

No. 07-2080

In the United States Court of Appeals  
for the Fourth Circuit

In re A-T-

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Alima Traore,  
Petitioner,

vs.

Michael B. Mukasey, U.S. Attorney General,  
Respondent.

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Petition for Review from Order of the  
U.S. Department of Justice, Executive Office For Immigration Review  
Board of Immigration Appeals

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BRIEF IN SUPPORT OF PETITIONER (REVERSAL) BY THE CENTER  
FOR GENDER AND REFUGEE STUDIES AND INTERNATIONAL  
WOMEN'S HUMAN RIGHTS LAW CLINIC, ET AL. AS *AMICI CURIAE*  
(ADDITIONAL *AMICI* LISTED INSIDE)

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## INTERESTS OF THE AMICI CURIAE

*Amicus* Center for Gender & Refugee Studies (“CGRS”), at the University of California Hastings College of the Law (*see* <http://cgrs.uchastings.edu>), has a direct and serious interest in the development of norms consistent with international refugee and human rights law pertaining to the protection of women under the Refugee Act and the Convention against Torture. CGRS was founded in 1999 by Professor Karen Musalo, who has litigated several of the most significant gender cases of the last 15 years, including *Matter of Kasinga*, and *Matter of R-A-*. Through its scholarship, expert consultations, and litigation, CGRS has played a central role in the development of law and policy related to gender persecution. CGRS has filed briefs, as counsel or as *amicus*, regarding female genital cutting, domestic violence, forced marriage, rape, trafficking, and other gender-based forms of persecution in the Second, Fourth, Fifth, Sixth, Eighth and Ninth Circuits.

*Amicus* the International Women's Human Rights Law Clinic (“IWHR”) is a project of Main Street Legal Services, Inc., the clinical programs of the City University of New York School of Law in Flushing, New York. Since its founding in 1992 and under the supervision of Professor Rhonda Copelon, IWHR has played a leading role, through scholarship, expert consultations, including the recognition of violence against women as a *jus cogens* norm of customary international law in itself and as a form of torture, persecution and enslavement under customary international law as well as treaties ratified by the United States. IWHR is particularly concerned that women seeking relief from removal in the form of political asylum, non-refoulement and withholding of removal based on such forms of violence against women as

female genital mutilation and forced marriage benefit from the recognition in international law that these are among the gravest crimes subject to universal jurisdiction.

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**I.**  
**SUMMARY OF ARGUMENT**

Appellant Alima Traore has established eligibility for asylum, withholding of removal, and protection under the Convention Against Torture because she has endured past persecution in the form of female genital mutilation (“FGM”), has a well-founded fear of future persecution, and likely faces torture and a threat to life or freedom because she is a female member of the Bambara tribe in Mali.

What Ms. Traore will suffer if she is returned to Mali is not an “arranged marriage,” whereby her father has played matchmaker and she ultimately consents. Ms. Traore faces *forced* marriage – a marriage literally against her consent and compelled through threats and duress. Not only will that deprive her of her fundamental right to freedom and choice, it also will inevitably result in the physical harm of spousal rape, since sex within that context is nonconsensual. In Mali, forced marriage also carries a high likelihood of additional violence. Domestic violence is common and tolerated by the government and society, and Malian law commands women to obey their husbands. The Malian government will do nothing to protect Ms. Traore’s liberty or ensure her safety once she is married.

The Board of Immigration Appeals (“BIA”) failed to recognize that the FGM Ms. Traore has suffered is a continuing harm, and that the forced marriage that awaits her in Mali is persecution, a threat to life or freedom, and torture under domestic and international standards. It instead

ruled that FGM does not constitute continuing persecution because it is performed once, despite its “ongoing physical and emotional effects,” and that forced marriage is nothing more than a “reluctant acceptance of family tradition over personal preference” instead of a violation of fundamental human rights.

Understandably, this decision already has attracted criticism from members of Congress. *See* Letter from 45 Reps. to Atty. Gen. Mukasey (Dec. 20, 2007) (on file with author);<sup>1</sup> Letter from Reps. Conyers and Lofgren to Atty. Gen. Mukasey (Jan. 28, 2008) (on file with author).<sup>2</sup>

For good reason. The BIA ignored that FGM is a grave and extremely damaging practice that harms a woman her entire life. It also ignored that forced marriage – and the spousal rape, domestic violence, and involuntary servitude so intertwined with it in Mali – is gender-based persecution, and threatens the very life and freedom of a woman.

If the BIA had applied the controlling legal standards, it would have reached the opposite conclusion and found Ms. Traore eligible for relief. Forced marriage amounts to persecution, a threat to life or freedom, and torture under U.S. refugee jurisprudence, as well as international law. The

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<sup>1</sup> <[http://cgrs.uchastings.edu/pdfs/DOC3-%20Addendum\\_FGM%20Letter\\_HOUSE-032408.pdf](http://cgrs.uchastings.edu/pdfs/DOC3-%20Addendum_FGM%20Letter_HOUSE-032408.pdf)>

<sup>2</sup> <<http://lofgren.house.gov/PRArticle.aspx?NewsID=1879>>



U.S. enacted its refugee laws to bring the nation into compliance with its obligations under the Convention Relating to the Status of Refugees, 1951, 189 UNTS 150, *entered into force* April 22, 1954 (“1951 Convention”), and the Protocol to the Convention Relating to the Status of Refugees, 1968, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 26 (“1967 Protocol”), and Congress intended courts to look to international standards for interpretive guidance.

For Ms. Traore, this Court is all that stands between her and a future of the most egregious violations of her fundamental human rights. Respectfully, the Court should reverse. Under the controlling law, it is obligated to do so.

## **II. FACTUAL BACKGROUND**

### **A. Forced Marriage And FGM**

On this record, there is no question that Ms. Traore will be forced into marriage if returned to Mali. The evidence was undisputed that Ms. Traore’s father, an authoritarian long-term government employee, will force her to marry her first cousin, that she does not consent to this marriage, and that she opposes forced marriage; the evidence is also undisputed that the Malian government will not protect her. A128 (“I don’t have any choice, I cannot go over my father’s wishes, I have to follow and I cannot say no. . . . I can’t hide because like especially in my country, . . . if a woman rent a house, you are considered a prostitute.”); A129-30, 147; *see also* A153, 157

(Ms. Traore’s uncle testified her father would “give her into marriage” even if she is against it, “[b]ecause he’s a very authoritarian person,” and that he had not ever heard of the government intervening to help any woman being forced into marriage); A195, 308-09.

