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## **Prosecuting Gender Persecution: An Analysis Into the 2022 Policy on the Crime of Gender Persecution Through Inherited Cases**

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# **Prosecuting Gender Persecution: An Analysis into the 2022 Policy on the Crime of Gender Persecution through Inherited Cases**

*Katherine Strych*

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## I. INTRODUCTION

Women and men have been subjected to persecution based on societal notions of maleness and femaleness during numerous conflicts in just the past century, but only in 1998, with the adoption of the Rome Statute, was gender persecution codified as an international crime.<sup>1</sup> On December 7, 2022, the Office of the Prosecutor (“OTP”), led by Prosecutor Karim Khan KC, published the Policy on the Crime of Gender Persecution (“2022 Policy Paper”). The 2022 Policy Paper builds upon the concepts introduced in the Rome Statute and the 2014 Policy Paper on Sexual and Gender-Based Crimes. This paper argues that the 2022 Policy Paper will provide the OTP and the international community generally with a more complete understanding of gender persecution, as well as with a clarifying and instructive framework for approaching the crime., It seeks to demonstrate this impact through examination of the ongoing trials of Ali Muhammad Ali Abd-al-Rahman and of Mahamat Said Abdel Kani.

This paper will begin by tracking the development of sexual and gender-based crimes generally. It will provide an account of their inclusion in the Rome Statute (“the Statute”). It will then describe the 2014 Policy Paper on Sexual and Gender-Based Crimes (“2014 Policy Paper”) and analyze the developments towards accountability for sexual and gender-based crimes made by Prosecutor Bensouda following its publication. The following section will describe the current ICC Prosecutor, Karim Khan’s, 2022 Policy Paper. This section will discuss the purpose and major components of the 2022 Policy Paper, as well as the statements released thus far by international actors regarding its anticipated impact. The final body section will analyze the 2022 Policy Paper through two current and ongoing cases before the International Criminal Court

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<sup>1</sup> UN WOMEN, IDENTIFYING GENDER PERSECUTION IN CONFLICT AND ATROCITIES, A TOOLKIT FOR DOCUMENTERS, INVESTIGATORS, PROSECUTORS AND ADJUDICATORS OF CRIMES AGAINST HUMANITY 4 (2021).

(“ICC”) which include charges of gender persecution. First, the facts and circumstances of the case in The Prosecutor v. Ali Muhammad Ali Abd–Al-Rahman will be applied to the components of the 2022 Policy Paper identified in the preceding section to evaluate the current and potential future impacts of the Paper. This mode of analysis will be repeated for the ongoing ICC case of The Prosecutor v. Mahamat Said Abdel Kani, applying the specific facts and circumstances of that case. Finally, the existing and potential impacts of the 2022 Policy Paper will be summarized.

## II. THE DEVELOPMENT OF SEXUAL AND GENDER-BASED CRIMES IN INTERNATIONAL LAW

### *A. Inclusion of Sexual and Gender-Based Crimes in the Rome Statute*

Sexual and gender-based crimes and gender persecution have long been marginalized and considered a natural consequence of war.<sup>2</sup> Sexual and gender-based crimes began to acquire greater acknowledgement on an international scale in the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) with charges for sexual violence in both tribunals.<sup>3</sup> Significantly, in the ICTR case against Jean-Paul Akayesu, the tribunal reached a conviction for rape as a crime against humanity and as an instrument of genocide.<sup>4</sup> Regarding the ICTY, its Statute since 1993 included rape as a crime against humanity.<sup>5</sup> Later, but significantly, the ICTY convicted Dragoljub Kunarac of rape as a

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<sup>2</sup> Barbara Bedont & Katherine Hall-Martinez, *Ending Impunity for Gender Crimes under the International Criminal Court*, 6 Brown J. of World Aff. 65, 65 (1999) <http://www.jstor.org/stable/24590222>.

<sup>3</sup> Dr. Denis Mukwege Foundation, *Jurisprudence of sexual violence in conflict: important cases at international tribunals* (2023), <https://www.mukwegefoundation.org/jurisprudence-sexual-violence/>.

<sup>4</sup> Kelly Dawn Askin, *Gender Crimes Jurisprudence in the ICTR: Positive Developments*, 3 J. of Int’l Crim. Just. 1007, 1007 (2005).

<sup>5</sup> Outreach Programme on the Rwandan Genocide and the United Nations, *Sexual Violence: a Tool of War* (March 2014), <https://www.un.org/en/preventgenocide/rwanda/assets/pdf/Backgrounder%20Sexual%20Violence%202014.pdf>.

crime against humanity and as sexual slavery.<sup>6</sup>

The Rome Statute, the treaty that established the ICC, was adopted on July 17, 1998.<sup>7</sup> In 1997, an international coalition of women's rights activists created the Women's Caucus for Gender Justice in the ICC, for the purpose of ensuring gender perspective in the Statute.<sup>8</sup> By the time of the Rome Diplomatic Conference, the Women's Caucus included about 200 women's organizations across the world, which were lobbying in their countries' capitols, as well as on the global stage.<sup>9</sup> The Women's Caucus was able to utilize the momentum from the recent consideration of gender-based violence at the World Conference on Human Rights and the Fourth World Conference, and the inclusion of sexual violence as a crime in the international tribunals for the former Yugoslavia ("ICTY") and for Rwanda ("ICTR").<sup>10</sup> Through lobbying and political compromise, the Women's Caucus was the essential catalyst to overcoming the gender crimes dissenters, particularly the Vatican and the Islamic states with concerns of being unable to prohibit abortion or homosexuality in their application, and thus the Caucus ensured the inclusion of gender crimes.<sup>11</sup>

The Statute was adopted on July 17, 1998, and was set into force with 123 State parties on July 1, 2002.<sup>12</sup> The Statute was the first international statute to explicitly include sexual and gender-based crimes as acts that may constitute crimes against humanity, war crimes, and acts of genocide.<sup>13</sup> The sexual and gender-based crimes the Statute recognizes are "rape, sexual slavery,

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<sup>6</sup> Dr. Denis Mukwege Foundation, *supra* note 3.

<sup>7</sup> Claire Klobucista, *The Role of the International Criminal Court*, Council on Foreign Relations (March 28, 2022), <https://www.cfr.org/background/role-international-criminal-court>.

<sup>8</sup> *History*, Women's Initiatives for Gender Justice (2023), <https://4genderjustice.org/history/>.

<sup>9</sup> Bedont and Hall-Martinez, *supra* note 2, at 67.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 68-69.

