the persecution must take place ‘in connection with’ another crime ‘within the jurisdiction of the Court’—it cannot be prosecuted as a crime on its own.

Because of this, [experts and civil society are calling for a separate crime of ‘gender apartheid’](#) to be recognised within the [Draft Articles on Prevention and Punishment of Crimes Against Humanity](#). Doing so would help to legally account for such conduct’s unique of the intersectional and systemic nature, give greater legitimacy to [coordinated international solidarity](#) combatting such systems, and [challenge the argument](#) that cultural practices can justify systematic gender discrimination.

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<sup>2</sup> The gendered harm in forced marriage includes where one or both parties are coerced into marriage, often through violence or threat of violence and including sexual servitude or forced reproduction.

<sup>3</sup> In the Rome Statute, this crime against humanity is found in Article 7(1)(k).

<sup>4</sup> Human trafficking is traditionally considered a [transnational crime](#). A distinctive feature of transnational crimes is that the conduct is prohibited under domestic law but takes place across two or more jurisdictions. There are separate treaties that support cooperation to prevent such crimes, like the [United Nations Convention against Transnational Organized Crime](#) and its [Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children](#) (also known as the Palermo Protocol).

<sup>5</sup> See [ICC Elements of Crimes](#) footnote 53 (Article 8(2)(b)(xxii)); footnote 66 (Article 8(2)(e)(vi)); footnote 11 (Article 7(1)(c)), and footnote 18 (Article 7(1)(g)). For more on ‘slavery crimes’, see the [2024 ICC OTP Policy on Slavery Crimes](#).