

“THIS IS NOW THE MOST IMPORTANT TRIAL IN THE WORLD”: A New Reading of Code #6, the Rule Against Immoral Offenses Under the Khmer Rouge Regime

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This paper provides a gender analysis² of Code #6, the official policy of the Khmer Rouge regime on sexual relations. It argues that Code #6 was not primarily, if at all, an anti-rape policy and therefore does not exonerate senior Khmer Rouge cadre from the sexualized violence committed under their leadership. This paper reviews the mounting body of research on sexual violence during the Khmer Rouge regime, including personal testimonies from survivors and witnesses as part of the Cambodian Women’s Oral History Project.³ A counter narrative emerges: rather than protect victims, Code #6 facilitated the sexual abuse of women; and rather than provide recourse for victims and punishment for perpetrators, the Code was a disincentive for victims to seek justice and thereby promoted impunity for perpetrators. Linking Code #6 to forced marriage and the “enemy policy”—two of the five policies of the regime to accomplish its criminal ends that have been recognized by the ECCC⁴—this paper suggest that sexualized violence may have played a larger role in the atrocities of that era than previously calculated, with Code #6 implicating rather than exculpating senior regime leaders.

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2 See generally Lenore J. Weitzman & Dalia Ofer, *Introduction*, in *WOMEN IN THE HOLOCAUST* (Lenore J. Weitzman & Dalia Ofer eds., 1998) (calling for researchers’ attention to the structural sources of gender difference, social expectations and behaviors, and gendered specificity of experiences of and agency in conflict. The methodology likewise prioritizes women’s personal narratives as a means of better understanding unique aspects of women’s lived ordeal in atrocity).

3 There is a growing body of research and policy exchange on sexual violence under the Khmer Rouge regime, including with the CEDAW Committee and the Office of the Special Representative to the United Nations Secretary-General on Conflict-Related Sexual Violence. For a repository of many of these resources, see *GBV under the Khmer Rouge*, at www.gbvr.org. See also generally Theresa de Langis, *Cambodian Women’s Oral History Project*, at www.cambodianwomensoralhistory.org.

4 See Closing Order, Case 002/19-9-2007-ECCC-OCIJ, ¶ 157 (Sept. 15, 2010). The five policies listed in the Closing Order are: forced movement; collectivization; an “enemy policy”; persecution of targeted groups based on religion, ethnicity and race; and regulation of marriage.

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I. INTRODUCTION

The United Nations-backed hybrid tribunal, the Extraordinary Chambers in the Courts of Cambodia (ECCC), was created in 2006 to bring those most responsible in the Khmer Rouge leadership to justice for crimes committed under the regime between April 17, 1975 and January 7, 1979.⁵ The current trial, Case 002, is considered one of the most complex since the Nuremberg Tribunal’s proceedings, reckoning with the highest death toll from mass atrocity since the Holocaust. Due to the gravity of the charged crimes and the leadership level of the accused, it has been called “the most important trial in the world” by Stephen J. Rapp, United States Ambassador at Large for War Crimes Issues, on behalf of one of the Court’s primary funders. The now commencing second trial segment, Case 002/02, is especially unique for taking up, among other charges, forced marriage and rapes within forced marriage.⁶ However, as to the myriad forms of other sexual violence reported by victims and witnesses from the Khmer Rouge period, the ECCC’s investigation found that, though rapes did occur, the accused senior leaders could not be held responsible because there was an official regime policy, Code #6, intended to prohibit rape and punish perpetrators.

2. “THERE WAS A RULE”

Colloquially speaking, the accepted thesis is that rape did not occur under the Khmer Rouge regime because “there was a rule” prohibiting it. Code #6 is listed as one of the “Twelve Codes of Conduct of the Combatants” circulated by the Khmer Rouge leadership as a series of disciplines expected of all cadre, with these norms imposed even on the general population. Code #6 is virtually universally

5 For background on the formation of the ECCC, see THE KHMER ROUGE TRIBUNAL (John D. Giorciari ed., Documentation Center of Cambodia 2006).

6 For a timeline on charges related to sexual and gender-based violence by the ECCC, see Theresa de Langis, *A Missed Opportunity, A Last Hope? Prosecuting Sexual Crimes Under the Khmer Rouge Regime*, 2 CAMBODIA L. & POL’Y. J. 39 (2014), at <http://cambodialpj.org/article/a-missed-opportunity-a-last-hope-prosecuting-sexual-crimes-under-the-khmer-rouge-regime/>.

known by regime survivors, and is most often paraphrased as the rule against “immoral offenses.” In the Closing Order for Case 002, which serves as the indictment of charges based on investigative findings, Code #6 is referred to as the “Party’s Moral Code” and translated as “do not take liberties with women.”⁷ The Closing Order identifies Code #6 as the basis for excluding liability of the senior level accused for rapes (outside of forced marriage) committed under their leadership:

[While] it is clearly established that under the Democratic Kampuchea^[8] regime crimes against humanity of rape were committed in diverse circumstances, notably in the security centres... [,] the official CPK policy regarding rape was to prevent its occurrence and to punish the perpetrators. Despite the fact that this policy did not manage to prevent rape, it cannot be considered that rape was one of the crimes used by the CPK leaders to implement the common purpose.⁹

Code #6 in this instance is assumed to be an anti-rape policy: “[T]he official CPK policy regarding rape was to prevent its occurrence and punish the perpetrators.”¹⁰ While rapes did occur, demonstrating that the policy was ineffectual as deterrence, according to the Closing Order for Case 002 the existence of the policy absolves the accused of responsibility for these crimes and dissociates rape from the atrocities committed in furtherance of their joint criminal enterprise.

