

# QUEER ATROCITY LAW?

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### I. INTRODUCTION

When I was asked to comment on Edoardo Stoppioni's chapter on queer approaches to international law I was equal parts excited and trepidatious. I was excited because queer legal theory is an area I have been interested in for some time and looked forward to learning more. I was trepidatious because my preexisting understanding of queer theory could be described as minimal at best. Thankfully, my trepidation at engaging with Professor Stoppioni's work was allayed by their generous and clear high-level overview of the evolution of queer theory and its complicated relationship over time with various strains of feminism. It's a credit to Stoppioni that they are able to cover so much territory within the brief confines of a single book chapter.

Given my lack of expertise in queer theory (or feminist legal theories for that matter), in this essay I engage with Stoppioni's writing by attempting to distill their main arguments and explore the implications of these arguments for my area of expertise: international criminal law.

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My reflection on Stoppioni's chapter proceeds in two main parts. First, I provide an overview of my reading of the chapter. In this overview, I attempt to summarize key components of the chapter and distill my interpretation of Stoppioni's main arguments. Second, inspired by Stoppioni's comparative analysis of two international human rights law cases as a means of illustrating both regressive and more progressive understandings of gender and sexuality, I engage in a similar analysis of a specific international criminal law case. I analyze Case 002/02 at the Extraordinary Chambers in the Courts of Cambodia (ECCC) and draw out sharp distinctions in framings of gender, sexuality, and gendered violence between the Trial and Supreme Court Chambers at the Court in relation to forced marriage and forced sexual consummation of said marriages. I then offer some concluding thoughts on the degree to which a "queering" of international criminal law might be feasible.

## II. QUEER APPROACHES TO INTERNATIONAL LAW: STOPPIONI'S ACCOUNT

A fulsome summary of Stoppioni's contribution is impossible in this brief essay, however it is important to draw out some general themes. One of the ways Stoppioni claims early work in the fields of feminism and women's studies "nourished" queer theory was by "challenging established structures of power," including by voicing silences and exposing biases, including when critiquing international law.<sup>1</sup> Moreover, one way queer theory departs from certain strands of feminism is in seeking to challenge and deconstruct the dominant, socially constructed male-female binary. Building on the insight that gender, rather than some scientific "fact," is in actuality a social construct built and continually reinforced through performed adherence to notions of masculinity and femininity, queer theory has evolved to reject the myths of an innate masculine or feminine "essence."<sup>2</sup> Queer theory rejects this binary as overly simplistic and non-reflective of the actual lived experiences of the full spectrum of humanity. Stoppioni refers to the stubborn resistance against any efforts to erode these simplistic, untrue binaries (of gender, masculinity/femininity, and sexuality) as a form of repressive "normative violence" committed against people who in any way fail to conform to dominant binaries of identity.<sup>3</sup>

Turning to international law, Stoppioni then identifies a tension within queer theory. This tension relates to a (in my view healthy) skepticism of international law generally, and international human rights law specifically. According to Stoppioni, many queer theorists are

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1. Edoardo Stoppioni, *Queer Approaches*, in OXFORD HANDBOOK OF WOMEN AND INTERNATIONAL LAW (J. Jarpa Dawuni, Nienke Grossman, Jaya Ramji-Nogales, & Hélène Ruiz Fabri eds., 2025).

2. *Id.*

3. *Id.*

skeptical that international human rights law has the potential to truly treat queer people as “viable [fully human] subjects” or to “destabilize[e] normative violence.”<sup>4</sup>

Stoppioni makes two claims regarding the utility of queer legal theory as a potential means of improving international law. First, they argue that queer theory “can be seen as a tool of discourse analysis to deconstruct the way international law speaks about women.”<sup>5</sup> Second, Stoppioni addresses the more vexing question of whether it is possible to “queer” international law.<sup>6</sup> In considering this question, Stoppioni focuses exclusively on international human rights law. While stopping short of making an affirmative claim that this area of law can be transformed by queer legal theory, Stoppioni does suggest that at times human rights jurisprudence has come close to adopting an orientation that strives to fully respect and address the lived realities of queer subjects. Stoppioni does so by engaging in a queer discourse analysis of two decisions: the European Court of Human Rights (ECtHR) case *JL v. Italy* and the Inter-American Court of Human Rights (IACtHR) case *Vicky Hernández v. Honduras*.

In *JL*, a case involving the sexual assault of a woman by multiple assailants, the ECtHR invalidated the deeply problematic reasoning of the Italian Appellate Court that had acquitted JL’s assailants. The Court found that the Italian Appellate Court’s reasoning was framed in “language and arguments” reflective of “prejudices toward the role of the woman that exist in the Italian society and that can be an obstacle to the effective protection of the victims of gender violence.”<sup>7</sup> Despite the Court finding JL’s human rights to a private and family life were violated, Stoppioni identifies serious shortcomings in the Court’s attitudes toward gender and sexuality, referring to the decision as “cold and ‘queer-blind’” by failing to fully engage with the Italian Appellate Court’s use of gender stereotypes predicated on “assumptions about the victim’s changing sexual orientation, her (bi)sexuality and her gender troubles.”<sup>8</sup> By failing to fully engage with and deconstruct these assumptions, according to Stoppioni, the ECtHR effectively “silenc[ed] the queer element[s]” of the case, raising questions as to whether the ECtHR and other international courts are equipped to address gender stereotypes.<sup>9</sup>

Stoppioni contrasts this “cold” “silencing” of the (many) queer

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4. *Id.*

5. I would add that queer theory could be similarly useful to deconstruct the way international law speaks about gender and sexuality.