Forced marriage differs from arranged marriage. In an arranged marriage, while parents may suggest that a man and woman marry, the bride and groom consent before the ceremony; a forced marriage proceeds despite the bride’s (or groom’s) lack of consent. *See* U.S. State Department Foreign Affairs Manual Volume 7 – Consular Affairs, 7 Fam. 1450, at 10 (2005).<sup>3</sup> Although the BIA refused to recognize that distinction below, the U.S. State Department itself has observed that, unlike in an arranged marriage, “[in] a forced marriage, at least one party does not consent or is unable to give informed consent to the marriage, and some element of duress is generally present.” *Id.*<sup>4</sup> This distinction has led the State Department to conclude that forced marriage constitutes a “violation of basic human rights.” *Id.* Thus, to speak of Ms. Traore’s impending forced marriage as simply involving a “family tradition” arranged with an “intended fiancé,” as the BIA did below [*In re A-T-*, 24 I & N Dec. 296, 302-303 (BIA 2007)], is to ignore the very definition of this practice—that it is “forced,” and that women are coerced to marry against their will.

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<sup>3</sup> <<http://www.state.gov/documents/organization/86802.pdf>. >

<sup>4</sup>*Accord* <<http://www.fco.gov.uk/resources/en/pdf/2855621/what-is-forced-marriage> > (UK recognition of distinction).

Forced marriage violates the most fundamental rights of the women subjected to it. It deprives them of the right to physical integrity, including the right not to be subjected to sexual assault or domestic violence. See BBC Radio World Service, *No Way Out* (podcast).<sup>5</sup> In the U.S., forced marriage and the non-consensual sex that results leads to criminal prosecution. See *Sect Leader is Convicted as an Accomplice to Rape*, N.Y. Times, Sept. 26, 2007 (cult leader Warren Jeffs was prosecuted and convicted of rape on theory that he forced girls into marriage against their consent); *State v. Chaney*, 989 P.2d 1091 (Ut. App. 1999) (father convicted of rape as accomplice where he performed marriage ceremony and instructed daughter she could not refuse intercourse).

Ms. Traore's right to physical integrity already has been violated through the infliction of FGM, which is the "partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons."<sup>6</sup> Although sometimes referred to as "female genital cutting" or "female circumcision," the term "mutilation" aptly captures the nature of this practice, which disfigures the victim and is all the more

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<sup>5</sup> <[http://www.bbc.co.uk/worldservice/documentaries/2008/03/080326\\_global\\_perspective\\_two.shtml](http://www.bbc.co.uk/worldservice/documentaries/2008/03/080326_global_perspective_two.shtml)>

<sup>6</sup> *Eliminating Female Genital Mutilation: An Interagency Statement* (World Health Organization) at 1 (1997), <[http://www.who.int/reproductive-health/publications/fgm/fgm\\_statement\\_2008.pdf](http://www.who.int/reproductive-health/publications/fgm/fgm_statement_2008.pdf)> ["FGM Statement"]; see also State Department Report, *Prevalence of the Practice of Female Genital Mutilation*, <<http://www.state.gov/documents/organization/9424.pdf>> ["FGM Report"].

egregious because it most often is performed on girls too young to consent or resist. *See FGM Statement* at 2. FGM has been criminalized in the U.S. and internationally condemned. *See infra*, Part. III.C. Ms. Traore continues to suffer as a result of the complete excision of her genitalia. *See* A175 (“circumcision has left me with both physical and mental scars that I will bear for all my life. I will have complications at childbirth, and sexual intercourse is painful.”).

In recognition of the harm FGM inflicts, every Circuit to address the question has found that the practice constitutes persecution warranting asylum. *See, e.g., Barry v. Gonzales*, 445 F.3d 741 (4th Cir. 2006); *Niang v. Gonzales*, 422 F.3d 1187, 1197 (10th Cir. 2005) (recognizing that FGM is persecution); *Mohammed v. Gonzales*, 400 F.3d 785, 795 (9th Cir. 2005) (same); *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004) (same). Indeed, the Seventh Circuit correctly labeled FGM as “a horrifically brutal procedure” that constitutes torture. *Nwaokolo v. INS*, 314 F.3d 303, 308 (7th Cir. 2002) (*per curiam*); *Oforji v. Ashcroft*, 354 F.3d 609, 615 n.2 (7th Cir. 2003).

## **B. Gender-Based Persecution Of Women In Mali Through FGM And Forced Marriage**

Girls and women in Mali are systematically targeted for life-long gender-based violence and liberty deprivations, including FGM, forced marriage, spousal rape, domestic violence, and polygamy.

The U.S. State Department recognizes that FGM, domestic violence and discrimination against women are key human rights problems in Mali. U.S. Dept. of State, *Country Reports on Human Rights Practices – 2006 – Mali* (2007), 2007 WL 1040066 [“2007 Country Report”]. The State Department also identifies myriad other practices as violative of Malian women’s human rights, including polygamy, marriage for girls as young as eleven, laws that demand women obey their husbands, and laws that mandate inequality in matters of economics, employment, and divorce. *Id.*

FGM is virtually universal in Mali, where ninety-five percent of Malian girls are forced to undergo it. The practice is “widespread in most regions and among most ethnic groups.” *Id.* at p.8. FGM is legal in Mali even though many other nations, including the U.S., have banned it.

In Mali, FGM is inextricably linked to forced marriage. The State Department itself has observed that FGM is practiced to make Malian women marriageable, and the few women whose genitals are uncut are considered unclean and shunned. A235; A307-08. Likewise, the World Health Organization recognizes that one primary reason for the practice is to “attenuate sexual desire in the female, maintain chastity and virginity and fidelity during marriage.” A240. As those reports illustrate, FGM is part of a larger societal goal to extinguish sexual desire in preparation for marriage and to ensure that women are faithful to their husbands.