In equating Code #6 with an anti-rape policy, the Closing Order likewise equates “immoral offenses” with rape. Yet, it is highly unlikely that Code #6 was primarily, if at all, intended to prevent rape *per se*. As a result, the policy “did not manage to prevent rape,” especially by state actors of the regime. Upon closer reading, Code #6’s primary injunction was against *any* sexual relations outside of state-sanctioned marriage, regardless of whether the sexual relation was voluntary or forced. The most commonly cited English translation of Code #6 is published in *Searching for the Truth*, the magazine of the Documentation Center of Cambodia (DC-Cam): “Do not abuse women (forcing a woman to have consensual sex or

7 Closing Order, *supra* note 4, ¶ 191.

8 The Khmer Rouge was officially called the Democratic Kampuchea; its political party was the Community Party of Kampuchea (CPK). For the purposes of this paper, the more common parlance of the Khmer Rouge regime is used.

9 Closing Order, *supra* note 4, ¶¶ 1426, 1429 (citations omitted).

10 *Id.* ¶ 1429.

having sex with a woman who is not your wife).”¹¹

Although not noted, this translation is only a small excerpt of the full policy. Additionally, the information in the parenthesis is authorial commentary and not part of the original Code. The first commentary example problematically equates “abuse of women” with rape: “*forcing* a woman to have *consensual* sex. . .” In contrast, the second example (“having sex with a woman who is not your wife”) unquestionably refers to *any* extra-marital sexual activity, without addressing questions of consent or coercion.

Cambodian analysts, in contrast to international scholars, most often interpret “immoral offense” to mean extra-marital sexual activity, primarily via secret, and consensual, love affairs.¹² When Code #6 is read in its entirety, its emphasis on sexual relations outside of marriage is much more distinct, and its concern with rape more tenuous. The full text of Code #6 reads:

6. Never commit any moral misconduct toward women.

In short, never commit any moral misconduct toward women and men. Our honor, revolutionary influence, the clean and dignified culture of our people would be affected if such acts were committed. On the one hand it would affect our people. On the other hand, and most importantly, if we committed such moral misconduct toward women and men, which is an acutely corrupt element believed to be possessed by enemies of all sorts, we would be easily lured by the enemy. This act is therefore dangerous to us and to the revolution movement.

There is no obstacle concerning the present arrangement of marriages, so long as the following principles are adhered to:

11 Youk Chhang, *Letter from the Director*, 15 SEARCHING FOR THE TRUTH 2 (Mar. 2001). DC-Cam serves at the central repository of records of the Khmer Rouge era. See DC-Cam, at www.dccam.org.

12 See, e.g., Youth for Peace, *Neary Padevat: Female Revolutionaries, Stories of the Khmer Rouge from Female Cadre* (2012). Where Code #6, or the policy against “moral offenses,” is referenced, it is within the context of sex outside of marriage. See in particular where a narrator describes how “a couple could not have a love affair before getting married” *Id.* at 29. “Moral offenses” are defined as “secret [I]ove affairs” in Sokhym Em, *Criticism and Self-Criticism*, 31 SEARCHING FOR THE TRUTH 18 (July 2002). Cf. Katrina Anderson, *Turning Reconciliation on Its Head*, 3:2 SEATTLE J. SOC. JUST. 790 (2005) (stating that “[i]n contrast to other regimes, the Khmer Rouge was widely known to have espoused a policy strictly forbidding rape”). Colloquially, the policy on “immoral offenses” is often described as “Do not love one another,” with its expansive reach prohibiting even parental affection for children, as *Angkar* was the “parent” of all. Even smiling, glancing, flirting and laughing were offenses. See generally Kalyanee Mam, Note, *Democratic Kampuchea (1975-1979): Women as Tools for Social Change*, DC-Cam 33-53 (Nov. 2000).

- First. Each to-be-married individual consents to the marriage; and
- Second. It is approved by the collective.

When these principles are followed, there is no reason for anyone to commit moral misconduct toward women and men.¹³

While “moral misconduct” does not exclude rape, or coerced sex, the policy’s central admonishment is to prohibit sex outside of marriages sanctioned—and, in virtually all instances during the period, forced—by the regime (i.e. “approved by the collective,” or *Angkar*¹⁴).

3. CODE #6 AND FORCED MARRIAGE

When read as a prohibition against any sexual activity outside of marriage, and when read as directed toward men in particular, the policy’s meaning stabilizes as a rationalization of forced marriage, especially for the civilian population. In paraphrase, the policy asserts: There is no need to have sexual relations outside of marriage, because *Angkar* will assign spouses to all men and women of reproductive age. Indeed, it is estimated that several hundred thousand individuals, both men and women, were subjected to the policy of forced marriage and coerced into conjugal relationships against their will and under penalty of punishment or death. New research suggests that men were in many instances permitted to “request” wives for final approval by *Angkar*; that sexual relations were compulsory in these arrangements, resulting in cases of rape of wives by husbands, with at least one documented rape aided and abetted by Khmer Rouge actors; and that forced marriage contributed to a state-enforced culture of rape, whereby sexualized violence was normalized within marriage (and, as discussed *infra*, as a form of punishment by Khmer Rouge actors).¹⁵ Perversely, although the state has a duty to

13 This translation was done by an independent professional translation company based on an electronic scan of the original code in Khmer from the DC-CAM archives.