6. Stoppioni, *supra* note 1.

7. *Id.* It bears noting that all references to the *Hernández* and *JL* cases in this essay, including quotations, are drawn from Stoppioni’s chapter, as this essay is concerned moreso with Stoppioni’s characterization of the cases than with engaging with the substance of the cases themselves in their own rights.

8. *Id.*

9. *Id.*

elements of the *JL* case with what they view as a more queer-sensitive approach of the IACtHR in *Hernández*. In this case, involving the killing of a trans activist and sex worker by police officers, Stoppioni posits that the Court recognized the state-sanctioned use of “legal violence against Vicky’s queer life” utilizing more nuanced, queer forms of discourse and analysis.<sup>10</sup> In *Hernández*, the Court chastised the Honduran authorities for labeling the brutal murder of Hernández as a “crime of passion,” owing to the fact that she was sexually assaulted before being killed.<sup>11</sup> The Court noted that, among other flaws, during the investigation Hernández’s “self-perceived gender identity was ignored and logical lines of investigation were not followed up on which could have examined her death as a possible manifestation of gender-based violence and discrimination owing to her trans feminine identity.”<sup>12</sup>

The Court goes on to render gender visible by reading the Inter-American Convention on Human Rights’ gender protections broadly, opining that, to comply with the Convention, states must ensure that people “can exercise their rights and assume obligations based on [their own gender] identity, without being obliged to retain another identity that does not represent their individuality”.<sup>13</sup> The Court also found a violation of Hernández’s rights under the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women, noting that “violence against persons based on gender identity or expression and specifically against trans women, is also based on gender, as a social construct of the identities, attributes and roles that society assigns to women and men.”<sup>14</sup>

Stoppioni contrasts these two decisions to illustrate their broader points regarding the question of whether queer theory can merely be utilized as a rhetorical tool to identify the shortcomings of international law, versus whether queer theory might be used to “transform” international law and the language of rights to “address the special needs of the queer subject.”<sup>15</sup> Ultimately, while Stoppioni seems to view the latter, transformative possibility as remote, they seem to view the effort as worthwhile as part of broader efforts to push forward an obligation for states to “protect diversity and heterogeneity” and “instill[] in international law a posture of care for intersectionality, vulnerability, and respect for diversity”.<sup>16</sup>

### III. FROM INTERNATIONAL HUMAN RIGHTS LAW TO

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10. *Id.*

11. *Id.*

12. Stoppioni, *supra* note 1.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

## INTERNATIONAL CRIMINAL LAW

Stoppioni's insights into how courts operate within their limited jurisdictional mandate to either reinforce or challenge gender-based normative violence is a helpful meditation on the possibilities (and limitations) of queering international human rights law and international law more generally. As an outsider to queer theory and an academic whose primary expertise lies in international criminal law, Stoppioni's writing resonates with me on multiple levels.

On a first, more macro level, queer theory's social constructivist orientation, questioning of power, rejection of binary categorization, and engagement with questions of social and juridical visibility and invisibility made me think of various other traditions of international law scholarship that can be loosely described as critical in orientation. For instance, social constructivist approaches to international law challenge linear accounts of lawmaking, along with narrow accounts of whose voices, opinions, ideas, and emotions factor into this ongoing, non-linear process.<sup>17</sup> Meanwhile, TWAIL scholars have deconstructed much of the self-aggrandizing mythology that frames international law as a "neutral," inherently progressive project, exposing the law's violent, racist colonial roots, as well as its role in perpetuating the hegemony of the Global North at the expense of the Global South.<sup>18</sup> The same can be said for other critically oriented scholars, who continue to question the lineage and possibilities of international law as a tool for actually improving global justice and combatting the kind of normative violence identified by queer theorists among other forms of repression.<sup>19</sup>

On another level, closer to my own particular interests, Stoppioni's account of queer theory and their seeming ambivalence regarding whether international human rights law can be truly transformed into a tool that actually serves the needs of "the most vulnerable queer subjects",<sup>20</sup> resonates with my view of both the current realities and future possibilities of international criminal law. Many of the queer critiques of international law generally and human rights law specifically that Stoppioni identifies are similar to critiques of international criminal

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17. See, e.g., JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* (2010).

18. See, e.g., ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004). This characterization is, of course, itself limited, under-inclusive, and overly simplistic. It is intended merely to highlight basic resonances between queer theory and TWAIL as critical traditions that identify and interrogate assumptions embedded in international law.

19. See, e.g., E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1573-74 (2019) (Challenging the legitimacy of the core sovereign power to exclude non-nationals when it comes to former colonial powers excluding nationals of postcolonial nations and more broadly calling for a reconceptualization of "sovereignty as interconnection").