<sup>12</sup> Klobucista, *supra* note 7.

<sup>13</sup> INT'L CRIMINAL COURT, OFFICE OF THE PROSECUTOR, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES 1 (2014), <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> [hereinafter ICC OTP POLICY PAPER SGBC].

enforced prostitution, forced pregnancy, and enforced sterilization.”<sup>14</sup> Under crimes against humanity, it also includes “other forms of sexual violence of comparable gravity,” while under war crimes, it also includes “any other form of sexual violence also constituting a serious violation of...the Geneva Conventions.”<sup>15</sup> The Statute including rape as a war crime, in addition to rape as a crime against humanity, significantly expands the scope of rape during wartime that is covered, since the crimes against humanity definition requires a showing that the rape is widespread or systemic, while rape as a war crime does not.<sup>16</sup> The Statute was also the first international statute to recognize persecution on the grounds of gender, or gender persecution, as a crime against humanity.<sup>17</sup> Before the Statute, the crime of persecution existed for persecution under only political, racial, or religious grounds.<sup>18</sup> This inclusion of gender as a ground for persecution was a step to signify that gender-based persecution was just as reprehensible as other kinds.<sup>19</sup>

#### *B. Developments Made Under Prosecutor Fatou Bensouda– 2014 Policy Paper on Sexual and Gender Based Crimes*

Fatou Bensouda began her term as Prosecutor for the ICC in 2012.<sup>20</sup> One of Prosecutor Bensouda’s highest priorities for her term as Prosecutor was to improve the OTP’s ability to

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<sup>14</sup> Rome Statute of the International Criminal Court, Arts. 7(1)(g), 8(2)(e)(vi), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

<sup>15</sup> *Id.*

<sup>16</sup> Bedont and Hall-Martinez, *supra* note 2, at 70.

<sup>17</sup> INT’L CRIMINAL COURT, OFFICE OF THE PROSECUTOR, POLICY ON THE CRIME OF GENDER PERSECUTION 2 (2022), <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf> [hereinafter ICC OTP POLICY PAPER].

<sup>18</sup> Bedont and Hall-Martinez, *supra* note 2, at 73.

<sup>19</sup> *Id.*

<sup>20</sup> DIANE BROWN, ACCOUNTABILITY FOR SEXUAL AND GENDER-BASED CRIMES AT THE ICC: AN ANALYSIS OF PROSECUTOR BENSOUDA’S LEGACY 4 (Éléonore Morel 2021).

effectively investigate and prosecute sexual and gender-based crimes.<sup>21</sup> On March 7, 2014, when the ICC Trial Chamber issued a judgment for the case of *The Prosecutor v. Germain Katanga*, it acquitted Katanga of rape and sexual slavery as a crime against humanity.<sup>22</sup> At this point, the OTP still had achieved no convictions for sexual and gender based crimes.<sup>23</sup> Then, in June of 2014, the OTP published the Policy Paper on Sexual and Gender-Based Crimes.

The first two objectives of the 2014 Policy Paper are to: “affirm the commitment of the Office to paying particular attention to sexual and gender-based crimes in line with Statutory provisions,” and to “Guide the implementation and utilization of the provisions of the Statute and the Rules so as to ensure the effective investigation and prosecution of sexual and gender-based crimes from preliminary examination through to appeal.”<sup>24</sup> One of the ways the OTP pursued these objectives was through clarifying how it interprets the Statute’s definition of gender.<sup>25</sup> The Statute’s definition is “the two sexes, male and female, within the context of society.”<sup>26</sup> The 2014 Policy Paper states that this definition acknowledges that gender can be a social construct in which girls, women, boys, and men are assigned roles, behaviors, activities, and attributes.<sup>27</sup> This definition is significant because it establishes that gender-based crimes may target someone not only because of their biological sex, but also because of socially constructed gender roles.<sup>28</sup> Additionally, following adoption of the 2014 Policy Paper, if the OTP decides not to investigate sexual and gender-based crimes in an investigation, this decision must be internally justified and

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<sup>21</sup> Fatou Bensouda, Prosecutor, International Criminal Court, Ceremony for the Solemn Undertaking of the Prosecutor of the International Criminal Court: Statement (June 15, 2012).

<sup>22</sup> Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, ¶ 1664 (Mar. 7, 2014), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015\\_04025.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF).

<sup>23</sup> Valerie Oosterveld, *The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law*, 24 Wm. & Mary J. Women & L. 443, 445 (2018).

<sup>24</sup> ICC OTP POLICY PAPER SGBC, *supra* note 13, ¶ 6.

<sup>25</sup> BROWN, *supra* note 20, at 6.

<sup>26</sup> Rome Statute, *supra* note 14, Art. 7(3).

<sup>27</sup> ICC OTP POLICY PAPER SGBC, *supra* note 13, ¶ 15.

<sup>28</sup> *Id.*

reported to the Prosecutor.<sup>29</sup> This policy serves as a significant step towards the objective that sexual and gender-based crimes no longer be left from consideration in ICC investigations.

Following the publication of the 2014 Policy Paper, the OTP has made some notable advances towards accountability for gender-based crimes. The OTP has since opened investigations into crimes including sexual and gender-based crimes in Mali, the Central African Republic (the investigation and involved cases labelled under “CAR II”), Georgia, Burundi, Bangladesh/Myanmar, and Afghanistan.<sup>30</sup> In March 2016, in *The Prosecutor v. Jean-Pierre Bemba Gombo*, the OTP secured its first conviction for charges of sexual and gender-based crimes in the case against Jean-Pierre Bemba.<sup>31</sup> Bemba was a military commander for the Mouvement de Libération du Congo in the Central African Republic, a rebel group which pillaged communities and committed many rapes and murders.<sup>32</sup> However, on June 8, 2018, the Appeals Chamber overturned the conviction against Bemba for the sexual and gender-based crimes of rape as a crime against humanity and as a war crime.<sup>33</sup> The Appeals Chambers acquitted Bemba of these charges because it found that the evidence was insufficient to show that Bemba had met the requirements for command responsibility for the crimes.<sup>34</sup>

Following the public setback of the Bemba acquittal, the OTP secured its long-awaited first confirmation of conviction for sexual and gender-based crimes in *The Prosecutor v. Ntaganda* on March 30, 2021, when the Appeals Chamber confirmed the convictions and sentencing of Bosco Ntaganda.<sup>35</sup> Ntaganda was the commander of operations for Forces

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<sup>29</sup> BROWN, *supra* note 20, at 6.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 15.