14 Literally, “the Organization,” referring to the highest political body of the Khmer Rouge.

15 Rape did not always result from these marriages, with instances of couples agreeing to have sexual relations for survival or to hide the fact they were not having sex from Khmer Rouge spies. See Theresa de Langis, Judith Strasser, Thida Kim & Taing Sopheap, “*Like Ghost Changes the Body*”: *The Impact of Forced Marriage under the Khmer Rouge Regime*, Transcultural Psychosocial Ass’n (Oct. 2014), at http://tpocambodia.org/fileadmin/user_upload/pdf/pdf-2/Forced_Marriage_Study_Report_TPO_October_2014.pdf. For the conditions of women under forced marriage during the regime, see Cambodian Defenders Project, *List of Critical Issues Submitted to the Committee on the Elimination of Discrimination against Women Regarding Sexual and Gender-Based Violence (SGBV) in Conflict in Cambodia* (Jan. 2013). These resources can be located at www.gbvr.org.

protect and prevent human rights violations, in this scenario the state compelled the violation, and at times state agents were the direct perpetrators.

Sok Samith, whose life-story is included in the Cambodian Women's Oral History Project, recounts how Code #6 operated in (and was commonly understood by) the civilian population, linking it specifically to forced marriage:

We were not allowed to love each other under the Khmer Rouge. There was a rule against “immoral offenses.” If an unmarried man and unmarried woman were caught wasting time together and suspected of loving each other, the Khmer Rouge would kill them or send them to prison. We were not allowed to have girlfriends or boyfriends. It was very strict—there was no flirting allowed, you could not love each other even without touching, we were not allowed to look each other in the face. Women and men could only be assigned by *Angkar* to marry. If you were found to be in love, you were killed. Only those not afraid of dying dared to love each other. For those afraid of dying, they dared not do so.¹⁶

The fact that consensual relationships were punished under Code #6 as “immoral offenses” is consistent with the thesis that Code #6 had as its target the regulation and control, for state purposes, of *all* sexual activity, and that it was rigidly enforced for the civilian population. Stories of rape committed by civilians outside of marriage are non-existent in the research, while the famous story of Bophana is an object lesson for the way in which consensual relations were harshly punished.¹⁷ Sok Samith recounts in her oral history an example of a Khmer Rouge cadre killing himself rather than face punishment for a consensual secret affair, providing some evidence that enforcement of the policy against secret sexual affairs extended to state actors.

Forced marriages and the rapes inside those marriages are charged by the ECCC in Case 002 as a crime against humanity. Those charges are documented through witness and survivor testimonies describing how regime policy reduced sex to its basic utilitarian purpose to meet the reproductive ideological aims of the

16 Theresa de Langis, Personal Interview, Narrator #2, Cambodian Women's Oral History Project (Jan. 26, 2012).

17 See ELIZABETH BECKER, *BOPHANA: LOVE IN THE TIME OF THE KHMER ROUGE* (2010). Bophana underwent five months of torture at the S-21 prison, generating the largest confession file at that execution center, charged with exchanging love letters with her consensual lover, her secret husband.

regime.¹⁸ In prohibiting sexual activity outside of the context of marriage, Code #6 rationalized the system of forced marriage and facilitated the rapes that happened within them, thereby providing the state total control over all sexual activity for revolutionary ends. Code #6 directly implicates rather than exculpates the accused in this crime.

4. CODE #6 AND RAPE

When reviewing Code #6's actual implementation as policy, it can be seen that the Code was concerned only peripherally with rape outside of marriage. Logically, Code #6 was an either/or proposition: the policy could not be implemented both to protect victims from coerced sex outside of marriage and to punish *any* sex outside of marriage, as to be implicated in the first was to be liable (and therefore punished) for the latter. This conclusion is supported by accumulative research. Studies show that Code #6 was implemented in instances of *both* consensual *and* non-consensual relations outside of marriage. In cases of rape, it was enforced against *both* the victim and the perpetrator. The common denominator in all scenarios was a prohibition of sexual activity outside of state-sanctioned—most often forced—marriage, which disrupted the state's control over sexual activity.

In one of the earliest extended treatments of sexual abuse under the regime, Kalyanee Mam found that Code #6 was “applied regardless of whether the act was voluntary or forced,” with punishment wielded against both victim and perpetrator in cases of coercion.¹⁹ Katrina Natale's 2011 study on the full range of sexual violence under the Khmer Rouge (including and beyond rape) both validates Mam's findings and extends them. The findings in Natale's study of two provinces suggests that Code #6 was most often applied to *consensual* relations, and that in non-consensual relations, victims were punished *more often* than perpetrators.²⁰ While all of her respondents were aware of the Khmer Rouge's “policy prohibiting moral offenses,” and many reported having seen individuals punished for such

18 See ELIZABETH BECKER, *WHEN THE WAR WAS OVER: CAMBODIA AND THE KHMER ROUGE* REVOLUTION 184 (1998).

19 Kayanee Mam, *Evidence of Sexual Abuse during the Rule of Democratic Kampuchea*, I5 SEARCHING FOR THE TRUTH 2 (Mar. 2001).