20. Stoppioni, *supra* note 1.

law lodged by more critically oriented scholars. For example, many scholars have identified a troubling tendency for international criminal law to be applied almost exclusively to prosecute Global South perpetrators, while ignoring the culpability of Global North actors, even when such actors were intimately involved in the very violence being addressed in a particular case or by a particular institution.<sup>21</sup> In many of these situations, international criminal law actors, from judges to lawyers, to institutional spokespersons, routinely tend toward reductive, oft-binary-based rhetoric when confronted with allegations of bias or the reproduction of problematic stereotypes through their actions and/or rhetoric.<sup>22</sup>

Of particular resonance with my own interests are the concept of “normative violence,” the emphases on visibility and associated biases, and the rejection of binaries within queer theory. My work has largely focused on similar issues, albeit refracted through differing theoretical lenses. I am interested in how international criminal law interacts with less obvious, more insidious forms of mass violence, ranging from the creation of famine conditions, to sustained socio-economic oppression.<sup>23</sup>

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21. See generally Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001); Tor Krever, *International Criminal Law: An Ideology Critique*, 26 LEIDEN J. INT'L L. 701 (2013); CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION (Christine Schwöbel ed., 2014); Christine Schwöbel-Patel, *Spectacle in International Criminal Law: The Fundraising Image of Victimhood*, 4 LONDON REV. INT'L L. 247 (2016); John Reynolds & Sujith Xavier, *The Dark Corners of the World: TWAJL and International Criminal Justice*, 14 J. INT'L CRIM. JUST. 959 (2016); Asad G. Kiyani, *The Three Dimensions of Selectivity in International Criminal Law*, 15 J. INT'L CRIM. JUST. 613 (2017); Randle C. DeFalco & Frédéric Mégret, *The Invisibility of Race at the ICC: Lessons from the US Criminal Justice System*, 7 LONDON REV. INT'L L. 55 (2019); Alyssa Couchie, *(Re)Braiding Frayed Sweetgrass for Niijaansinaanik (Our Children): Understanding the “Sixties Scoop” Through the Lens of Slow Atrocity Violence*, 44 MICH. J. INT'L L. 405 (2023).

22. For example, one common deflection tactic when questioned about the selective focus on racialized residents of the Global South as perpetrators of atrocity violence is to attempt to shift the focus to the victims and emphasize their status as racialized Global South residents as well, rather than to grapple with more complex questions regarding the possible perpetuation of stereotypes of racialized men as especially prone to violence. See, e.g., DeFalco & Mégret, *supra* note 21; Rachel López, *Black Guilt, White Guilt at the International Criminal Court*, in RACE AND NATIONAL SECURITY 211-228 (Matiangai V.S. Sirleaf ed., 2023). Another tactic is to minimize the supposed “gravity” of crimes authored by white and/or Global North actors in comparison to violence committed by Global South actors, even within the same context, evidenced by the “deprioritization” of alleged systematized acts of torture committed by United States actors within the context of the International Criminal Court (ICC) Office of the Prosecutor’s (OTP’s) ongoing investigation in Afghanistan. See Nada Kiswanson, *Limits to Prosecutorial Discretion: The ICC Prosecutor’s Deprioritisation Decision in Afghanistan*, OPINIO JURIS (Nov. 26, 2021), <https://opiniojuris.org/2021/11/26/limits-to-prosecutorial-discretion-the-icc-prosecutors-deprioritisation-decision-in-afghanistan> (last visited May 27, 2025).

23. RANDLE C. DEFALCO, *INVISIBLE ATROCITIES: THE AESTHETIC BIASES OF INTERNATIONAL CRIMINAL JUSTICE* (2022).

I have argued that slower, less aesthetically spectacular forms of mass violence are often wrongly assumed to fall outside the potential reach of international criminal justice, based on un-interrogated understandings<sup>24</sup> of atrocities themselves as spectacular eruptions of horrific violence.<sup>24</sup> Embedded in my analysis is a rejection of rigid binaries when it comes to divisions of violence and harm into artificial, supposedly mutually exclusive categories: slow or “structural” violence that is inherently “non-criminal” in nature, versus “direct” violence that implies criminal culpability.

Along these lines, reading Stoppioni’s overview of queer theory and application to international human rights law has furthered my view of the kinds of binaries that international criminal law seems to insist on. Queer theory raises questions regarding the potentially gendered nature of the relative invisibility of slower, less spectacular forms of mass violence within international criminal law (and likely international human rights law as well). Less spectacular violence tends to manifest itself in ways that may very well be deeply gendered. This violence often emanates from the state, which instrumentalizes its biopolitical power over the day-to-day lives of those subject to its jurisdiction to produce harms accretively, through the cumulative effects of numerous actions. Each of these actions may individually seem relatively banal, but cumulatively they can cause mass suffering, even mass death.<sup>25</sup> Often these actions impose upon and stringently regulate aspects of the private sphere, deeply implicating gender due to the persistence of gendered divisions between the public and private spheres of life. Moreover, in some instances it may be seen as an acceptable, even laudable, expression of masculinity to commit acts of direct violence against members of a disfavored group perceived as male, but to commit the same acts against people perceived as female may be viewed as cowardly, even feminine in

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24. *Id.* at 149–99.