Forced marriage is common in Mali, with government officials turning a blind eye or actively pressuring women into “customary” marriages, despite a statutory requirement of consent for a government-sanctioned civil ceremony. *See* Code Malien du Mariage et de la Tutelle (1962) (“Code Malien”), arts. 1 & 107: “It has been reported that forced marriage frequently occurs in Mali, even though it is formally illegal. . . . young girls are sometimes pressured by their families, and even by state agents responsible for preventing forced marriages, to enter into a customary law marriage.” *Violence Against Women in Mali: A Report to the [United Nations] Human Rights Committee*, at 277 [“Violence”].<sup>8</sup>

Once a girl or woman has been forced into marriage, she has no right or ability to refuse intercourse, and no legal protection from spousal rape. This is because in Mali, “spousal rape is not illegal.” 2007 Country Report. Domestic violence and other forms of spousal abuse are common and carried out with impunity. “Mere” beatings go unpunished. *See* A309 (describing how Malian women owe obedience to their husbands, who “can do anything they like to their wives, beating them, mistreating them and generally abusing them, and it is considered normal.”). “[P]olice [are] reluctant to enforce laws against or intervene in cases of domestic violence.” 2007 Country Report. In fact, wives who report violence are doubly

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<sup>7</sup> *Infra*, 4e-10e.

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< [http://www.omct.org/pdf/vaw/publications/2003/eng\\_2003\\_07\\_mali.pdf](http://www.omct.org/pdf/vaw/publications/2003/eng_2003_07_mali.pdf). > (last visited April 10, 2008).

victimized: “It is reported that state agents, particularly police, prosecutors and judges continue to treat women victims of violence without any regard and sometimes even inflict violence. The victims are blamed by the authorities for the crimes they have suffered.” Violence, *supra*, at 282.

Apart from the risk of gender-based violence (sexual and otherwise), women in Mali are denied other fundamental human rights by virtue of marriage. Malian law requires that wives obey their husbands, art. 32 (*infra*, 7e and 10e), and provides husbands with “power over [a wife’s] right to work and the choice of residence.” Violence, *supra*, at 275, (citing Code Malien, art. 34 & 38).

Malian husbands may engage in polygamy without their wives’ consent, further undermining the position of women. Violence, *supra*, at 275, 280 (citing Code Malien, art. 7) (“Polygamous marriage contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited.”).

Because Malian women suffer pervasive and severe economic discrimination, they cannot escape forced marriage by leaving their families to support themselves. “Women’s access to employment and to economic and educational opportunities [are] limited,” and women make up only 15 percent of the labor force. 2007 Country Report. Because of economic gender discrimination, those women who try to live alone often are forced into

prostitution to survive. Violence, *supra*, at 275 (“Prostitution is widespread in Mali. The main reason women and girls go into prostitution is economic.”).

Most Malian women also cannot escape once married. The law is stacked against them:

Family law favor[s] men, and women [are] particularly vulnerable in cases of divorce, child custody, and inheritance rights, as well as in the general protection of civil rights. Women ha[ve] very limited access to legal services due to their lack of education and information, as well as the prohibitive cost.”

2007 Country Report.

Ms. Traore’s experience exemplifies the persecution faced by Malian women. She was subjected to FGM in childhood and continues to suffer its physical and emotional repercussions. Like so many young women in Mali, she now faces the horrific prospect of spending her life in involuntary servitude—forced against her will to marry, serve, and endure unwanted sex without means of escape.



### III. ARGUMENT

#### A. **International Norms Guide Eligibility For Asylum, Withholding Of Removal, And Protection Under The Convention Against Torture In The U.S.**

A person fearing persecution, threats to life or freedom, and torture if returned to her home country has three avenues of relief: asylum, withholding of removal, and protection under the Convention Against Torture.<sup>9</sup> Each of these forms of relief stems from international treaties to which the U.S. is a party. As explained below, the relief afforded by each should be informed by international norms.

##### 1. **Asylum And Withholding Of Removal**

The U.S. committed itself to protect refugees by ratifying the 1967 Protocol<sup>10</sup> and enacting the 1980 Refugee Act to bring its domestic laws into compliance with the Protocol: “If one thing is clear from the legislative

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<sup>9</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, S. Treaty Doc. No. 100-20, 1465 UNTS 85, *entered into force* June 26, 1987 (“CAT”).

<sup>10</sup> The U.S. did not ratify the 1951 Convention, but the 1967 Protocol is identical to the 1951 Convention in all respects with the exception that the 1967 Protocol eliminated the geographic and date restrictions present in the 1951 Convention. Therefore, most commentators refer to the obligations assumed under the 1951 Convention and the 1967 Protocol interchangeably. See Brigitte Frantz, *Proving Persecution: The Burdens of Establishing a Nexus in Religious Asylum Cases and the Dangers of New Reforms*, 4 Ave Maria L. Rev. 499, 506 n. 43 (2007).

history [of the 1980 Refugee Act] . . . it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the [1967 Protocol].” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). The Supreme Court has directed federal courts to consider international materials, such as United Nations High Commissioner for Refugees (“UNHCR”) Handbook, when interpreting domestic asylum law, as they provide “significant guidance” in addressing asylum claims. *Id.* at 437-39 & 439 n.22.<sup>11</sup>

The former INS (now Department of Homeland Security) and the BIA repeatedly have acknowledged the importance of consulting international norms regarding basic human rights. For example, the INS Gender Guidelines provide that “the evaluation of gender-based claims must be viewed within the framework provided by existing human rights instruments and the interpretation of these instruments by international organizations.” INS Gender Guidelines; *see also Matter of N-M-A*, 22 I. & N. Dec. 312 (BIA 1998) (applying UNHCR Handbook to determine well-founded fear of persecution from changed regime); *Matter of Kasinga*, 21 I. & N. Dec. 357, 377 (BIA 1996) (Rosenberg, J., concurring) (courts should be guided by international human rights instruments and their interpretation by international organizations in assessing whether harm amounts to persecution).

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<sup>11</sup> *See Ndom v. Ashcroft*, 384 F.3d 743, 753 n.4 (9th Cir. 2004) (“The UNHCR Handbook is considered persuasive authority in interpreting the scope of refugee status under domestic asylum law.”).