<sup>32</sup> Int’l Crim. Ct., Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Case Information Sheet, ICC-PIDS-CIS-CAR-01-020/18\_Eng (March 2019), <https://www.icccpi.int/sites/default/files/CaseInformationSheets/BembaEng.pdf>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> BROWN, *supra* note 20, at 12.



Patriotiques pour La libération du Congo, a rebel group that strategically targeted the civilian population in Ituri, Democratic Republic of the Congo.<sup>36</sup> On July 8, 2019, Ntaganda was found guilty of the sexual and gender-based crimes of rape and sexual slavery as both war crimes and crimes against humanity, and he was sentenced to thirty years of imprisonment in total.<sup>37</sup> The ICC convicted Ntaganda of these crimes because the evidence persuaded the court that he intentionally directed their commission.<sup>38</sup> The Appeals Chamber confirming the conviction and sentence of Ntaganda provided the first example in the ICC of full legal accountability being reached against a perpetrator for sexual and gender-based crimes.

Lastly, the OTP is currently prosecuting its first gender persecution charge in *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*.<sup>39</sup> Al Hassan was a significant political leader in Ansar Eddine and Al-Qaida in the Islamic Maghreb (“AQIM”), which committed a violent attack on the civilian population of Timbuktu, Mali..<sup>40</sup> During this period, the groups enacted a policy of forcing women into marriages, causing widespread rape and sexual enslavement of women and girls.<sup>41</sup> Women and girls were also required to follow a strict dress code and could not leave their home freely.<sup>42</sup> Thus, on September 30, 2019, the Pre-Trial Chamber confirmed the charges.<sup>43</sup> This first charge for gender persecution makes a statement to the international community that the acts of rape and sexual slavery against women are not just

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<sup>36</sup> Id.; Press Release, International Criminal Court, ICC Trial Chamber VI declares Bosco Ntaganda guilty of war crimes and crimes against humanity (July 8, 2019) (on file with the author).

<sup>37</sup> Int’l Crim. Ct., Situation in the Democratic Republic of the Congo, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Case Information Sheet, ICC-PIDS-CIS-DRC-02-018/21\_Eng, July 2021, <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/NtagandaEng.pdf>.

<sup>38</sup> Id.

<sup>39</sup> Int’l Crim. Ct., Situation in Mali, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18, Case Information Sheet, ICC-PIDS-CIS-MAL-02-012/23\_Eng, March 2023, <https://www.icccpi.int/sites/default/files/CaseInformationSheets/al-hassanEng.pdf>.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> BROWN, *supra* note 20, at 13.

<sup>43</sup> Id.

crimes themselves, but that the targeting of women systematically for these acts is the crime of gender persecution that warrants its own punishment. In sum, following the 2014 Policy Paper, there was an increase in prosecutions for sexual and gender-based crimes and the first upheld conviction for such crimes. In light of this progression, as well as the lack of a charge for the specific crime of gender persecution until 2019, the OTP recognized that a policy paper on the crime of gender persecution was necessary to establish a systematic approach to gender persecution crimes.<sup>44</sup> The OTP published this new policy paper in December of 2022, which will be discussed in the following section.

### III. 2022 ICC POLICY ON THE CRIME OF GENDER PERSECUTION UNDER PROSECUTOR KARIM KHAN KC

This section discusses the stated objectives of the 2022 Policy Paper. It then explores the components and sections of the Paper that are likely to have a significant impact on the investigatory and prosecutorial process for the crime of gender persecution. Lastly, it discusses the opinions of international advocacy organizations and international law experts thus far regarding the 2022 Policy Paper.

#### *A. Purpose of the 2022 Policy Paper*

The Policy Paper on Gender Persecution was published on December 7, 2022, under the leadership of Prosecutor Karim Khan KC. Prosecutor Khan began his term on June 16, 2021.<sup>45</sup>

The 2022 Policy Paper builds upon the 2014 Policy Paper, but differs in that it seeks to provide guidance for a particular sexual and gender-based crime: the crime against humanity of

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<sup>44</sup> Press Release, Int'l Crim. Ct., The Office of the Prosecutor launches public consultation on a policy initiative to advance accountability for gender persecution under the Rome Statute (Nov. 9, 2022) (on file with the author).

<sup>45</sup> Press Release, Int'l Crim. Ct., Mr Karim Asad Ahmad Khan QC sworn in today as the Prosecutor of the International Criminal Court (June 16, 2021) (on file with author).

persecution on the basis of gender.<sup>46</sup> The 2022 Policy Paper defines key terms for investigating and prosecuting gender persecution.<sup>47</sup> It provides a regulatory framework for gender persecution through identifying the Elements of the crime, and then describes how this framework and the key terms would be applied to each stage of the OTP's process.<sup>48</sup> The OTP's purpose in publishing the 2022 Policy Paper is set forth in its introduction. The OTP states five objectives it hopes to achieve through the Paper:

“1) Affirm the commitment of the Office to pay particular attention to addressing sexual and gender-based crimes in line with its statutory mandate 2) Provide clarity and direction to staff in the interpretation and application of the Statute...in order to ensure the effective investigations and prosecution of gender persecution... 3) Contribute to advancing a culture of best practice in relation to the investigation, analysis, and prosecution of gender persecution...4) Contribute...to the ongoing development of international jurisprudence regarding gender persecution, and 5) Raise awareness regarding the importance of addressing gender persecution...”<sup>49</sup>

The overarching purpose the OTP articulates in its list of objectives is to provide the OTP and the international community generally with a greater ability to achieve justice regarding gender persecution. The potential effectiveness of the OTP in achieving these objectives through the 2022 Policy Paper will be analyzed and predicted in the upcoming sections.

### *B. Potentially Significant Components of the Policy Paper*

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<sup>46</sup> ICC OTP POLICY PAPER, *supra* note 17, ¶16.

<sup>47</sup> *Id.* at 3.

<sup>48</sup> *Id.* at ¶ 18.

<sup>49</sup> *Id.* at ¶ 16.

First, the 2022 Policy Paper expands upon the 2014 Policy Paper’s interpretation to define gender. After stating that, “Gender refers to sex characteristics and social constructs and criteria used to define maleness and femaleness, including roles behaviors, activities, and attributes,” the 2022 Policy Paper adds that, “as a social construct, gender varies within societies and from society to society and can change over time.”<sup>50</sup> A specific definition for gender persecution is not included in the “Use of Key Terms” section of the 2014 Policy Paper. The 2022 Policy Paper applies its understanding of gender to its gender persecution definition, which is written as follows: “‘Gender persecution’ is the crime against humanity of persecution on the grounds of gender, under article 7(1)(h) of the Statute. Gender persecution is committed against persons because of sex characteristics and/or because of the social constructs and criteria used to define gender.”<sup>51</sup> Since the key terms section broadly defines gender and persecution based on gender, the potential reach this authorizes for current and future investigations regarding gender persecution could be quite extensive.