25. For example, for decades the Rohingya were persecuted by the Myanmar government through a series of bureaucratic actions that cumulatively impoverished and ostracized the Rohingya population to the point of causing mass suffering. *See generally* Maung Zarni & Alice Cowley, *The Slow-Burning Genocide of Myanmar’s Rohingya*, 23 PAC. RIM L. & POL’Y J. 72 (2014); AZEEM IBRAHIM, *THE ROHINGYAS: INSIDE MYANMAR’S HIDDEN GENOCIDE* (2016); Randle C. DeFalco, *Time and the Visibility of Slow Atrocity Violence*, 21 INT’L CRIM. L. REV. 905, 922–26 (2021). Similarly, bureaucratic decision-making regarding anticipated crop yields, farming and public works project labor practices, state rice collection, and public policies banning private farming, cooking, and eating combined to kill between 1.2 and 2 million Cambodians during the relatively brief reign of the Khmer Rouge regime. *See generally* Helen Fein, *Genocide by Attrition 1939-1993: The Warsaw Ghetto, Cambodia, and Sudan: Links between Human Rights, Health, and Mass Death*, 2 HEALTH & HUM. RTS. 10, 18–22 (1997); DAVID CHANDLER, *A HISTORY OF CAMBODIA* 255–276 (4th ed. 2008); JOHN D. CIORCIARI & ANNE HEINDEL, *HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* 1–2 (2014); Randle C DeFalco & Savina Sirik, *The Fluctuating Visibility of Everyday Violence in Khmer Rouge-Era Cambodia*, 31 S. CAL. INTERDISC. L.J. 217, 222–224 (2022).

nature. As such, certain forms of violence perpetrated against women may recede into the background when it comes to the dominant gaze of international criminal law.

Beyond these peculiarities of international criminal law, the question remains whether international criminal justice actors and institutions are able to incorporate queer perspectives or, in contrast, engage in the “cold” “silencing” of the queer aspects of harms that occur in the midst of atrocity. Inspired by Stoppioni’s analyses of the *JL* and *Hernández* cases, the remainder of this essay engages in an (admittedly crude) rhetorical analysis of the treatment of the issue of forced marriage by the ECCC in the prosecution of accused Nuon Chea and Khieu Samphan in Case 002/02.

#### IV. FORCED MARRIAGE IN KHMER ROUGE ERA CAMBODIA

The Communist Party of Kampuchea (CPK), popularly known as the “Khmer Rouge” swept into power on April 17, 1975 following the collapse of the Lon Nol government almost immediately after the United States withdrew its support for the regime and hastily left the country.<sup>26</sup> The new regime took over a nation reeling from the effects of a bitter five year civil war, preceded by various regional conflicts and nearly a century of exploitative colonial plunder at the hands of the French.<sup>27</sup> The Khmer Rouge leadership, consisting of Pol Pot and a small cadre of trusted confidants, but known throughout the country at the time solely as the amorphous *Angkar Padevat* (roughly translatable to “revolutionary organization”), sought to radically transform Cambodian society on an incredibly aggressive timetable.<sup>28</sup>

The regime’s general plan was to overhaul Cambodia’s agricultural sector in order to fund longer-term revolutionary projects, such as modernizing the country’s industrial capacities, without becoming beholden to foreign interests through financial reliance.<sup>29</sup> Ever fearful of so-called “internal enemies” seeking to undermine the revolution, the leadership set up a nationwide system of prisons and encouraged local cadres to carefully monitor the behaviors of those under their authority. The regime’s repeated violent internal purges created a nationwide atmosphere of fear and paranoia, as everyone, save for perhaps Pol Pot and a handful of his closest confidants, lived in a state of perpetual precarity, always at risk of arrest, torture, and/or execution.

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26. See generally KHAMBOLY DY, A HISTORY OF DEMOCRATIC KAMPUCHEA (1975–1979) (2007); CHANDLER, *supra* note 25, at 255–276; CIORCIARI & HEINDEL, *supra* note 25, at 1–2.

27. For a historical overview of events leading up to the takeover of the Khmer Rouge, see generally CHANDLER, *supra* note 25, at 211–254.

28. See generally DY, *supra* note 26, at 26–29; CHANDLER, *supra* note 25, at 255–276.

29. See generally DY, *supra* note 26, at 26–29; POL POT PLANS THE FUTURE: CONFIDENTIAL LEADERSHIP DOCUMENTS FROM DEMOCRATIC KAMPUCHEA, 1976–1977, (David P. Chandler & Ben Kiernan eds., Chanthou Boua trans., 1988).

The regime preferred citizens with “clean” revolutionary backgrounds. So-called “old” or “base” people—primarily rural farmers who lived in areas long-controlled by the Khmer Rouge—were preferred over so-called “new” people. New people, a designation roughly equivalent to the bourgeoisie, were those affiliated with the previous regime or who held white-collar jobs and/or lived in cities prior to the Khmer Rouge’s seizure of power.<sup>30</sup>

Once the regime took power, every aspect of daily life became subject to strict regulation by *Angkar*, including marriage and sexuality.<sup>31</sup> Extramarital sex was forbidden, and the regime took it upon itself to determine who should get married and whom they should marry.<sup>32</sup> Most often this state of affairs resulted in women and men with “clean” revolutionary backgrounds being assigned to marry one another. Many of the men subjected to forced marriages were members of the Khmer Rouge. The leadership’s goal was to forge offspring-bearing relationships between relatively trusted citizens in order to foster a new generation of Cambodians totally faithful to the regime. Weddings themselves became mass affairs with up to hundreds of couples being wed at once in relatively brief ceremonies. Newlyweds were directed to pledge to commit to one another and to have a child within a year. In some instances, local cadres spied on newlyweds in order to ensure they consummated the marriage. In virtually all cases, couples who refused to sexually consummate their marriage risked severe repercussions up to and including imprisonment and execution.