Where an international consensus develops regarding whether an act or practice amounts to persecution, or a threat to life or freedom sufficient to qualify an individual for protection under the 1967 Protocol, the U.S., as a party to it, should be guided by that consensus. *See, e.g.*, INS Basic Law Manual: U.S. Law and INS Refugee Asylum Adjudications ch. II.B, reprinted in 8 Charles Gordon et al., Immigration Law and Proc., Special Supplement 1995 at 8 (noting that, while UNHCR Handbook is not legally binding, it may be cited where it does not conflict with U.S. law or regulations). Indeed, renowned scholar Guy Goodwin-Gill<sup>12</sup> has observed that developments within the broad field of human rights inform any analysis of what amounts to persecution under the 1951 Convention. The Refugee in Int'l Law 38 (1st ed. 1983).

Congress intended that the interpretation of the Refugee Act be guided by international norms including the “fundamental rights and freedoms” set forth in the U.N. Charter and the Universal Declaration of Human Rights.<sup>13</sup> 1951 Convention, preamble & art. 2(a)(2).

To establish eligibility for asylum under the Refugee Act, an applicant must show she is a “refugee” by demonstrating past persecution or a

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<sup>12</sup> In *Cardoza-Fonseca*, the U.S. Supreme Court recognized Mr. Goodwin-Gill as an authoritative source on the U.S.’s obligations under the Refugee Convention. 480 U.S. at 440 n.24; *id.* at 451 (Blackmun, J., concurring).

<sup>13</sup> G.A. Res. 217A, U.N. GAOR, 3d Sess., U. N. Doc. A/810 (1948) (“UDHR”).

“well-founded fear of [future] persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42)(A). Withholding of removal is mandatory if the applicant shows a “clear probability” of persecution in the country to which she will be removed, based on the same grounds. *See, e.g., Niang*, 422 F.3d at 1195.

Although protection from persecution constitutes a fundamental element of the 1967 Protocol and U.S. refugee law, neither the 1951 Convention, the 1967 Protocol, nor the 1980 Refugee Act (nor any other treaty governing protection) specifically defines persecution. Indeed, as the UNHCR Handbook observes, no universally accepted definition of persecution exists and “various attempts to formulate such a definition have met with little success.” UNHCR Handbook 51. However, as the UNHCR Handbook states, “a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution,” as are “[o]ther serious violations of human rights.” *Id.*

Commentators agree that the drafters of the 1951 Convention intentionally declined to provide a fixed definition of “persecution,” so that it could develop along with evolving international standards. *See, e.g.,* Lori Nessel, “*Willful Blindness*” *To Gender-Based Violence Abroad*, 89 Minn. L. Rev. 71, 97 n.101 (The 1951 Convention purposefully failed to define persecution “so that it could be interpreted in accordance with evolving standards.”). The concept of persecution is thus broad enough to encompass

harms such as forced marriage and spousal rape—practices that have grown increasingly intolerable in the eyes of the international community and the U.S. since the 1951 Convention was first drafted.

## 2. The Convention Against Torture

The U.S. also has ratified the CAT, which prohibits the return of an applicant to a country where “it is more likely than not that he or she would be tortured.” 8 C.F.R. § 1208.16(c)(2).<sup>14</sup> The United Nations General Assembly unanimously adopted the CAT on December 10, 1984. *See Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 211 (3d Cir. 2003). The CAT’s purpose is to “make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.” CAT, preamble.

Like the 1951 Convention, the CAT is founded on the Universal Declaration of Human Rights. *See* David Weissbrodt and Isabel Hortreiter, *The Principle of Non-Refoulement*, 5 Buff. Hum. Rts. L. Rev. 1 (1999). While the CAT defines torture, as an international instrument signed by 145

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<sup>14</sup> The U.S. actively participated in drafting the CAT and became a party to it in 1994. *See generally* J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture* 39-46 (1988); S. Exec. Rep. 101-30, at 2; U.N. Doc. 571 LEG/SER.E/13.IV.9 (1995). In 1998, Congress enacted the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), which implemented CAT. Pub. L. No. 105-277, § 2242, 112 Stat. 2681 (1998), followed by INS Regulations in 1999: 64 Fed. Reg. 8488 (Feb. 19, 1999); 65 Fed. Reg. 76135 (Dec. 6, 2000); 8 C.F.R §§ 208.16- 208.18 (2005).

states it must be interpreted with regard to both domestic and international law. *See* Andrea Montavon-McKillip, *CAT Among Pigeons: The Convention Against Torture, A Precarious Intersection Between International Human Rights Law and U.S. Immigration Law*, 44 *Ariz. L. Rev.* 247, 250 (2002). International sources that inform the interpretation of CAT include the judgments of international tribunals, commentary from those who drafted the Convention, leading scholarly writings, and customary international law, which “results from a general and consistent practice of states followed by them from a sense of legal obligation.” Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987) (“Restatement Third”); *see also* Montavon-McKillip, *supra*, at 249-50 (noting that CAT “is founded upon the international recognition that a prohibition on torture is a fundamental principle that already exists in customary international law and that applies to all countries”); *see infra* C.2.

**B. Forced Marriage Violates Domestic Human Rights Norms Because It Subjects Participants To A Life Of Involuntary Servitude And Rape, Constituting Persecution And Torture**

The loss of liberty, spousal rape, and domestic violence visited upon women forced into marriage causes grave physical and psychological damage, constituting persecution, a threat to life or freedom, and torture.

## 1. **Forced Marriage Is Persecution And A Threat To Life Or Freedom**

For purposes of asylum and withholding, the BIA has explained that persecution is “the infliction of suffering or harm upon those who differ in a way regarded as offensive.” *Matter of Acosta*, 19 I.&N. Dec. 211, 222-23 (BIA 1985), overruled on other grounds by *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). As described above, forced marriage involves grave physical harm. However, even if it did not, it would constitute persecution, for courts have long held that “[t]he harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.” *Matter of Laipenieks*, 18 I & N Dec. 433, 456-457 (BIA 1983), rev'd on other grounds, 750 F.2d 1427 (9th Cir. 1985).

Federal courts routinely find that fundamental human rights violations constitute persecution. *See, e.g., INS v. Stevic*, 467 U.S. 407, 428 n.22 (1984); *Li v. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005); *Li v. Attorney Gen. of United States*, 400 F.3d 157, 168-69 (3d Cir. 2005) (being fined twenty months salary, blacklisted from most legitimate employment, and deprived of other economic benefits for violating population control policies would be sufficient to establish persecution); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1095-96 (9th Cir. 2000) (rape and other sexual harm endured by gay Mexican male with female sexual identity constituted persecution).