In the largest section of the paper, called “Regulatory Framework,” the OTP makes clear that Article 7(1)(h) of the Statute will provide the primary framework for identifying gender prosecution.<sup>52</sup> There are six elements of persecution as a crime against humanity:

- 1) The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights
- 2) The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such
- 3) Such targeting was based on... political, racial, national, ethnic, cultural, religious, gender...
- 4) The conduct was committed in connection with any act referred to in Article 7,

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<sup>50</sup> *Id.* at 3.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at ¶ 31.

paragraph 1 of the statute or any crime within the jurisdiction of the Court 5) The conduct was committed as part of a widespread or systematic attack directed against a civilian population, and 6) The perpetrator knew that the conduct was part of, or intended the conduct to be a part of, a widespread or systematic attack...<sup>53</sup>

The OTP provides guidance in this section as to how a gender lens may be applied to these required Elements of the Crime.

Regarding evidence in prosecutions, the 2022 Policy Paper notes that orders given to commit sexual and gender-based crimes have, in the past experiences of the ICC and other tribunals, often left behind no direct evidence.<sup>54</sup> In acknowledgment of this lack of direct evidence, the OTP states that in such circumstances, evidence of prior or subsequent conduct, specific notice, and existing organizational policies and attitudes towards the targeted group may be used to meet the mens rea requirement.<sup>55</sup> Additionally, the 2022 Policy Paper explicitly states that investigations and preliminary investigations of gender persecution will include determining the status of women, men, girls, boys, and LGBTQI+ persons.<sup>56</sup> Here, the OTP appears to recognize that persecution of members of the LGBTQI+ community may often relate to persecution based on gender norms and expectations. A final notable aspect of the 2022 Policy Paper is that the OTP provides examples of policies that perpetrators might impose which constitute gender persecution.<sup>57</sup> It lists restricting how individuals classified in a certain gender group may behave, how they may dress, where they may work, where they may live, and even whether they are allowed to exist, as examples of gender persecution policies.<sup>58</sup> In sum, the 2022

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<sup>53</sup> *Id.* at ¶ 34.

<sup>54</sup> *Id.* at ¶ 90.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at ¶¶ 64, 74.

<sup>57</sup> *Id.* at ¶ 91.

<sup>58</sup> *Id.*

Policy Paper expands the definition of gender, provides a framework for pursuing gender persecution claims, and provides further guidance on how to identify gender persecution.

### *C. Opinion Thus Far on the Policy Paper's Significance*

Due to the recent date of publication, there is little literature discussing the 2022 Policy Paper. However, multiple organizations have released statements following the publication of the paper. MADRE, an international feminist human rights organization, believes that the 2022 Policy Paper provides the international community with a better understanding of the forms of gender persecution, as well as of the discrimination that underlies gender persecution.<sup>59</sup> MADRE was one of the organizations that made submissions for consideration during the consultative drafting process with the Special Advisor on Gender Persecution.<sup>60</sup>

Outright International, an international LGBTIQ rights organization, argues that the 2022 Policy Paper is a substantial step towards accountability for violence that occurs due to the gender identity and perceived sexual orientation of individuals.<sup>61</sup> Outright International cites to the key terms section of the 2022 Policy Paper, where the OTP provided its updated interpretation of “gender.”<sup>62</sup> The OTP in its definition states that gender refers to sex characteristics, as well as to various social constructs and criteria used to define maleness and femaleness, which vary among societies.<sup>63</sup> Members of the LGBTIQ community often break assigned gender roles and norms in the societies they live in, and they are often subjected to violence on the basis of breaking these gender roles and expectations.<sup>64</sup> Outright International

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<sup>59</sup> *The Policy Paper on Gender Persecution*, MADRE, <https://www.madre.org/policy-paper-gender-persecution>.

<sup>60</sup> *Id.*; ICC OTP POLICY PAPER, *supra* note 17, at 5.

<sup>61</sup> Hannah Kohn, *Ending Impunity for Anti-LGBTIQ Persecution: ICC Launches Anti-Persecution Policy Paper*, Outright International (Dec. 26, 2022), <https://outrightinternational.org/insights/ending-impunity-anti-lgbtq-persecution-icc-launches-gender-persecution-policy-paper>.

<sup>62</sup> *Id.*

<sup>63</sup> ICC OTP POLICY PAPER, *supra* note 17, at 3.

<sup>64</sup> Kohn, *supra* note 61.

argues that this definition will be helpful for investigations of crimes against LGBTIQ people because it provides a deeper understanding of why LGBTIQ people are targeted for crimes.<sup>65</sup>

Also noteworthy is the comment written by Public International Law Policy Group following the release of the draft for the 2022 Policy Paper. The Public International Law Policy Group, also an organization that made submissions for consideration during the consultative drafting process, wrote a comment to the OTP explaining what it liked about the 2022 Policy Paper at that point, and its recommendations for the final draft.<sup>66</sup> The organization commended the OTP's use of a definition of gender beyond the male-female binary, and particularly the expansion of gender as something that can change over locations and through time.<sup>67</sup> The Public international Law Policy Group states that this was an important inclusion because it emphasizes that societal context is an essential element in each potential investigation into gender persecution.<sup>68</sup> The definition for gender that the Public International Law Policy Group describes in its comment was retained for the final draft at publication, thus the organization is discussing the published 2022 Policy Paper definition. Regarding the recommendations for the final draft, the organization believed there was room for the OTP to provide more clarity on the difference between motive and intent for gender persecution.<sup>69</sup> Since for the crime of persecution the required discriminatory intent may exist even if the individual's motive was purely personal, the organization suggests clear guidelines for intent for each stage of the prosecutorial process.<sup>70</sup> Another criticism the organization articulated was that the 2022 Policy Paper should provide a

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<sup>65</sup> Id.

<sup>66</sup> Public International Law Policy Group, COMMENTS ON THE INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR'S DRAFT POLICY ON THE CRIME OF GENDER PERSECUTION UNDER THE ROME STATUTE 1 (2022).

<sup>67</sup> Id. at 2.

<sup>68</sup> Id.