20 See Katrina Natale, “I Could Feel My Soul Flying Away from My Body,” *A Study on Gender-Based Violence during Democratic Kampuchea in Battambang and Svay Rieng Provinces*, Cambodia Defenders Project (2011). Of those surveyed for the study, 64.5% were aware of rape perpetrated by actors of the Khmer Rouge state, with close to a third directly witnessing such acts, and nearly a quarter reporting knowledge of sexual mutilation. In all but one instance, the perpetrator was identified as an agent of the Khmer Rouge, and in all but two cases the perpetrator was identified as male. *Id.* at 3. The overwhelming majority of victims were women. Only in one case did a respondent report that a perpetrator was punished.

offenses, the overwhelming majority of those punished were in what were considered *consensual* relationships.²¹ In contrast, Natale found that despite “rape being overall the single most reported type of GBV [gender-based violence] by participants” in her study, the vast majority of perpetrators—an overwhelming majority of whom were male agents of the Khmer Rouge regime acting in their official state capacities—were reported to have gone unpunished.²² Moreover, even in the few cases cited where perpetrators were punished for immoral offenses, “it is not entirely clear that [gender-based violence, or rape] was the reason for the punishment.”²³ de Langis and Studzinsky argue further that perpetrators could be pardoned and exempt from punishment under Code #6 if they demonstrated a “good revolutionary” background.²⁴ Collectively, the research strongly suggests two separate regimes of enforcement for Code #6 penalties—one for Khmer Rouge actors, another (more rigid) for the civilian population.

As for rape victims, the research of Mam and others has found that, due to the Code #6 policy, they may have been more likely to be murdered by the perpetrators to conceal the evidence.²⁵ For those rape victims who survived, the Code was a distinct disincentive to seek justice, because “if they accused their rapist, they would only succeed in implicating themselves” under the rule against immoral offenses.²⁶ Rather than being protected by Code #6, they may have been at greatest risk of being punished under the policy, especially when there was a resulting pregnancy—impossible to conceal and difficult to endure under the harsh regime conditions. For example, Sok Samith recounts how her friend was punished under Code #6:

Yes, in that regime, I myself say the exact story as that of sister Ouk, raped until she was pregnant and then sent to prison, tortured and beaten, her legs in chains for everyone to see. She had her baby in that prison.²⁷

Sok Samith goes on to distinguish how women and men received different punishments under Code #6:

21 Natale, *supra* note 20, at 2.

22 *Id.* at 3, 27.

23 *Id.* at 44.

24 See Theresa de Langis & Silke Studzinsky, *Briefing Paper on the ECCC, the Cambodian Women’s Hearing, and Steps for Addressing Sexual Violence under the Khmer Rouge Regime* (May 2012) (unpublished manuscript on file with author).

25 Kayanee Mam, *Evidence of Sexual Abuse*, *supra* note 19, at 4.

26 *Id.*

27 de Langis, “Personal Interview,” *supra* note 16.

The woman was always punished more than the man. . . . Ouk was sent to prison [when she was seven-months pregnant] and then tortured so everyone could see she was seriously punished. They shackled her legs and forced her to dig the dyke[.] . . . She was released in 1977, but she was later killed as part of the regime's targeting of the Vietnamese population. For the man, for Ta So, [a senior district officer for the regime,] I did not see any torture. They sent him away but we didn't know where[;] he disappeared. After the Khmer Rouge collapsed, he was back home as though nothing had ever happened.²⁸

In this case Code #6 was applied in an instance of rape; however, the victim was punished apparently rather than the perpetrator, a Khmer Rouge actor, and was certainly punished more publicly and harshly. The case of Ouk suggests that punishment of women for sexual violations was a spectacle intended for the entire community, further entrenching a normalized rape culture whereby sexual control of women's bodies was monopolized by the state, and women were treated as the primary guilty party in cases of sexual violence. Contextualized within the cumulative research, Sok Samith's account of Ouk's ordeal supports the thesis that Code #6 was enforced inconsistently and infrequently against Khmer Rouge actors for rape of civilian women. Additionally, Vietnamese such as Ouk were at higher risk of sexual abuse due to the Khmer Rouge's "enemy policy," discussed *infra*.

Thus, the relation of Code #6 to prohibiting and punishing rape is tenuous at best: inside forced marriage, rape was compelled (as recognized in the Case 002 indictment, and as rationalized by Code #6 itself); outside of marriage, all sexual activity was punished as divergent from the revolution, regardless of whether consensual or coerced. In either instance, Code #6 served primarily as a means to regulate sexual activity and ensure that it conformed to revolutionary aims. As such, the policy appears to have had two separate enforcement regimes: one for civilians and one for Khmer Rouge actors. For civilians, in light of the paucity of documented rapes of civilians by civilians outside of forced marriage during the period, the Code and its harsh penalties evidently served as a deterrent to rape outside of forced marriage. At the same time, for civilians, the Code at least rationalized compulsory sexual relations within forced marriages, which at times amounted to rape. For Khmer Rouge actors, who are most often reported as the alleged rapist outside of forced marriage, yet rarely reported punished *per se* for the sexual violence under the Code, Code #6 essentially facilitated a *de facto* state

monopoly on sexual violence during the regime.²⁹ That monopoly was exerted both indirectly (by cadre compelling husbands to rape within forced marriage), and directly through rapes and other sexual violence perpetrated nearly exclusively by state actors.