The issue of forced marriage under the Khmer Rouge brings with it a bevy of issues related to gender and sexuality. Forced marriage and sexual violence within the context of forced marriages were prosecuted by the ECCC as manifestations of the crime against humanity of other inhumane acts.<sup>33</sup> Questions of who the victims of these offenses were raise important questions about gendered notions of marriage and sexual violence, and complicate the presumed victim-perpetrator binary in situations where a female civilian and a male Khmer Rouge cadre (themselves prototypical perpetrators of atrocity violence) were forced to marry one another. Moreover, sexual relations between couples after being subjected to forced marriage present complicated questions of

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30. DY, *supra* note 26, at 30–32.

31. See generally Prosecutor v. Nuon, Case No. 002/19-09-2007/ECCC/TC, Judgement, ¶ 3539 (Nov. 16, 2018) [hereinafter Case 002/02 Trial Judgement].

32. DY, *supra* note 26, at 32–34.

33. This is because the Court’s temporal jurisdiction covered crimes occurring between 1975 and 1979, when forced marriage and rape did not exist as discrete crimes against humanity, as they now both do. It is worth noting that the Court’s Co-Prosecutors only pursued charges based on forced marriage and associated sexual violence following sustained advocacy by civil parties at the ECCC. Theresa De Langis, *A Missed Opportunity, A Last Hope? Prosecuting Sexual Crimes Under the Khmer Rouge Regime*, CAMBODIA L. & POL’Y J. 39, 40 (2014).

gender and sexuality, especially as the ECCC sought to prosecute instances of nonconsensual sex between forcibly married couples as criminal sexual violence in the form of inhumane acts.

### **V. A QUEER DISCOURSE ANALYSIS OF FORCED MARRIAGE JURISPRUDENCE: A TALE OF TWO CHAMBERS**

The issue of forced marriage was primarily addressed by the ECCC in Case 002/02. The accused in this case were the most senior former Khmer Rouge officials still alive when the case was initiated: Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith. Only Nuon Chea and Khieu Samphan survived the initial trial in the case and were convicted by the Trial Chamber of various offenses, including the crime against humanity of inhumane acts predicated on their roles in the regime's policies of forced marriage and the forced sexual consummation of such marriages. As summarized by the ECCC Trial Chamber, the Khmer Rouge regime's "policy to regulate family-building and marriage in an attempt to control the people and increase [Cambodia]'s population resulted in . . . widespread forced marriage and rape."<sup>34</sup>

One widely considered question in the lead up to the Case 002/02 trial was how the ECCC would characterize forced marriage and forced sexual consummation, especially in relation to issues of gender and perpetrator/victim identities.<sup>35</sup> More specifically, it was unclear how the experiences of persons gendered as male, especially those who were members of the Khmer Rouge regime, subjected to forced marriages and/or forced to engage in non-consensual sex with their assigned female-gendered spouses would be viewed. These individuals troubled binary understandings of sexual violence, and especially rape, as a male-perpetrated crime, with women as the primary victim group. In situations where the men subjected to forced marriage were members of the Khmer Rouge, their being subject to forced marriage also troubled the victim-perpetrator binary that continues to plague international criminal law, despite a long history of examples of individuals who have both participated in, and been victimized by, atrocity crimes.<sup>36</sup>

### **VI. THE TRIAL CHAMBER JUDGMENT: REINFORCING NORMATIVE VIOLENCE**

In its Case 002/02 judgment, the ECCC Trial Chamber struggled to untangle the gendered and queer dimensions of Khmer Rouge era

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34. Case 002/02 Trial Judgment, *supra* note 31, ¶ 279.

35. See generally De Langis, *supra* note 33.

36. See generally Mark A. Drumbl, *Victims Who Victimise*, 4 LONDON REV. INT'L L. 217 (2016).

practices of forced marriage and associated forced sexual consummation. While the Chamber did recognize both women and men subjected to forced marriages as victims of the crime against humanity of other inhumane acts,<sup>37</sup> it reproduced gendered normative violence in relation to acts of forced sexual consummation of such marriages in at least two ways. First, the Chamber held that the harms suffered by male victims of forced marriage compelled to non-consensually sexually consummate the marriage (and thereby rape their spouses) were not themselves victims of rape. It also found the harms experienced by such men were not serious enough to legally qualify as inhumane acts. Second, the Chamber reinforced the normative violence of this finding by equating the experiences of a transgender woman forced to marry and have non-consensual penetrative sex with a woman, with that of male victims of forced marriage also forced to engage in similar non-consensual sex acts, thereby excluding her from being a victim of sexual violence.

Utilizing an outdated, deeply gendered definition of rape as limited to instances of non-consensual acts involving the physical penetration of the victim, the Chamber held that “men could not be the victims of rape in the context of forced marriage,”<sup>38</sup> and thus, were implicitly limited to the role of perpetrator in this context. The Chamber’s regressive definition of rape may have been justified on the grounds that the ECCC was limited to the law as it existed at the time the Khmer Rouge held power (1975-79), however, despite identifying an opportunity to address harms suffered by male victims of forced marriage coerced under threat into non-consensually consummating the marriage, the Chamber declined to do so.