<sup>69</sup> Id. at 6.

<sup>70</sup> Id.

specific scheme for ensuring the input of victims of gender persecution as active participants at each stage of the prosecutions.<sup>71</sup>

In a recent report published by MADRE in just April 2023, MADRE claims that the Taliban's treatment of women in Afghanistan amounts to the crime against humanity of gender persecution.<sup>72</sup> This is MADRE's first report in what will be its series of reports on the Taliban and gender persecution, and this one claims specifically that the deprivation of the rights of women to education, assembly, and expression constitutes gender persecution.<sup>73</sup> Significantly, this report uses the framework and guidance provided by the 2022 Policy Paper to prove that the deprivation of these rights constitutes gender persecution.<sup>74</sup> The purpose of this report is to provide an unequivocal statement with evidence that gender persecution, a triable crime in the ICC, is being committed by the Taliban.<sup>75</sup> The fact that MADRE used the 2022 Policy Paper guidance in its analysis to make this claim shows the belief this organization has in the paper's usefulness and ability to bring clarity and cohesiveness to the international community regarding gender persecution.

The organizations that have released statements thus far emphasize the significance of the expansion of the OTP's definition of gender in the key terms section. The shortcomings that could partially restrict the OTP's goals to achieve justice and accountability are also acknowledged. Lastly, in the newly released report, MADRE recognizes the usefulness of the 2022 Policy Paper's framework and uses it to prove that the crime of gender persecution is in fact being committed by the Taliban. This paper joins the sentiment that the inclusive definition

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<sup>71</sup> *Id.* at 9.

<sup>72</sup> MADRE & CUNY, GENDER PERSECUTION IN AFGHANISTAN: A CRIME AGAINST HUMANITY - PART ONE: SEVERE DEPRIVATION OF THE FUNDAMENTAL RIGHTS TO EDUCATION, ASSEMBLY, AND EXPRESSION 3 (2023).

<sup>73</sup> *Id.* at 4-5.

<sup>74</sup> *Id.* at 6.

<sup>75</sup> *Id.* at 5.



of gender and the provided framework will likely have a significant impact towards the goal of achieving justice regarding gender persecution. This paper seeks to show the impact these 2022 Policy Paper components have and will have on gender persecution prosecutions through analyzing the gender persecution cases the OTP has inherited.

#### IV. ANALYSIS OF THE 2022 POLICY PAPER THROUGH THE LENS OF ONGOING CASES INHERITED BY PROSECUTOR KHAN

This section examines two on-going cases that current ICC Prosecutor Khan inherited from Prosecutor Bensouda: *The Prosecutor v. Ali Muhammad Ali Abd-al-Rahman* and *The Prosecutor v. Mahamat Said Abdel Kani*. Both of these cases involve claims of gender persecution, and in both cases the alleged gender persecution is against men, rather than women. In each subsection, the components of the 2022 Policy Paper discussed in the previous section will be applied to the specific facts and circumstances of one of the trials.

##### A. *The Trial of Ali Muhammad Ali Abd-al-Rahman*

One current case involving gender persecution is *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*.<sup>76</sup> Ali Muhammad Ali Abd-Al-Rahman is known as “Ali Kushayb,” and was a senior leader of the militia, Janjaweed, in Sudan.<sup>77</sup> Abd-Al-Rahman is alleged to have commanded thousands of soldiers in attacks on civilian communities, recruited members, and provided arms and funds for the Janjaweed.<sup>78</sup> In the Document Containing the Charges, in March 2021, the OTP charged him with either committing or ordering, soliciting, inducing, or

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<sup>76</sup> Int’l Crim. Ct., Situation in Darfur, Sudan, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, ICC-02/05-01/20, Case Information Sheet, ICC-PIOS-CIS-SUD-006-010/23\_Eng (March 2023), <https://www.icc-cpi.int/sites/default/files/2023-03/abd-al-rahmaneng.pdf>.

<sup>77</sup> *Id.*

<sup>78</sup> Int’l Criminal Court Project, ALI MUHAMMAD ALI ABD-AL-RAHMAN, (2023), <https://www.aba-icc.org/accused/ali-muhammad-ali-abd-al-rahman/>.

attempting to commit, 31 counts of war crimes and crimes against humanity.<sup>79</sup> The alleged crimes the OTP charged Abd-Al-Rahman with included persecution as a crime against humanity under Article 7(1)(h) of the Statute.<sup>80</sup> These charges were confirmed on May 24-26, 2021.<sup>81</sup> The OTP charged Abd-al-Rahman with persecution on political, ethnic, and gender grounds.<sup>82</sup> The gender component is based on the OTP's argument that troops under Abd-Al-Rahman's control targeted men in their attacks on civilians because of the gender role assigned to men of being fighters.<sup>83</sup>

Since the publication of the 2022 Policy Paper, there have been various developments in the Abd-Al-Rahman case. One significant filing was made on December 14, 2022, in which the OTP requested to submit into evidence "Victim Lists," which are lists of victims of the civilian attacks Abd-Al-Rahman is alleged to have helped lead.<sup>84</sup> The Victim Lists provide evidence from victims besides those that are witnesses in the trial.<sup>85</sup> The OTP argues the relevance of the Victim Lists in part because they help to establish Counts 21 and 31 of gender persecution<sup>86</sup> The Victim Lists do so because they provide evidence of the quantity of people killed and the identity of the victims involved in the attacks on the villages of Mukjar and Delieg.<sup>87</sup>

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<sup>79</sup> Id.

<sup>80</sup> Id.

<sup>81</sup> Id.

<sup>82</sup> Ana Martin, *The Potential of Gender Persecution in ICC Case Abd-Al-Rahman: A Twofold Opportunity to Interpret its Customary Status and Intersectional Discrimination*, OpinioJuris (March 24, 2022), <https://opiniojuris.org/2022/03/24/the-potential-of-gender-persecution-in-icc-case-abd-al-rahman-a-twofold-opportunity-to-interpret-its-customary-status-and-intersectional-discrimination/>.

<sup>83</sup> Prosecutor v. Abd-Al-Rahman, Case No. ICC-02/05-01/20-887, Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb'), ¶ 80 (July 9, 2021), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021\\_06131.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_06131.PDF).

<sup>84</sup> Prosecutor v. Abd-Al-Rahman, Case No. ICC-02/05-01/20-887, Prosecution's request to submit lists of victims from the bar table, ¶ 1 (Dec. 14, 2022), <https://www.icccpi.int/sites/default/files/CourtRecords/0902ebd18031c818.pdf>.