5. CODE #6 AND THE ENEMY POLICY

When contextualized within the Khmer Rouge's enemy policy, the fact that state actors were the most common perpetrators but rarely punished suggests that at least in some instances rape was considered a legitimate tool in advancing the aims of the revolution. The Case 002 Closing Order refers to the enemy policy as one of the five policies used by the Khmer Rouge leadership to implement and defend its socialist revolution through "the reeducation of bad-elements' and the killing of 'enemies', both inside and outside the Party ranks, by whatever means necessary."³⁰ The policy was primarily a means to identify and punish acts of political subversion against the state—which could be as slight an infraction as complaining of hunger or exhaustion, or later in the regime, being suspected of treason and collaboration with the Vietnamese. To implement the policy, nearly 200 security centers and countless execution sites throughout Cambodia were established.³¹ Those suspected of immoral offenses or violations of Code #6 were also considered bad elements or enemies depending on the gravity of the offense. Additionally, detainees were routinely questioned about immoral offenses as part of their interrogation, presumably even when their detention was unrelated to Code #6.³² Significantly, according to the Closing Order the Khmer Rouge state did not draw distinctions between civilians and state actors in eliminating enemies, indicating that "enemies" may have occupied a separate category of "citizenship" bereft of protections or rights.³³

Just as the enemy policy occupied itself with immoral offenses in punishing subversion against the total revolution, Code #6 alluded to the enemy policy in justifying its prohibition against sexual relations outside of marriage. Indeed, the Code distinguishes between the "clean" and "dignified" revolution of the Khmer Rouge and the "acutely corrupt" "enemy," "dangerous" for its seductive "lure[.]" thereby defining any sexual relations outside of revolutionary aims as politically

29 While Khmer Rouge actors were rarely punished for moral offenses *per se*, there are instances where moral offenses were used as an excuse by the regime to purge those state actors deemed "enemies," as discussed *infra*.

30 Closing Order, *supra* note 4, ¶ 1428.

31 *Id.* ¶ 178.

32 *Id.* ¶ 191.

33 *Id.* ¶ 1364.

subversive. In marking the enemy as sexualized, the Code both dehumanized the enemy and rationalized sexualized punishment for political infractions. If Code #6 was intended to extend protections against rape, it appears that such protections did not extend to “bad elements” or “enemies.” Indeed, in equating illicit sexual activity with the political enemy, the Code created a sexual social hierarchy whereby the perceived enemy could be raped by state actors with impunity.³⁴ In this way, Code #6 synergistically re-enforced the enemy policy promulgated by the highest Khmer Rouge leadership.

Under the enemy policy, those targeted for arrest, re-education, imprisonment, torture, or execution were *de facto* dehumanized; to expunge their corruption, they were eliminated, according to the Closing Order, by “whatever means necessary.”³⁵ The Closing Order explicates “by whatever means necessary” of the enemy policy as such:

[B]eatings, applying electric shocks, asphyxiation... , simulated drowning, puncturing and extracting fingernails and toenails and inserting needles in them, inflicting cigarette burns, forcing detainees to pay homage to images of dogs or other objects, force feeding excrement and urine, direct or indirect threats to torture or kill detainees or their family members, the use of humiliating language, plunging detainees in a water jar or suspending them from their hands tied behind their back.³⁶

When glossed with the sexualized language of Code #6, the absence of sexual torture, including rape and sexual mutilation, is conspicuous. Both Code #6 and the enemy policies made permissible the most inhumane treatment against the enemy, with the enemy policy providing impunity for perpetrators acting as agents of the state to meet revolutionary goals. The existence of the enemy policy, alongside the policy on “immoral offenses,” suggests senior political leaders were aware or should have been aware that sexual violence could and would be used to execute the enemy policy by “whatever means necessary” to fulfill the aim of creating a pure revolution, and that Code #6 permitted sexual abuse as a means to exact punishment against a sexualized enemy for cases of perceived political offense.

34 See de Langis & Studzinsky, *supra* note 24. The authors point to the indictment on one charge of rape of Kang Kew Iew (*alias* Duch) showing that sexual violence against the enemy was “neither prohibited nor punished.”

35 Closing Order, *supra* note 4, ¶¶ 175, 1428.

36 *Id.* ¶ 1410.

The use of the “moral code” for political purposes in conjunction with the enemy policy is well documented. As discussed above, the Closing Order for Case 002 states that “detainees were *routinely* questioned about ‘immorality’ during interrogations” and that rapes were found to have taken place *most notably* at security centers.³⁷ Trudy Jacobsen discusses how a fabricated charge of “moral offense” played a role in the political purge of the Chief of Phum Angdong,³⁸ while “The Forced Confession of Hu Nim” recounts how a member of the political elite (the Minister of Information) was purged as a result of a series of political and sexual intrigues that are difficult to disentangle.³⁹

The political purges of the Eastern Zone in 1978 and at Svay Chrum hospital are reported to have included rapes, and Natale found increases in rape and mass rape during Khmer Rouge political purges as they affected Svay Rieng province.⁴⁰ Rape is also documented as a tool of political punishment and torture. In ECCC Case 001, Kaing Guek Eav, alias *Duch*, was convicted of one count of rape as an element of torture in the notorious S-21 prison he oversaw. Van Nath, one of the handful of prisoners to have survived the S-21 death camp, documented through his famous paintings the use of gang rape at the prison against a female prisoner.

In inscribing the ubiquitous “enemy” within a sexual paradigm of social order, Code #6 also rationalized sexual violation, especially against those perceived to be the “enemy,” for political aims. This extended to the spouses and other family members of enemies. Research shows that wives and other family members were targeted for sexual violence when males were accused of enemy activity. Nan Mon recounted for the Cambodian Oral History Project how she was raped by a prison guard at S-21 as punishment after her father was executed for being a political enemy.⁴¹ Another project narrator, Leang Korn, recounted her experience as the sole survivor of a 30-member women’s work crew, taken into the jungle and methodically gang raped before execution as “bad elements” due to their husbands’ alleged CIA affiliations.⁴²

Women deemed enemies were apparently especially targeted for sexual abuse prior to execution at Choeng Ek, the killing fields associated with S-21. As part

37 *Id.*, ¶¶ 191, 1426.