The State Department recognizes forced marriage as a violation of fundamental human rights and the INS Gender Guidelines characterize it as a gender specific form of harm. *See* INS Gender Guidelines.<sup>15</sup> Several U.S. immigration courts have found the prospect of being deported to a country where an applicant faces forced marriage establishes eligibility for asylum relief. *Matter of [name redacted]*, A#76-512-001, (Chic., IL, Imm. Ct., Oct. 18, 2000) (granting asylum to girl facing forced marriage according to feudal practices she opposed); *Matter of O-O-*, A#[redacted], (Atl., GA, Imm. Ct., July 3, 2002) (granting asylum to woman who would be forced into polygamous marriage if returned to home country).<sup>16</sup>

U.S. recognition of the injurious effects of forced marriage is consistent with the sanctified position that marriage holds in our country. As the Supreme Court long ago recognized, “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” *Loving v. Va.*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. State of Okla.*, 316 U.S. 535, 541 (1942)); *see also Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (noting Supreme Court’s “past decisions make clear that the right to marry is of fundamental importance”). Forced marriage, by definition is inherently coercive, violates the fundamental right to marry by depriving women of choice at the outset, and deprives women of freedom throughout married life.

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<sup>15</sup> < <http://www.state.gov/s/l/65633.htm>. >

<sup>16</sup> *Infra*, 23e-45e.



The U.S. has long rejected the notion of treating wives as their husbands' property. The Supreme Court observed, "[a] State may not give to a man the kind of dominion over his wife that parents exercise over their children." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 898 (1992). The U.S. also recognizes that women deserve protection from spousal rape, as laws throughout the country identify and penalize non-consensual marital sex as rape. See Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 *Hastings L.J.* 1465, 1468-70 & n.8, 9, 10 (2003) (collecting statutes throughout country showing elimination of historical exception for marital rape). In Mali, however, no such law exists. 2007 Country Report, at p.8. As physically and emotionally traumatizing as rape is, Malian women forced into marriages endure it for a lifetime. See *infra* Part II.A.

Laws throughout the U.S. protect women from other forms of domestic violence as well. See American Bar Association, Commission on Domestic Violence (compiling laws). In Mali, however, women have little or no such recourse. See *infra* Part. II.A.

Forced marriage in Mali is also irreconcilable with the Thirteenth Amendment's prohibition on involuntary servitude. At its core, it is the forced servitude of one person to another without choice, hope, or recourse. Cf. *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896) ("Slavery implies involuntary servitude,-a state of bondage; the ownership of mankind as a

chattel, or, at least, the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services.”). Understood this way, involuntary servitude encompasses forced marriage as practiced in Mali, as it condemns women to a life of sexual and domestic servitude without protection of their person or control over their labor and services.

Although not every practice that conflicts with the U.S. Constitution amounts to persecution, or a threat to life or freedom, our constitutional framework provides an invaluable yardstick for determining whether certain practices do. *See, e.g., Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993). When a practice is prohibited by our Constitution, threatens life or freedom and violates the most fundamental norms of human rights, it must be recognized as a basis for protection.

## **2. Forced Marriage Is Torture**

CAT defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as “coercing a confession, punishment, intimidation or discrimination (among others), and which is committed by, or with the acquiescence of, a public official or other person acting in an official capacity.” CAT, art. 1; 8 C.F.R. § 208.18(a)(1).

CAT's definition of "torture" encompasses gender-based forms of harm causing severe physical or mental pain or suffering, such as forced marriage and rape. *See Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003) (granting CAT protection where petitioner would likely be raped if returned to home country); *see also Mohammed*, 400 F.3d at 802 (remanding to determine whether FGM's permanent and continuing harmful effects entitled applicant to CAT relief). The Third Circuit succinctly explained: "Rape can constitute torture. Rape is a form of aggression constituting an egregious violation of humanity." *Zubeda*, 333 F.3d at 472. As discussed in Part II.A, in Mali, practices such as forced marriage, spousal abuse and rape are committed with the government's acquiescence.

Because rape and other forms of domestic violence are inherent in forced marriages in Mali, women in such relationships are condemned to a lifetime of torture. It is difficult to comprehend a more all-encompassing violation of a woman's basic right to freedom and bodily integrity than a life of sexual servitude to a husband she did not choose, who can force himself upon her or beat her at will.

### **C. Forced Marriage Violates Fundamental Human Rights As Recognized By International Law**

Ms. Traore's claims also are fully consistent with the recognition of forced marriage as a violation of fundamental rights expressed in treaties, customary law, and international jurisprudence, all of which the BIA ignored in evaluating her claims. *See supra* section III. A.

## **1. International Treaties Recognize An Individual's Fundamental Right To Freely Consent To Marriage**

The Court's consideration of Ms. Traore's claims should be informed by the principle, expressed in myriad international treaties signed or ratified by the U.S., that forced marriage violates the fundamental human right to choose if, when, and whom to marry.

The right to freely consent to marriage was enshrined as a fundamental right in the trio of landmark human rights instruments collectively known as the "International Bill of Human Rights": the UDHR, the International Covenant on Civil and Political Rights, 1966, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, 999 UNTS 171 *entered into force* March 23, 1976 ("ICCPR"); and the International Covenant on Economic Social and Cultural Rights, 1966, G. A. Res. 2200A (XXI), 993 UNTS 3 *entered into force* January 3, 1976 ("ICESCR").

The UDHR has been widely acclaimed as setting a common standard of achievement for all peoples and nations. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (quoting Eleanor Roosevelt); *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) (recognizing UDHR as "an authoritative statement of the international community"). Drafted in large part at the U.S.'s insistence [*Nicholson v. Williams*, 203 F. Supp. 2d 153, 234 (E.D.N.Y. 2002)], and adopted internationally and by the U.S., the UDHR affirms the "free and full consent" of the intending spouses as a marriage prerequisite. UDHR, art. 16(2). While the UDHR is not a

treaty, its core principles, including the prohibition of forced marriage, have had far-reaching effect through numerous cases<sup>17</sup> and many subsequent treaties.