<sup>85</sup> Id.

<sup>86</sup> Id. at ¶¶ 17, 20.

<sup>87</sup> Id.

Although this request was made very shortly after the publication of the 2022 Policy Paper, the paper may have had some influence on the request and the decision of the Trial Chamber regarding it. As a general rule under the Statute, the testimony of victims ought to be through witness testimony.<sup>88</sup> The OTP in its request cites to the fact that Trial Chamber I in the case against Thomas Lubanga admitted evidence from the bar table.<sup>89</sup> The Trial Chamber I reasoned that, although there is express reference in the Statute to oral testimony of witnesses taken at trial, there is nevertheless a recognition that in certain circumstances, other means of introducing evidence of victims are appropriate.<sup>90</sup> In the 2022 Policy Paper, the OTP acknowledges the difficulty in finding direct evidence of orders to commit sexual and gender-based crimes, as was evidenced by the Bemba case discussed in the 2014 Policy Paper section, where the Appeals Chamber found insufficient evidence to prove command responsibility.<sup>91</sup> Further, the OTP states that discriminatory intent can be inferred from the pattern of targeting the accused engages in.<sup>92</sup>

The Victim List relating to the incidents covered by Count 21 contains the names, the gender, and ethnicity of the victims who were detained and later killed during the attacks on their villages.<sup>93</sup> This information would be vital towards proving a pattern of targeting. Not every person that witnessed acts involving gender persecution are alive or are willing or able to testify as a witness, and the Victim Lists provide a method of presenting information on the victims that is required to show such a pattern of targeting from which intent may be inferred. Thus, the OTP

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<sup>88</sup> Rome Statute, *supra* note 14, Art. 15(2).

<sup>89</sup> Prosecutor v. Abd-Al-Rahman, Case No. ICC-02/05-01/20-887, Prosecution's request to submit lists of victims from the bar table, ¶ 7.

<sup>90</sup> *Id.*

<sup>91</sup> ICC OTP POLICY PAPER, *supra* note 17, at ¶ 90; Int'l Crim. Ct., *supra* note 32.

<sup>92</sup> *Id.* at ¶ 90.

<sup>93</sup> Prosecutor v. Abd-Al-Rahman, Case No. ICC-02/05-01/20-887, Prosecution's request to submit lists of victims from the bar table, ¶ 17

may have felt a greater level of confidence to submit this request following the 2022 Policy Paper, as the OTP policy on gender persecution now includes acknowledgment that traditional direct evidence such as witness testimony is not the only means of evidence regarding victims that may be used to meet the elements of the crime. Therefore, the 2022 Policy Paper's section regarding evidence lends support to the OTP's argument in this request that this is one of those circumstances referenced in the Lubanga case where other means of introducing evidence of victims is appropriate. For this case against Abd-Al-Rahman, Trial Chamber I granted the request on January 13, 2023, and recognized the Victim Lists as submitted.<sup>94</sup> In its decision granting the request, the Trial Chamber noted the relevance of the Victim Lists and found that their probative value outweighed any prejudice.<sup>95</sup>

On February 28, 2023, the OTP concluded its presentation of evidence.<sup>96</sup> Thus, there was under three months between the release of the 2022 Policy Paper and the OTP's conclusion of its presentation of evidence. Considering this short period of time, it is likely that the release of the 2022 Policy Paper did not fundamentally change the OTP's approach in the rest of its presentation of evidence. However, the ultimate effect of the 2022 Policy Paper on the Prosecution's presentation and its persuasiveness will not be revealed until the public release of the ICC's decision, and there is a substantial amount of the trial remaining. Next, the common legal representatives of the victims are going to make their opening statements and call their witnesses beginning on May 22, 2023.<sup>97</sup>

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<sup>94</sup> Prosecutor v. Abd-Al-Rahman, Case No. ICC-02/05-01/20-887, Decision on The Prosecution's Request To Submit Lists Of Victims From The Bar Table, ¶ 13 (Jan. 13, 2023), <https://www.iccpi.int/sites/default/files/CourtRecords/0902ebd180363922.pdf>.

<sup>95</sup> *Id.* at ¶ 11-12.

<sup>96</sup> Prosecutor v. Abd-Al-Rahman, Case No. ICC-02/05-01/20-887, Notice Of The Conclusion Of The Prosecution's Presentation Of Evidence, ¶ 1 (Feb. 28, 2023), <https://www.iccpi.int/sites/default/files/CourtRecords/0902ebd1803cd45d.pdf>.

<sup>97</sup> Int'l Crim. Ct., *supra* note 76.

Going forward in the trial, the Prosecution will face challenges in proving gender persecution. Although the OTP has charged Abd-al-Rahman with rape both as a war crime and crime against humanity, the OTP in March 2021 chose not to include a charge of gender persecution in relation to those crimes, which were against women.<sup>98</sup> Instead, the OTP chose to charge Abd-al-Rahman with gender persecution on the basis of the targeting of males for murder and inhumane detention during its attacks of Mukjar and Delieg.<sup>99</sup> The application of sexual and gender-based crimes to seek justice for male victims is still relatively new territory, especially in terms of gender persecution. The issue of gender persecution against men is a matter of first impression for the ICC specifically. The ICC is concurrently hearing a case involving a claim of gender persecution against males in *The Prosecutor v. Mahamat Said Abdel Kani*, but Abd-al-Rahman's case began first and is on track to be decided before the Said case. Thus, it is likely that the judges will look to the 2022 Policy Paper's interpretations of gender and gender persecution.

The Court is likely to refer to the definition of gender persecution and gender in the "Use of Key Terms" section in order to evaluate whether the alleged conduct did in fact have a gendered element, rather than just a racial and ethnic basis. The 2022 ICC Policy Paper defines gender persecution as "the crime against humanity of persecution on the grounds of gender..." which is "committed against persons because of sex characteristics and/or because of the social constructs and criteria used to define gender."<sup>100</sup> The paper defines gender as the OTP did in the 2014 Policy Paper, but added the acknowledgment that gender roles vary among societies and

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<sup>98</sup> Rosemary Gray, *Gender-based Persecution against Men: the ICC's Abd-al-Rahman Case*, OpinioJuris (May 30, 2021), <https://opiniojuris.org/2021/05/30/gender-based-persecution-against-men-the-iccs-abd-al-rahman-case/>.