38 TRUDY JACOBSEN, *LOST GODDESSES: THE DENIAL OF FEMALE POWER IN CAMBODIAN HISTORY* 228 (2008) (emphasis added).

39 *POL POT PLANS THE FUTURE: CONFIDENTIAL LEADERSHIP DOCUMENTS FROM DEMOCRATIC KAMPUCHEA, 1976-1977*, at 279-83, 289-99 (David Chandler, Ben Kiernan & Chantou Boua eds. and trans., 1988).

40 JACOBSEN, *supra* note 38, at 229; Natale, *supra* note 20, at 3.

41 Theresa de Langis, Personal Interview with Nan Mon, Narrator #3, Cambodian Women’s Oral History Project (Mar. 5, 2013).

42 Theresa de Langis, Personal Interview with Leang Korn, Narrator #4, Cambodian Women’s Oral History Project (Mar. 15, 2014). *See also* Theresa de Langis, Personal Interview with Prak Yoeun, Narrator #11, Cambodian Women’s Oral History Project (Dec. 10, 2013).

of the audio tour of the numerous mass graves at the memorial Choeung Ek Genocidal Center, one grave is distinguished by an explanatory note on the use of sexual violence before execution, with this mass grave being the only one on the grounds where the remains were found to be naked, containing the bodies of 100 women and children.

This is consistent with global genocide studies showing how women targeted for extermination (that is, deemed the enemy) are at highest risk of rape.⁴³ Additionally, emerging patterns across genocides show that in cases where a specific policy expressly prohibits state actors from engaging in sexual relations with the enemy population, such as during the Holocaust, these policies may serve to accomplish their opposite effect, with enemy “women becom[ing] more desirable prey, but also more invisible as human beings,”⁴⁴ and therefore at higher risk of abuse.

6. CODE #6 AND GENDERED ATROCITY

Sexual violence during genocide, like sexual violence generally, is a specific type of harm that has gendered dimensions, serving as a means of expressing a masculine identity associated with violence and control, whether perpetrated against women or men. The harms and the structures that create the conditions for sexual violence are replicated globally, even as they are “culturally variant, cross cultural, hierarchical and knitted into the fabric of everyday” life as a means of establishing gender roles, expectations and behaviors.⁴⁵

Violence against women is the most pervasive yet under-recognized human rights violation in the world.⁴⁶ Indeed, even when configured as an offense, it is often referred to as a crime against “honor,” not a crime of violence.⁴⁷ Even less frequently is it considered as a crime of gender-based violence, motivated by a

43 Helene J. Sinnreich, *The Rape of Jewish Women during the Holocaust*, in *SEXUAL VIOLENCE AGAINST JEWISH WOMEN DURING THE HOLOCAUST* 118 (Sonja M. Hedgpeh & Rochelle G. Saidel eds., 2010).

44 Niomi Levenkron, *Death and the Maidens: “Prostitution,” Rape, and Sexual Slavery During World War II*, in *SEXUAL VIOLENCE AGAINST JEWISH WOMEN DURING THE HOLOCAUST* 14 (Sonja M. Hedgpeh & Rochelle G. Saidel eds., 2010).

45 Gina Heathcote, *Time to Rethink the Women, Peace and Security Agenda?*, Intlaw Grrls: Gender Voices on International Law, Policy and Practice (July 3, 2013), at <http://ilg2.org/2013/07/03/time-to-rethink-the-women-peace-and-security-agenda/>.

46 Mary Ellsberg & Lori Heise, *Researching Violence Against Women: A Practical Guide For Researchers And Activists*, World Health Organization (2005), at 9, at www.path.org/publications/files/GBV_rvaw_complete.pdf.

47 *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW*, 370-77 (Roy Gutman, David Rieff & Anthony Dworkin eds., 2nd ed. 2007). See also *Analytical and Conceptual Framework of Conflict-Related Sexual Violence*, UN Action Against Sexual Violence in Conflict (2011), at <http://gbvaor.net/wp-content/uploads/sites/3/2012/10/Analytical-and-Conceptual-Framing-of-Conflict-Related-Sexual-Violence-UN-Action-against-Sexual-Violence-in-Conflict-2011.pdf>.

desire to demonstrate male power and control, authoritarian domination and supremacy.⁴⁸ A fundamental form of discrimination against women, rape reinforces rigidly defined social hierarchies and gender identities linking masculinity to force and aggression, serving to establish a culture of violence, obedience and terror, whereby the sexualized female body is “owned” and controlled by men.⁴⁹ With this in mind, we can say that Cambodian men and women experienced the same atrocities under the totalitarian Khmer Rouge regime, but in unique ways. This was due primarily to the difference in their social status and the ever-present threat of sexual violence as a means of enforcing unequal power relations between men and women, as well as between the “masters” of the revolution and the enslaved population.⁵⁰

Researchers have established how deeply embedded cultural markers of identity, especially as they concern gendered power relations, are “wielded via a myriad of violent technologies to reinforce women’s subordination and justify domination.”⁵¹ During the Khmer Rouge period, such violent technologies are reported to have included not only forced marriage and rape, but also sexual slavery, sexual mutilation, sexual torture, sexual exploitation, forced pregnancy and forced prostitution, among other acts.⁵² Not merely isolated or even secret events, sexual violations during the period included gang rapes and mass rapes, and the public display of naked mutilated corpses and sexual body parts at or near security installations.⁵³ In evoking the contrast between “clean” and “dignified” revolution and sexual transgressions, Code #6 targeted the female body for scrutiny,

48 For efforts to examine gendered aspects of sexualized violence crimes, see generally Katharine Derderian, *Common Fate, Different Experience: Gender Specific Aspects of the Armenian Genocide, 1915-1917*, 19:1 HOLOCAUST & GENOCIDE STUD. 1 (Spring 2005); MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA (Alexandra Stiglmeier ed., 1994); Lisa Sharlach, *Gender and Genocide in Rwanda: Women as Agents and Objects of Genocide*, 1:3 J. GENOCIDE RES. 387 (1999); Roger W. Smith, *Women and Genocide: Notes on an Unwritten History*, 8:3 HOLOCAUST & GENOCIDE STUD. 315 (1994).