The ICCPR, which the U.S. ratified in 1992, is one of the most significant of these later treaties reaffirming the requirement of consent. [ICCPR, art. 23]. The Human Rights Committee (“HRC”)<sup>18</sup> authoritatively articulated member states’ obligation under the ICCPR to support meaningful consent. *E.g.*, HRC General Comments #19, Article 23 (39th Sess. 1990)<sup>19</sup> (emphasizing minimum marriage age to ensure personal consent) and #28, Equality of Rights of Men and Women, ¶ 7 (68th Sess. 2000)<sup>20</sup> (noting obligation to protect “informed and uncoerced” consent despite local laws or customs, and explaining that domestic violence violates ICCPR article 7’s prohibition of torture, cruel and degrading treatment). State parties must ensure to all under their jurisdiction the rights the ICCPR recognizes. *See* ICCPR, art. 2 (requiring adoption of measures to effectuate ICCPR rights) and art. 3 (requiring provision of remedies for violations of ICCPR rights).

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<sup>17</sup> *E.g.*, *Nicholson*, 203 F. Supp. 2d at 234 (detailing use of UDHR in determining scope of internationally guaranteed rights); *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002)(providing history of UDHR and listing cases relying on its terms), *reversed on other grounds*, 329 F.3d 51 (2d Cir. 2003).

<sup>18</sup> The body charged with receiving reports from, and working with, ICCPR member states on implementation. ICCPR, arts. 28-43.

<sup>19</sup> U.N.Doc HRI/GEN/1/Rev.6 (2003).

<sup>20</sup> U.N.Doc CCPR/C/21/Rev.1/Add.10 (2000).

The U.S. has recognized its obligations to adhere to ICCPR principles, though articles 1-27 are not self-executing.<sup>21</sup> The 1994 U.S. report to the HRC explained that no additional legislation was needed because the “fundamental rights and freedoms protected by the Covenant are already guaranteed as a matter of law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases. . . .” U.S. Report under the ICCPR, Part Two: Specific Provisions, July 1994.<sup>22</sup>

Since ratification, courts refer to the ICCPR in elucidating the scope of rights protected by the U.S. Constitution and laws. *M.A. A26851065 v. INS*, 858 F.2d 210, 219 n.7 (4th Cir. 1988) (asylum case referring to UDHR and ICCPR as “[d]ocuments detailing minimum standards of human rights”); *see also Roper v. Simmons*, 543 U.S. 551 (2005) (finding imposition of death penalty on juveniles unconstitutional, citing ICCPR); *Nicholson*, 203 F. Supp. 2d at 234 (relying on ICCPR prohibition on arbitrary interference with family life); *Beharry*, 183 F. Supp. 2d at 597 (describing ICCPR provisions as customary law).

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<sup>21</sup> Senate Resolution of Ratification of ICCPR, 102d Cong., 138 Cong. Rec. S4781-84 (1992). *See also* Senate Committee on Foreign Relations Report on the ICCPR, S. Exec. Rep. No. 102-23, 31 I.L.M. 645, 652 (1992) (noting “existing U.S. law generally complies with the Covenant”).

<sup>22</sup> <<http://dosfan.lib.uic.edu/ERC/law/Covenant94/07.html>>

Given the U.S.’s ratification of the ICCPR and its recognition that the rights the ICCPR enunciates are enshrined in existing U.S. law, this Court should find the ICCPR’s rejection of forced marriage relevant in evaluating whether Ms. Traore’s forced marriage is a harmless family tradition, as the BIA held, or persecution, a threat to her life or freedom, and torture.

Numerous other international instruments affirm the right to consensual marriage. The ICESCR,<sup>23</sup> which declares in article 10(1) the right to consensual marriage, is authoritatively construed by the Committee on Economic, Social, and Cultural Rights (“CESCR”)<sup>24</sup> to apply to both sexes. *See* General Comment No. 16, ¶ 27, E/C.12/2005/4, August 11, 2005. Other instruments reject the idea that tribal, cultural, or religious traditions excuse forced marriage. *E.g.*, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 226 UNTS 3 (“Slavery

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<sup>23</sup> The U.S. has not ratified the ICESCR, but as signatory since 1966, should support its goals. Indeed, the U.S. has elsewhere recognized this point. Its statement concerning the Platform for Action at the Fourth World Conference on Women (“Beijing Conference”) explains that such instruments, while not legally binding, provide recommendations concerning how states “can and should promote the objectives of the Conference.” *See* Interpretive Statement of U.S.A., Beijing Conference, 17 October 1995, A/CONF.177/20.

<sup>24</sup> The body of member state representatives authorized to issue general comments on implementation. ICESCR, arts. 16-22.

Convention”),<sup>25</sup> art. 1 (identifying forced marriage involving exchange of bride for consideration as akin to slavery).<sup>26</sup> Treaties also emphasize the harm to women—including violence—caused by forced marriage even in a traditional or religious setting.<sup>27</sup> *E.g.*, Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”),<sup>28</sup> art. 16, 18

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<sup>25</sup> The U.S. acceded to the Slavery Convention on December 6, 1967.

<sup>26</sup> Rome Statute of the International Criminal Court (“Rome Statute”), art. 7(2), *opened for signature* July 17, 1998, 2187 UNTS 90 *entered into force* July 1, 2002 (explaining chattel slavery encompasses trafficking in women and children).

<sup>27</sup> *See* Elimination of Violence Against Women, U.N. Commission on Human Rights Resolution 2001/49, ¶ 3 (2001) (violence against women includes traditional practices like FGM and forced marriages); Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children, Implementation of G.A. Res. 60/251, March 15, 2006 (explaining forced marriage may involve threats, pressure, abduction, imprisonment, rape, murder).

<sup>28</sup> The U.S. signed CEDAW in 1980. *See also* Committee on the Elimination of Discrimination Against Women, General Recommendation #21: Equality of Marriage and Family Relations (13th Sess. 1994) (custom, poverty and religion do not excuse) <<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>>. American courts recognize CEDAW, though unratified by the U.S., reflects international consensus. *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003)(J. Ginsberg, concurring) (citing CEDAW as demonstrating support for measures to accelerate *de facto* equality); *State v. Romano*, 155 P.3d 1102, 1114 n. 14 (Haw. 2007) (relying on CEDAW for international consensus).