<sup>99</sup> *Id.*

<sup>100</sup> ICC OTP POLICY PAPER, *supra* note 17, at 3.

through time.<sup>101</sup> Here, dozens of men, as well as boys, were rounded up, beaten, inhumanely detained, and killed.<sup>102</sup> These men were presumed to be fighters due to both gender roles based on maleness, and due to stereotypes Janjaweed had against the ethnic group that resides in Mukjar and Delieg, the Fur.<sup>103</sup> The gender roles about men required for this assumption are that men are aggressive, strong, and protectors of communities. These are gender norms that are pervasive among many societies, including in Sudan.<sup>104</sup> Based on the reasonable application of these definitions to the facts of the case, if the evidence is sufficient, the ICC will likely find that the male victims of these civilian attacks were subjected to gender persecution. In sum, the 2022 Policy Paper in the Abd-al-Rahman trial may have helped support the OTP's request to submit Victim Lists, and may throughout the case help show that the gender component is met.

#### *B. The Trial of Mahamat Said Abdel Kani*

The trial of Mahamat Said, *The Prosecutor v. Mahamat Said Abdel Kani*, just opened on September 26, 2022.<sup>105</sup> The OTP charged Said, a lower officer in the Seleka rebel group in the Central African Republic ("CAR"), with gender persecution as a crime against humanity, among other charges.<sup>106</sup> On December 9, 2021, the Pretrial Chamber II confirmed these charges.<sup>107</sup> The OTP has begun its presentation of evidence, and no hearings in this case have yet been

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<sup>101</sup> *Id.*

<sup>102</sup> Gray, *supra* note 98.

<sup>103</sup> Martin, *supra* note 82.

<sup>104</sup> Olivia Giovetti, *Gender inequality in South Sudan is shaped by prevailing cultural norms*, Concern Worldwide (Mar. 2, 2022), <https://www.concern.net/news/gender-equality-in-south-sudan>.

<sup>105</sup> Int'l Crim. Ct., Situation in Central African Republic II, *The Prosecutor v. Mahamat Said Abdel Kani*, Case no. ICC-01/14-01/21, Case Information Sheet, ICC-PIOS-CIS-CARII-004-001/21\_Eng, March 2021. <https://www.icc-cpi.int/sites/default/files/2023-02/saidENG.pdf>.

<sup>106</sup> Adrienne Ringin, *Gender Persecution Again a Focus for ICC in the Said Trial*, OpinioJuris (Sept. 29, 2022), <https://opiniojuris.org/2022/09/29/gender-persecution-again-a-focus-for-icc-in-the-said-trial/>.

<sup>107</sup> Int'l Crim. Ct., *supra* note 105.

scheduled.<sup>108</sup> Thus, there is much less completed in this trial than in the Abd-al-Rahman trial.

The analysis of the Said case will focus on predictions of the impact of the 2022 Policy Paper on the OTP's presentation of its case, rather than analysis of actions the OTP has already taken, or predictions of the judges' decision-making. However, the prediction made in the previous section that the judges will look to the 2022 Policy Paper's definitions for gender persecution and gender carries over. It is likely that the judges will incorporate these most-updated definitions into its decision-making on the gender persecution charge in this case as well.

Said was a senior militant in the Seleka rebel group in the Central African Republic, which successfully invaded the capitol, Bangui, and staged a coup in 2013.<sup>109</sup> Between April and August 2013, Said, as a senior Seleka colonel exercising control, detained many individuals, kept the detainees in inhumane conditions, and subjected them to abuse and torture. .<sup>110</sup> In the OTP's confirmed charges against Said, it is alleged that Seleka and Said targeted individuals based on believed allegiance to the overthrown president of the CAR, Bozize.<sup>111</sup> The OTP stated that all of the victims of detention suspected to have allegiance to Bozize had shared characteristics of being predominately Christian, belonging to the Gyaba, Mandja or Banda ethnicity, and being male.<sup>112</sup> Thus, in Count 7, the OTP charges Said with persecution as a crime against humanity on political, racial, ethnic, and/or gender grounds.<sup>113</sup>

In attempting to prove how the facts of the case constitute the crime of gender persecution, the OTP is likely using the "Regulatory Framework" section provided by the 2022

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<sup>108</sup> Id.

<sup>109</sup> Ringin, *supra* note 106.

<sup>110</sup> Prosecutor v. Said, ICC 01/13 01/21, Decision on the Confirmation of Charges against Mahamat Said Abdel Kani, ¶ 66 (Dec. 9, 2021), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021\\_11432.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_11432.PDF).

<sup>111</sup> Id. at ¶ 65.

<sup>112</sup> Ringin, *supra* note 106.

<sup>113</sup> Id.

Policy Paper to argue that each of the required elements of the crime of persecution are met regarding gender. The 2022 “Regulatory Framework” section provides guidance on how gender is to be applied to the Elements of the Crime of persecution, as established in the Statute. Thus, this section of the paper is a new but vital tool to the prosecution towards the goal of proving that the alleged crimes of detention, abuse, and torture were not just crimes in and of themselves, but also were crimes of persecution based, in part, on gender.

The first Element requires that “the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.”<sup>114</sup> Here, the OTP reports that Said and Seleka kept the detainees in dark and cramped cells, did not provide enough food and water, and provided no medical attention.<sup>115</sup> They were brought to the centers after being violently arrested, hooded, and beaten.<sup>116</sup> The detainees were physically abused in a variety of ways: beaten with a rifle butt, slapped, hit with whips or metal sticks, burnt, had their ears ripped, and/or had their hands, elbows, and feet tied together.<sup>117</sup> In light of these alleged occurrences, it is evident that Said and Seleka deprived the detained men of the fundamental rights to “life, bodily integrity, freedom of movement, and freedom from torture or cruel, inhumane, or degrading treatment.”<sup>118</sup> The OTP claims that, since Said was a senior Seleka commander, he is liable for these crimes under both 25(3)(a) and 25(3)(b) of the Rome Statute, through direct co-perpetration and through ordering or inducing commission of said crime.<sup>119</sup> The OTP will almost

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<sup>114</sup> ICC OTP POLICY PAPER, *supra* note 17, at ¶ 34.

<sup>115</sup> Prosecutor v. Said, ICC 01/13 01/21, Decision on the Confirmation of Charges against Mahamat Said Abdel Kani, The Confirmed Charges, ¶ 26.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 28.

<sup>118</sup> *Id.* at 25.

<sup>119</sup> Int’l Crim. Ct., *supra* note 105; see Rome Statute, *supra* note 14, Art. 25(3)(a)(b).



certainly meet the first Element of persecution through presentation of the deprivations of fundamental rights it alleges in the Charges.