49 Ellsberg & Heise, *supra* note 46, at 11, 24. See also Amnesty International, *Breaking the Silence: Sexual Violence in Cambodia* (2010), at <http://www.amnesty.org/en/library/asset/ASA23/001/2010/en/17ebf558-95f0-4cf8-98c1-3f052ffb9603/asa230012010en.pdf>.

50 This is not to argue that men did not experience sexual violence under the regime, sometimes by female cadre. See, e.g., Natale, *supra* note 20, at 34. It is also not to suggest that women did not experience sexualized violence before and after the Khmer Rouge regime, especially as related to the protracted civil war. See, e.g., BECKER, *WHEN THE WAR WAS OVER*, *supra* note 18, at 152.

51 Lenore Manderson & Linda Rae Bennett, *Introduction: Gender Inequality and Technologies of Violence*, in *VIOLENCE AGAINST WOMEN IN ASIAN SOCIETIES I* (Lenore Manderson & Linda Rae Bennett eds., 2003).

52 See Nakagawa Kasumi, *Gender-Based Violence under the Khmer Rouge Regime: Stories of Survivors from the Democratic Kampuchea (1975-1979)*, Cambodia Defenders Project (2008), for an early effort to systematically collect oral history narratives of sexual violence under the regime. It includes forced marriage and marital rape; punishment for refusal to marry; women awarded to soldiers; rape before killing; rape in prisons and reeducation centers; rape by Khmer Rouge officials; rape among soldiers; rape against males; sex for survival; sexual assault mutilation; and forced nudity.

53 Natale, *supra* note 20, at 2.

exploitation, and abuse.⁵⁴

Sexual violence including rape during conflict may function as a ritual degradation to instill terror and control over entire populations.⁵⁵ Often aimed at destroying the opponent's culture, rape of the women in a community stands symbolically for the rape of the community itself,⁵⁶ with rape perceived more than any other wartime trauma as the “scene of the violent encounter between the personal trauma and the collective trauma.”⁵⁷ Code #6's identification of sexual activity as a critical marker differentiating the pure revolutionary from a lurid enemy exemplifies a global pattern of sexualized violence during genocide and armed conflict, whereby women's bodies, culturally over-determined as sexualized objects of male exchange and ownership, serve as sign and cipher of the “honor” of the nation state.

Examining the gender ideology as codified in *Chpab Srey*, or the Code of Womanhood, in which women's role is equated with purity and honor of family and ancestors, illuminates this point. This traditional Khmer poem is a normative text that articulates societal expectations for women's appropriate behavior as embedded in religious, cultural, and national identity. Passed down orally from mother to daughter for generations by the time the Khmer Rouge took power, the Code continues to hold powerful sway even today, and it was taught in public schools up until 2007.⁵⁸ In the poem—and in other Cambodian oral traditions, such as the common proverb, “Men are gold, women are white cloth”—sexual purity determines women's social and cultural value, status and identity.⁵⁹ Within this paradigm, the “good Khmer woman” is steward of the reputation and honor of the family, signaled through her chastity, passivity, and submission, which in

54 The emphasis on “revolutionary purity” as a related racial purity discourse is also relevant, though beyond the purview of this paper. See, e.g., BECKER, *WHEN THE WAR WAS OVER*, *supra* note 18, at 155, 163, 242-43, on what she calls “racial pogroms.”

55 For the different functions of sexual violence in genocide, including as a means to appropriate reproduction and spoil and humiliate the “other,” see generally Helen Fine, *Genocide and Gender: The Uses of Women and Group Destiny*, I J. GENOCIDAL RES. 43 (1999).

56 *Id.* at 43.

57 Levenkron, *supra* note 44, at 23.

58 Amnesty International, *supra* note 49, at 45. *Chpab Srey* was highlighted in the 2006 Concluding Observations to the Royal Government of Cambodia from the Committee on the Convention on the Elimination Against All Forms of Violence Against Women (CEDAW) as a restrictive cultural stereotype that legitimizes discrimination against women and impedes women's full enjoyment of their human rights, and is particularly linked to violence against women and women's access to justice. See Concluding Comments of the Committee on the Elimination of Discrimination against Women: Cambodia, ¶¶ 17-18, UN Doc. CEDAW/C/KHM/CO/3 (2006).

59 For further discussion of how this controlling idea has determined women's status in Cambodia throughout history until today, see generally Nakagawa Kasumi, *More Than White Cloth? Women's Rights in Cambodia*, Cambodia Defenders Project (2006). See also Katherine Bricknell, “We Don't Forget the Old Rice Pot When We Get the New One”: Discourses on the Ideal and Practices of Women in Contemporary Cambodia, 36:2 SIGNS 437 (2011).

turn is reflective of the “purity of Cambodian culture” writ large.⁶⁰ In the logic of *Chpbab Srey*, women are the (sexual) property of men, and the sexual activity of women outside of a “legitimate” union is regarded as an outrage against family, community, ancestors⁶¹ and, during the Khmer Rouge period, the revolution. Indeed, as “good” women are by definition sexually “pure,” victims of rape are first and foremost blamed for assumed complicity in the act of sexual violation. The question of sexual consent on the part of women is therefore moot. Even if a victim can prove her non-complicity, she is nevertheless, by definition, irreparably stained by the sexual encounter. The result is a perverse reversal that entrenches impunity for perpetrators and shame and blame for victims.