December 1979, 1249 UNTS 13, 19 I.L.M. 33 (1980) (forbidding forced marriage).<sup>29</sup>

Under CAT and its implementing statute and regulations, forced marriage, and the resulting rape and domestic abuse, constitute torture.<sup>30</sup> *See supra* Part III. A., *see also* *Zubeda*, 333 F.3d at 472 (finding rape constitutes torture under CAT); Rome Statute, art. 8(2)(b)(xxii) (rape and other sexual violence are war crimes); Special Rapporteur on Violence against Women, Its Causes and Consequences, H.R.C. 52d Sess., 5 February 1996, E/CN.4/1996/53 (declaring domestic violence—behavior intended to punish, intimidate, and diminish a woman’s personality—constitutes torture); R. Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 Colum. Hum. Rts. L. Rev. 291 (1994) (severe domestic violence can constitute torture).

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<sup>29</sup> *See also* International Conference on Population and Development and Development, Programme of Action, Chapter II, principle 9 (1994) (affirming requirement of consent to marriage); World Summit for Social Development Programme of Action, Chapter 4, ¶ 80 (1995) (same); Declaration on the Elimination of Violence Against Women, 12 U.N. GAOR, 48th Sess., Supp. #49, at 217, Art. 3, U.N. Doc. A/Res/48/49 (1993) (same); Beijing Conference, 17 October 1995, A/CONF.177/20 (plan of action to eliminate violence against women, including domestic abuse, dowry-related violence, marital rape, FGM, and other harmful traditional practices).

<sup>30</sup> Privately inflicted rape and domestic violence violate CAT when state authorities know or have reasonable grounds to believe that private actors are committing these acts and fail to exercise due diligence to prevent, investigate, prosecute and punish them. (CAT/C/GC/2 (24 January 2008, ¶ 18).

This Court should be guided by the international consensus condemning forced marriage as a practice that violates fundamental human rights and degrades, enslaves, and leads to violence and torture of women. *See Roper*, 543 U.S. at 578 (“It is proper that we acknowledge the overwhelming weight of international opinion” which, by affirming fundamental human rights, “underscores the centrality of those same rights within our own heritage of freedom.”).

## **2. International Customary Law Recognizes An Individual’s Fundamental Right To Consensual Marriage**

This Court should also consider principles of customary international law, recognizing an individual’s right to freely consent to marriage, in evaluating Ms. Traore’s appeal. *See Sosa*, 542 U.S. at 694 (discussing formation of customary international law); *Paquete Habana*, 175 U.S. 677, 708 (1900) (courts must apply law of nations as federal law); *Filartiga*, 630 F. 2d at 884 (determining that federal courts may enforce customary law prohibiting torture).

Customary law results from a “general and consistent practice of states followed by them from a sense of legal obligation.” *See* Restatement Third of Foreign Relations, § 102. International agreements intended for adherence by states generally, and widely accepted by nation states, are an important source of customary law. *E.g., Id.* Other sources are the “well-established, universally recognized norms of international law.” *E.g., Filartiga*, 630 F. 2d at 888; *id.* at 881 (noting the standard of comity had

ripened into “settled rule of international law” by “the general assent of civilized nations”). Persuasive decisions of national courts are also sources [see *Paquete Habana*, 175 U.S. at 708], as are general principles of law articulated in scholarly commentary. See Stat.I.C.J., 59 Stat. 1062, T.S. No. 993 (1945).

The forced marriage prohibition is unquestionably a core provision of international agreements intended for adherence by states generally. See, e.g., ICCPR, art. 2 (requiring state parties to take necessary implementation steps); Slavery Convention, art. 1 (requiring member nations to take affirmative compliance steps). These agreements, and their characterization of forced marriage as a human rights violation, are in fact widely accepted. The UDHR was ratified unanimously<sup>31</sup>; ICCPR and the ICESCR were both overwhelmingly ratified by some 181 states. The Slavery Convention was ratified by 122, CEDAW by 185, and CAT by 145 party states.

Moreover, the forced marriage prohibition states a discrete rule amenable to national implementation. See *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251-52 (2d Cir. 2003) (customary law requires specific rules, not broad principles); cf., *Sosa*, 542 U.S. at 736 (rejecting claim that customary law prohibits arbitrary detention, in part, because proposed rule

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<sup>31</sup> See, e.g., Montreal Statement of the Assembly for Human Rights (March 1968) reprinted in 9 J. Int’l Comm’n Jurists (June 1968) (declaring UDHR is part of customary law).

was excessively broad). Notably, states enforce the prohibition through legislation and administrative efforts. *See, e.g.*, Forced Marriage Act (Civil Protection), 2007, c. 20 (U.K.) (legislation assisting forced marriage victims); U.K. Forced Marriage Unit (Foreign and Commonwealth Home Office partnership to assist victims).<sup>32</sup> States also enforce the principle through their national courts, often noting that these international instruments legally compel the results. *See infra* Part III. C.3.

Under these standards, the principle forbidding forced marriage forms part of customary international law<sup>33</sup> that should guide the Court here.

### **3. Foreign Courts Consistently Rely On International Law To Rule That Women Facing Forced Marriage Qualify For Refugee Convention Relief**

The rejection of forced marriage articulated in the ICCPR, the CEDAW, and other international instruments has informed foreign courts in asylum decisions under the 1951 Convention and its 1967 Protocol.

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<sup>32</sup> <<http://www.press.homeoffice.gov.uk/press-releases/fmu-public-information-campaign>>

<sup>33</sup> The failure of states like Mali to rigorously implement the norm does not affect its status as a rule of customary law. *E.g.*, *Filartiga*, 630 F. 2d at 884 n.15 (that the prohibition of torture is often “honored in the breach does not diminish its binding effect as a norm of international law”); *Flores*, 414 F.3d at 248 (implementation of customary law need not be universally successful).