The second Element requires that the perpetrator “targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.”<sup>120</sup> As mentioned, the OTP argues that males were targeted. Based on the facts of the case, Said and Seleka believed that those who had allegiance to Bozize, and those whose allegiance bore a threat to Seleka, were male.<sup>121</sup> It is likely that the OTP is arguing that this belief that male sympathizers to the past president are a threat comes from the gender role that men are the fighters and the defenders of communities.<sup>122</sup> The 2022 Policy Paper explains under Element Two that persons may be targeted by reason of the gender group they belong to either because of sex characteristics or because of social constructs used to define gender roles.<sup>123</sup> Under this guidance, the OTP has clear authority to convincingly argue that targeting individuals based on the gender roles assigned by their society to their sex, here the gender role that men are fighters and defenders, is a means of targeting persons “by reason of the identity of a group or collectivity,” to meet Element Two.<sup>124</sup>

Next, the third Element states, “Such targeting was based on...gender as defined in article 7, paragraph 3, of the Statute...”<sup>125</sup> The 2022 Policy Paper explains that this element refers to the required mental element.<sup>126</sup> Specifically, the perpetrator must intend to cause or know that they would cause a severe deprivation of fundamental rights, have the intent to

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<sup>120</sup> ICC OTP POLICY PAPER, *supra* note 17, at ¶ 34.

<sup>121</sup> Prosecutor v. Said, ICC 01/13 01/21, Decision on the Confirmation of Charges against Mahamat Said Abdel Kani, The Confirmed Charges, ¶ 25.

<sup>122</sup> Ringin, *supra* note 106.

<sup>123</sup> ICC OTP POLICY PAPER, *supra* note 17, at ¶ 42.

<sup>124</sup> *Id.* at ¶ 34.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at ¶ 46.

discriminate based on gender, and intend for or know that the conduct was part of a widespread attack.<sup>127</sup> Here, the OTP will likely be able to meet the first requirement, by arguing that Said and Seleka purposely detained and tortured the victims. It may be difficult for the OTP to meet the second requirement—an intent to discriminate based on gender—because gender roles such as men being fighters are so deeply engrained in members of society that assumptions may be made unintentionally. However, the OTP may argue that Said and Seleka intended to target the fighters and defenders of communities, and so regardless of whether they were aware of the assumptions they were making, they make the conscious decision to detain and torture individuals who were all men. Regarding the third requirement, Said and Seleka detained many men in Bangui throughout a prolonged period, and thus were at least aware that their conduct was a widespread, not individualized, attack. In sum, the Prosecution may use this outline provided in the 2022 Policy Paper to show that Element Three of persecution is met through Said and Seleka’s detention and torture of almost exclusively men.

Next, Element Four requires that “The conduct was committed in connection with any act referred to in Article 7, paragraph 1 of the statute or any crime within the jurisdiction of the Court.”<sup>128</sup> The 2022 Policy Paper notes that gender persecution does not just have to be connected with violent crimes, it could also be connected to crimes such as attacks on places of cultural or religious significance.<sup>129</sup> The OTP needs little help meeting the Element Four, as it has charged Said, with substantial evidence to support, with the crimes against humanity of imprisonment or other severe deprivation of physical liberty, torture, and other inhumane acts,

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<sup>127</sup>Id.

<sup>128</sup> Id. at ¶ 34.

<sup>129</sup> Id. at ¶ 58.

aswell as the war crimes of torture, cruel treatment, and outrages upon personal dignity, all in connection with the crime of gender persecution.<sup>130</sup>

Elements Five and Six are grouped together in “Regulatory Framework” section:

“Element 5: The conduct was committed as part of a widespread or systematic attack directed against a civilian population; Element 6: The perpetrator knew that the conduct was part of, or intended the conduct to be part of, a widespread or systematic attack directed against a civilian population.”<sup>131</sup> The 2022 Policy Paper advises that the persecutory acts themselves do not have to be widespread or systematic, as long as they formed as part of, or are connected to, a widespread or systematic attack.<sup>132</sup> Here, the OTP alleges that Said and Seleka systematically detained and subjected to inhumane treatment suspected supporters of President Bozize.<sup>133</sup> The OTP will likely argue that targeting groups of people, males, based on suspected allegiance to a political figure throughout a capitol city is intentional systematic conduct. If this were to fail, the OTP could lean onto the fact emphasized in the 2022 Policy Paper that the act the gender persecution is connected to may be the systematic or widespread component for Elements Five and Six. It could accordingly argue that these Elements are met because the crime of imprisonment or other severe deprivation of physical liberty, for instance, was committed in a widespread manner against many individuals through detention for a two-month period. In sum, the “Regulatory Framework” section will provide useful guidance for the successful prosecution of the Said case, as well as for organizing future gender persecution claims.

## V. CONCLUSION

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<sup>130</sup> Int’l Crim. Ct., *supra* note 105.

<sup>131</sup> ICC OTP POLICY PAPER, *supra* note 17, at ¶ 34.

<sup>132</sup> *Id.* at ¶ 59.

<sup>133</sup> Ringin, *supra* note 106.

The analyses of the ongoing trials of Abd-al-Rahman and Said reveal that the Policy on the Crime of Gender Persecution is a useful tool for navigating the recent practice of prosecuting gender persecution. The codification of the crime of gender persecution first occurred just 25 years ago, and the 2014 Policy Paper helped progress accountability for gender persecution and other sexual and gender-based crimes significantly. The 2022 Policy Paper was the necessary next step for accountability for individuals that commit and orchestrate persecution based on sex and gender expectations. However, these cases do reveal a major gap in achieving justice, which the 2022 Policy Paper alone may be unable to combat. Despite a large majority of the world's societies being patriarchal, two of the three cases where charges for gender persecution have been confirmed were for gender persecution against men. The MADRE report finding gender persecution against women occurring on a massive scale across Taliban rule of Afghanistan illustrates this prosecutorial gap. Until there are more charges brought and confirmed for gender persecution against women and female-presenting persons, justice for many victims of gender persecution will be left unmet. Nevertheless, further research, as well as time, is required to precisely measure the impact of the 2022 Policy Paper on prosecutions. It can be concluded from this analysis, however, that the 2022 Policy Paper provides a more complete understanding of gender and gender persecution, and well as a useful, clear framework for prosecuting gender persecution. The trials of Abd-al-Rahman and Said have not yet been decided, leaving uncertainty. Still, the future for accountability for gender persecution is brighter and more promising than ever before in its recent history.