The Chamber acknowledged that these harms could “possibly be characterized as another form of sexual violence of such serious gravity that it amounts to other inhumane acts.”<sup>39</sup> Nonetheless, evincing a problematically gendered understanding of sexual violence, the Chamber went on to hold that despite forced marriage and associated sexual violence having a severe general impact on victims,<sup>40</sup> and that like women, “men also could not refuse to consummate marriage,”<sup>41</sup> the Chamber declined to hold that men forced to non-consensually consummate forced marriages were not victims of inhumane acts. The Chamber concluded:

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37. See Case 002/02 Trial Judgment, *supra* note 31, ¶ 3692 (“The severity of the mental suffering caused by being forced to marry in a coercive environment caused serious mental harm with lasting effects on the victims. Considered holistically, the Chamber finds that this conduct is of similar gravity as other enumerated crimes against humanity. The *actus reus* of the crime against humanity of other inhumane acts through conduct characterised as forced marriage is therefore established.”).

38. *Id.* ¶ 732.

39. *Id.* ¶ 731.

40. *Id.* ¶ 3679.

41. *Id.* ¶ 3701.

in the absence of clear evidence concerning the level of seriousness of this kind of conduct and of its impact on males, the Chamber, while acknowledging that men were subjected to sexual violence that was contrary to human dignity, is unable to reach a finding on the seriousness of the mental and physical suffering suffered by these men. Accordingly, the Chamber is unable to reach a conclusion to the requisite standard in relation to these incidents and does not consider that they constitute the crime against humanity of other inhumane acts through sexual violence.<sup>42</sup>

In sum, the Trial Chamber held that men forced under threat of serious violence or even death, to engage in non-consensual sexual intercourse with a woman, not only were not victims of rape, but were also not victims of inhumane acts. In contrast, victims gendered as women were found to be victims of both offenses. These holdings perpetuate a host of gendered notions relating to cis-gender male sexuality.

Compounding this reductionist view of men as not being seriously harmed by being forced to engage in heterosexual sex, even when with an unwilling partner, was the Trial Chamber's failure to recognize the particular gendered violence suffered by a transgender woman forced to marry and have sexual intercourse with another woman.

Sou Sotheavy, a transgender woman, was unable to express her gender identity openly during the Khmer Rouge regime. Due to being assigned male at birth, she was forcibly married to a women in a ceremony involving 117 couples.<sup>43</sup> Despite referring to Sou as a transgender woman and at times using female pronouns<sup>44</sup>, the Chamber repeatedly misgenders Sou by using male pronouns throughout the judgment.<sup>45</sup> The Chamber compounds this normative violence by failing to address whether Sou, who testified that she and her wife decided together to sexually consummate the marriage out of fear of the repercussions if they did not,<sup>46</sup> qualifies as a victim of gendered sexual violence rising to the level of inhumane acts. In failing to do so, the Chamber implicitly finds that Sou "raped" her wife and while qualifying as a victim of forced marriage as an inhumane act, Sou was not the victim of any criminal sexual violence, despite being forced not only to have sex against her will, but to do so with a woman in contravention to Sou's

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42. *Id.*

43. Case 002/02 Trial Judgment, *supra* note 31, ¶ 3632.

44. *Id.* ¶ 3679.

45. *Id.* ¶ 3657 ("SOU Sotheavy did not have sexual intercourse with *his* wife for several weeks after their weddings. *He* and *his* wife were then called separately by the village chief and warned that if it was discovered that they had not consummated their marriage, they would be smashed [i.e. killed]. *He* was given some wine and after drinking the wine and being warned repeatedly, *he* and *his* wife decided to consummate the marriage.") (emphasis added).

46. *Id.*

sexual preference.

## VII. THE SUPREME COURT CHAMBER JUDGMENT'S (QUEER?) REVISIONS

On appeal, the Supreme Court Chamber, the ECCC's highest appellate body, took the Trial Chamber to task for its reductive analyses of the gendered dimensions of forced marriage and forced consummation under the Khmer Rouge regime. In a particularly scathing passage, the Chamber overturned:

the Trial Chamber's finding that there was insufficient evidence of serious mental or physical harm or suffering on the part of the male victims who were forced to consummate their marriage. The Trial Chamber reached a conclusion no reasonable trier of fact could have reached, and also failed to provide a reasoned opinion. Particularly prominent as an error in its assessment was the different treatment of men and women with regard to identical factual circumstances. The Trial Chamber also made unreasonable findings on the evidence and failed to consider direct relevant evidence. This Chamber has also held that the Trial Chamber erred in failing to consider whether human dignity had been seriously breached in light of its negative finding on physical or mental suffering or injury. This Chamber has, furthermore, found that forcing individuals to have sexual intercourse amounted to a serious breach of human dignity. This conclusion applied to both male and female victims, albeit with distinctive elements applicable to each.<sup>47</sup>

The Supreme Court Chamber ultimately set aside the Trial Chamber's findings regarding the gendered dimensions of forced sexual consummation, holding "that male victims who were forced to have sexual intercourse in the context of forced marriage experienced at a minimum serious mental harm, and also a serious attack on human dignity" and as such were victims of the crime against humanity of other inhumane acts.<sup>48</sup>

The Supreme Court Chamber also took issue with the Trial Chamber's blindness to the gendered nature of the harms experienced by Sou and its misgendering of her in parts of its judgment.<sup>49</sup> The

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47. *Prosecutor v. Nuon*, 002/19-09-2007-ECCC/SC, Appeal Judgment, ¶ 1590 (Dec. 23, 2022) [hereinafter "Case 002/02 Appeal Judgment"] (internal citations to Trial Judgment omitted).

48. *Id.* ¶ 1591.