The logic of *Chpbab Srey* is evident in Code #6, or the policy on “immoral offenses” under the totalitarian patriarch, *Angkar*. This point is especially salient in illuminating the gendered dimensions of the enemy policy. Recalling the intolerability of women’s sexually “soiled” status in *Chpbab Srey*, Code #6’s punishment of rape victims (possibly *more often* than perpetrators) asserted the central injunction around women’s sexual purity and passivity, even as it exerted male (sexual) prerogative and power. In certain instances, punishment of the (impure) victim under Code #6 involved even more sexual violation, again by the state, further dehumanizing sexually impure *women*. Indeed, the first victim—a transgendered woman—to pursue legal action as a civil party in ECCC Case 002 for sexual violence under the Khmer Rouge regime alleged that she was raped as a punishment for moral offenses.⁶²

In this light, it is easy to understand why women’s sexual *agency* was so harshly punished in *consensual* relations (to recall Bophana’s biography once again⁶³), with sadistic sexual tortures reportedly reserved specifically for women in these instances.⁶⁴ Natale and others have shown that even victims of rape were assigned sexual agency and often accused of being “prostitutes” and “new people.”⁶⁵ Prostitution is the embodiment of women’s sexual agency, and the elimination of prostitution is “often referred to as a goal immediately after the communist victory,” with reports of mass deaths of suspected prostitutes by cadres.⁶⁶ In daily

60 JACOBSEN, *supra* note 38, at 192.

61 *Id.* at 96.

62 ASSOC. PRESS, *Victim of Khmer Rouge Sexual Abuse Seeks Justice*, Sept. 3, 2008.

63 BECKER, BOPHANA, *supra* note 17.

64 BECKER, *WHEN THE WAR WAS OVER*, *supra* note 18, at 224 (“[T]heir breasts were slashed; their vaginal areas were burned with hot pokers; poisonous reptiles were allowed to roam their bodies; if they were mothers, they were forced to watch their children slowly tortured. They were regularly called bitch or pig.”). See also JACOBSEN, *supra* note 38, at 228 (regarding sadistic gendered punishment).

65 “New people” describes the urban population forced into the countryside when the Khmer Rouge took power, a group already considered to be “corrupt elements.”

66 Jacobsen, *supra* note 38, at 226.

life, women's bodies were under acute sexual surveillance via the regulatory gaze of the regime, with precisely a view to suppress women's seductive "lure." Indeed, Code #6, regarding *women's* bodies, did not exclusively regulate sexual intercourse, it also prohibited any "sexy style of dressing, which revealed [the] skin," and there is at least one example of a woman being punished for the "immoral offense" of wearing a short sleeve shirt.⁶⁷ Women were also banned from "decorating" with jewelry and "fashionable clothes, wearing long hair" or perfume⁶⁸ under a prohibition that served to silently sexualize capitalist tendencies. Women's bodies were required to be de-sexualized, with all ordered to wear the same uniform haircut. While men and women both wore loose fitting shirts and pants, women's shirts were required to be buttoned to the neck.⁶⁹

The logic of *Chpab Srey* was also exploited in numerous other ways, including the regime's system of forced marriage, a direct implementation of Code #6, which can be viewed as a manifestation of the state's appropriation of women's (sexualized) bodies, circulated as objects of (sexual) exchange by the political elite. The pool of civil parties comprising close to 800 victims of the "regulation of marriage"—the second largest group of victims admitted by the ECCC—will tell the details of that story in Case 002/02. The regime's practice of punishing wives and daughters along with male kin suspected as enemies likewise demonstrates women's status as extension and property of men. Other research suggests that sexual control was used to assert the Khmer Rouge's dominion and power, with elite leaders reportedly retaining "all the feudal privileges of deflowering virgins," with impunity for sexualized violence a direct correlative to the perpetrator's political power to exercise exclusive sexual prerogative as an agent of the state.⁷⁰ The social inscription of women's subordination through the environment of unchecked Khmer Rouge power, the culture of rape instituted through forced marriage, and the use of sexual violence as punishment, put women at constant jeopardy of abuse; her sexualized abuse, in turn, disciplined and terrorized (and "feminized") the entire community into submission while asserting Khmer Rouge control.

With the aid of accumulative research on the Khmer Rouge period and in global genocidal studies more generally, and situated within the specific Cambodian cultural context of entrenched gendered power dynamics and ideologies, sexualized violence takes on a larger role in the Khmer Rouge atrocities

67 Sokhym Em, *Revolutionary Female Medical Staff in Tram Kak District: Part Two*, 35 SEARCHING FOR THE TRUTH 17 (Nov. 2002).

68 *Id.*

69 *Id.*

70 JACOBSEN, *supra* note 38, at 231.

than previously calculated—with Code #6 serving to implicate, rather than dissociate, senior leaders of the regime. Code #6 was not a remedy for sexual violence but rather an instrument to rationalize and justify it, alongside its companion policies on “bad elements” and forced marriage, which the Code synergistically facilitated. These policies did not serve to protect women, but rather put women at greater risk of abuse while insuring impunity for perpetrators and, thereby, total domination over a terrorized civilian population. While it is too late for Code #6 to be made the basis of criminal charges in Case 002—“now the most important trial in the world”—at least an historical correction is called for that reflects the full specificity of women’s experiences of atrocity under the regime so as to strengthen commitments to non-repetition.