49. *Id.* ¶ 1340, n. 3771 ("This Chamber uses the term 'she' in light of SOU

Chamber made an effort to recognize the distinctively gendered harms suffered by Sou as a transgender woman forced to marry and have sex with another woman.<sup>50</sup> The Chamber noted that not only was Sou forced to cut her hair and “dress as a male,”<sup>51</sup> but also “was required to engage in penile penetration of a female, an act to which neither party consented but in which both parties participated out of fear of death.”<sup>52</sup>

The Supreme Court Chamber further took the Trial Chamber to task for failing to address the specific harms suffered by Sou:

Unlike most other “husbands”, however, SOU Sotheavy suffered the additional harm of being compelled to dress and appear as a man, as well as engage in sexual intercourse involving the penetration of a biological woman, which was contrary to SOU Sotheavy’s own identity as a transgender woman. SOU Sotheavy underscored the extremity of her situation by referencing how she knew of other transgendered people who drank poison or committed suicide rather than engage in forced marriages with a woman in which sexual consummation was required. Furthermore, she described how this single occasion of forced sexual intercourse on her part “was the only time [in her life] that [she] had sexual intercourse with a woman”. Given the aggravated harm caused by the forced sexual intercourse to SOU Sotheavy as a transgender woman, the Trial Chamber should have further taken her experience into account in its findings on serious mental or physical suffering or injury caused to women.<sup>53</sup>

### VIII. A TALE OF TWO CHAMBERS: HOW QUEER CAN INTERNATIONAL CRIMINAL LAW BECOME?

In the context of ECCC Case 002/02 the Supreme Court Chamber clearly issued a much-needed corrective to the Trial Chamber’s reductive framings of gender and sexuality in its holdings regarding forced marriage and forced sexual consummation. The Trial Chamber framed the harms

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Sotheavy’s self-description as a transgendered person. Although SOU Sotheavy is a biological male, she states that she has worn female clothing since the age of ten and she ‘wore a long skirt and had my long hair tied up, and I behaved like a woman,’ even during the early days of her captivity by the Khmer Rouge.”). Interestingly, the Khieu Samphan defense argued that the Trial Chamber had “erred in drawing ‘generalised inferences’ about the harm of forced marriage from SOU Sotheavy’s personal experiences, rather than evaluating how she ‘suffered most’ as a transgendered woman forced into marriage.” *Id.* ¶ 1492. The defense did so while still misgendering Sou in its filings. *Id.* ¶ 1526. The Supreme Court dismissed these arguments. *Id.* ¶ 1340.

50. *Id.* ¶ 1528 (“[W]ith respect to the issue of forced sexual intercourse, the case of SOU Sotheavy presents distinct considerations owing to her status as a biological male who self-identifies as a transgender female.”).

51. *Id.*

52. *Id.*

53. Case 002/02 Appeal Judgment, *supra* note 47, ¶ 1529.

experienced by men forced to engage in non-consensual sexual intercourse with women under the threat of death as failing to rise to the level of rape or to qualify as an inhumane act, in contrast to the experience of women victims. The Chamber also repeatedly misgendered a transgender woman forced to marry and have sexual intercourse with another woman. The normative violence of this misgendering was compounded by the Chamber's failure to grapple with the particularized harms suffered by this victim due to their trans identity, even within its own reductionist gendered view of the sexual violence that accompanied forced marriages.<sup>54</sup>

The Supreme Court Chamber's correctives to these glaringly reductionist framings of the gendered aspects of forced marriage and accompanying sexual violence under the Khmer Rouge were much needed. Thus, returning to Stopponi's comparative analysis, the Trial Chamber's problematic framings of gender and sexuality appear similar to the ECtHR's approach in *JL*, or perhaps even the Italian Appellate Court's even worse approach. Meanwhile, the Supreme Court Chambers much more thoughtful approach to issues of gender and sexuality appear similar to that of the IACtHR in *Hernández*.

My analysis of Case 002/02 hopefully demonstrates the utility of queer theory as a tool of rhetorical analysis of international criminal law cases, even by those with at best a rudimentary understanding of queer theory. Queer theory helps us to think about how international criminal law "speaks about women" in this case. Specifically, it helps us to see how in this instance, the Trial Chamber repeatedly slips into binaries—of gender, of victims versus perpetrators of sexual violence—and how the Supreme Court Chamber seeks to speak about women, gender, and sexual violence in a more nuanced way.

The Supreme Court Chamber's judgment operates as an important corrective to the regressive notions of gender and sexual violence that permeate the trial judgment, for example by rendering visible the special harms suffered by Sou as a transgender woman who was forced not only to marry and have sexual intercourse with a woman, but also to dress and live as a man according to prevailing gendered social norms enforced by the Khmer Rouge at the time.

This type of granular analysis, however, does little in the way of helping assess whether international criminal law may be "transformed" by queer theory to address the special needs of queer subjects. Firstly, the Supreme Court Chamber's correctives only occurred after the Trial

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54. The Trial Chamber implicitly found that Sou was not the victim of inhumane acts predicated on being forced to engage in penile penetrative sex with her wife by finding first that in the context of mutually non-consensual sex only the party who engages in acts of sexual penetration commits rape and further, that only such acts rose to the level of inhumane acts as crimes against humanity in a legal sense. Case 002/02 Trial Judgment, *supra* note 31, ¶ 1340.

Chamber's judgment was subjected to sustained critique.<sup>55</sup> As such, the Supreme Court Chamber may have been reactively working to remedy "bad press" regarding the trial judgment. More substantively, the Supreme Court Chamber's recognition of the special harms suffered by Sou, for example, does not answer the question of whether such harms are appropriately articulated and characterized. The Supreme Court Chamber held that men forced to engage in sexual intercourse to consummate a forced marriage were victims just as women were. It also referenced the "additional" harms suffered by Sou in this context as a transgender woman. But, in a structural sense, the Supreme Court Chamber lacked a mechanism to legally articulate these additional harms. Implicit in the judgment is that because both women and men were victims of inhumane acts by being forced to sexually consummate forced marriages, Sou was a victim like any other woman. Thus, Sou's experiences were, in a certain sense, pushed back into false binaries. The Chamber mentions the special harms she suffered at being forced to be married as a man and to have penetrative penile sex with her wife in opposition to her sexual and gender identities as a transgender woman. The Chamber, however, ends there, lacking a legal category to place these unique harms within, exposing the structural limitations of international criminal law. Sou's experiences are thus, shoehorned into being framed as the same as those of similarly situated cisgender women.

Overall, Case 002/02 raises, but does not answer the question posed by Stoppioni regarding whether international human rights, or in this case, international criminal law, can be transformed by queer theory. For example, can notions of violence, harm, and atrocity itself be queered while remaining cognizable within international criminal law? Arguably, international criminal law has taken some small steps in this direction in its relatively recent increased focus on sexual and gender-based violence. Yet, recognizing such violence does not guarantee that relevant investigators, diplomats, lawyers, judges, and institutions will embrace queer understandings of sexuality, gender, and violence themselves<sup>56</sup>, as evidenced by the Trial Chamber's extremely reductive treatment of

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55. See e.g. Rosemary Grey, *Seen and Unseen: Sexual and Gender-Based Crimes in the Khmer Rouge Tribunal's Case 002/02 Judgment*, 25 AUSTL. J. HUM. RTS. 466 (2019) (critiquing the ECCC for relegating "incidents of sexual violence against men, forced breeding, and the repression of diverse sexual orientations and gender identities" to the "margins" in the Case 002/02 Trial Judgment).

56. See David Eichert, *(Re)Constructing an International Crime: Interpreting Sexual Victimhood in the Rohingya Genocide and Beyond*, 45 U. PA. J. INT'L L. 299, 320 (2024) (observing that "for centuries the crime of sexual violence has been purposefully and explicitly articulated in international law as a crime committed by men against women"); Grey, *supra* note 37, at 481 (arguing that the trivialization of men's experiences of sexual violence, failures to understand unconventional gender identities, and "little emphasis" placed on "violations of reproductive autonomy" evident in the Case 002/02 Trial Chamber judgment are not outliers, but fall in line with "recurring omissions" of these issues in international criminal law more generally).

gender-based sexual violence within the context of forced marriage in Khmer Rouge era Cambodia.

Ultimately, I am skeptical of whether international criminal law can be truly, in a transformative sense, queered. As a manifestation of liberal criminal law, international criminal law's normative substructure is deeply embedded in rather rigid binaries. Is a situation of sufficient "gravity" to warrant investigation? Should a suspect be indicted? Where does a person fall within the victim-perpetrator-bystander triad? And of course, is an accused guilty or innocent? Moreover, due to assessments of individual culpability being the exclusive focus of the law, international criminal law necessarily excludes a whole host of forms of slow and/or structural violence, much of which may be equivalently destructive as more familiar forms of atrocity violence as well as deeply gendered in nature. While queer theory may push back against some of these binaries and associated reductive notions of gender and sexuality, a true queer transformation of international criminal law may require it to become something distinctly other than a manifestation of liberal criminal law norms. While I for one would welcome opportunities to imagine such radically different approaches to addressing atrocity violence via law, even if limited to some form of "criminal" law, I doubt queer theory could be the catalyst for such a radical change, given the current entrenchment of the prosecute and punish paradigm globally. As such, perhaps even more so than international human rights law, international criminal law appears resistant to any truly transformative queering process.

More generally, both international human rights and international criminal law are embedded within public international law. While queer theory can clearly enrich human rights and international criminal law, more radical possibilities of queer transformations of these regimes may be tied to challenging the problematic normative foundations of international law more broadly; foundations embedded in legitimating conquest, killing, racism, and colonial plunder that critical scholars of various orientations have worked hard to excavate for decades. Moreover, in relation to gender and sexuality specifically, David Eichert argues that international criminal law understandings of gender, sex, and sexual violence are "grounded in a long European legal tradition of understanding gender as both binary (only men and women) and hierarchical (men as more important than women)."<sup>57</sup>

Despite these efforts, there is little evidence that actors wielding the power to meaningfully change international law to acknowledge and address these foundational shortcomings have any interest in doing so. Perhaps it is this willful blindness, and the deeper invisibilities of international law's own shortcomings that queer theory may be most

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57. David Eichert, *Decolonizing the Corpus: A Queer Decolonial Re-Examination of Gender in International Law's Origins*, *MICH. J. INT'L L.* 557, 559 (2022).

helpful in unmasking through its emphases on questioning prevailing power relations and resisting simplistic binary-based thinking. It is this insight that Stoppioni's excellent chapter placed into focus for me and while I remain skeptical, I certainly hope queer theory plays a role in such a much-needed transformation.