For example, a French appeals court granted protection to a young Malian woman facing forced marriage to her first cousin if returned to Mali. The court concluded that her flight to escape the marriage transgressed social norms, giving rise to a well-founded fear of persecution under the 1951 Convention. See *La Commission des Recours des Réfugiés* [C.R.R.] [Refugees Appeals Board], Sept. 28, 2005, 526802 (Mlle. AK) (Fr.).<sup>34</sup>

National courts in New Zealand, Australia, Canada, and the United Kingdom—states with legal systems and traditions closely akin to ours—have likewise found persecution due to forced marriage. *E.g.*, *Vidhani v. Canada*, [1995] 3 F.C. 60 (Can.) (forced marriage violates women’s basic human rights reflected in United Nations conventions to which Canada is party); MA1-08227 [2002] R.P.D. (Can.)<sup>35</sup> (following *Vidhani* and international law, finding threatened forced marriage for FGM victim was persecution) (Can.); V/96/04445 [1996] R.R.T.A. 2166 (Austl.)<sup>36</sup> (forced marriage violates “core human rights” expressed in UDHR and ICCPR and is persecution when refusal causes violence, likely future retribution, and exclusion from normal life); Ref. App. 75656 [2006] R.S.A.A. (N.Z.) (finding applicant is beneficiary of ICCPR and CEDAW rights prohibiting forced marriage, a form of persecution); NO3/145861 [2003] R.R.T.A. 1111

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<sup>34</sup> *Infra*, 11e.

<sup>35</sup> <[http://www.irb-cisr.gc.ca/rtf/reflex/fulltext/197c/rpd/MA108227S\\_e.rtf](http://www.irb-cisr.gc.ca/rtf/reflex/fulltext/197c/rpd/MA108227S_e.rtf)>

<sup>36</sup> <<http://www.austlii.edu.au/au/cases/cth/RRTA/1996/2166.html>>

(Austl.) (finding that claimant threatened by forced marriage and without recourse to authorities feared persecution where laws fall short of CEDAW).

Many other courts also conclude, based on reasoning consistent with customary international law, that forced marriage constitutes persecution. *E.g.*, T99-09887 [2000] I.R.B. (Can.)<sup>37</sup> (threatened forced marriage established persecution notwithstanding local traditions); TA2-00417 [2002] R.P.D. (Can.)<sup>38</sup> (forced traditional marriage is persecution); TB (PSG-women) Iran [2005] U.K.I.A.T. 00065 (U.K.)<sup>39</sup> (claimant without adequate state protection from forced marriage fears persecution); NS (Social Group-Women-Forced Marriage) Afghanistan CG [2004] U.K.I.A.T. 00328 (U.K.) (claimant threatened by past forced marriage fears future persecution from forced re-marriage); T99-06804 [2000] I.R.B. (Can.) (claimant threatened with forced marriage without realistic recourse to authorities faced persecution); C.R.R., Sept. 21, 2005, 527391 (Mme. SC) (Fr.)<sup>40</sup> (applicant who fled forced, abusive marriage feared persecution and could expect no help from authorities); C.R.R., Sept. 19, 2005, 534159/CG51 (Mlle. LO)

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37 <[http://www.irb-cisr.gc.ca/rtf/reflex/fulltext/145c/crdd/T9909887S\\_e.rtf](http://www.irb-cisr.gc.ca/rtf/reflex/fulltext/145c/crdd/T9909887S_e.rtf)>

38 <[http://www.irb-cisr.gc.ca/rtf/reflex/fulltext/204c/rpd/TA200417S\\_e.rtf](http://www.irb-cisr.gc.ca/rtf/reflex/fulltext/204c/rpd/TA200417S_e.rtf)>

39 <<http://www.ait.gov.uk/Public/SearchResults.aspx>>

40 *Infra*, 14e.

(Fr.) (applicant who fled forced marriage had well-founded fear of persecution).<sup>41</sup>

In determining that the threat of forced marriage amounts to persecution and entitles claimants to relief<sup>42</sup> under the Refugee Convention, these courts confirm that the forced marriage prohibition has attained the status of binding customary law. *See New Jersey v. Delaware*, 291 U.S. 361, 383 (1934) (municipal courts lend imprimatur to validity of international customary law). This Court, like those cited above, should recognize that Ms. Traore has established a well-founded fear of persecution and threat to life or freedom from forced marriage, and should be afforded Refugee Convention protection.

#### IV. CONCLUSION

Ms. Traore has demonstrated that she is entitled to asylum, withholding of removal, and CAT protection. She has already been the victim of, and continues to endure the injury from, Mali's widespread practice of FGM. If returned to Mali, she will be forced into a marriage

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<sup>41</sup> *Infra*, 18e.

<sup>42</sup> In every country other than the U.S. the relief granted upon a finding of persecution is the equivalent of U.S. asylum as well as withholding. *See generally* Joan Fitzpatrick, *The Int'l Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. at 2-3 (1997).

where she will spend a life of sexual and physical servitude to a man against her will, with no reasonable expectation of protection from the state.

This prospect constitutes persecution, a threat to life or freedom, and torture under both domestic and international norms of basic human rights. Although no published federal court of appeal opinion has spoken to this issue, the international community has spoken in one clear voice. Our country is bound as a party to the 1967 Protocol and the CAT to bring its refugee law in line with that international consensus.

Apart from that obligation, our country has the independent moral obligation to recognize threats to free people and to protect against those threats. Our country cannot rid the world, or even Mali, of the evils of forced marriage, but it can ensure that it does not send someone from our shores to a country where she will endure a life of pain and suffering without



option, recourse, or hope. Irrespective of its international obligations, our country is, and must always be, better than that.

Dated April 15, 2008

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE  
PURSUANT TO FED. R. APP. P. 32(a)(7)(B)**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the attached Amicus Brief of Center for Gender & Refugee Studies and the International Women's Human Rights Law Clinic is double-spaced and was printed in proportionately spaced, fourteen-point CG Times type.

On April 7, 2008, this Court granted the motion of amici to file a brief not to exceed 7,900 words, and this brief contains 7,640 words (inclusive of footnotes, but exclusive of tables, the Interests of the Amici Curiae, addenda containing authorities (declarations with exhibits) and this Certificate). In preparing this Certificate, I relied on the word count generated by Microsoft Word 2003.

Dated April 15, 2008

Reed Smith LLP

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Brian P. McKeever

## CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2008, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via Hand Delivery, the required number of copies of the Brief in Support of Petitioner (Reversal) by the Center for Gender and Refugee Studies and International Women's Human Rights Law Clinic, et al. as *Amici Curiae* ("Brief of *Amici Curiae*"), and further certify that on April 15, 2008, I electronically filed the Brief of *Amici Curiae* with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users: [None]

I further certify that I have mailed the required number of copies of the Brief of *Amici Curiae* by First Class U.S. Mail, postage prepaid, to the following non-CM/ECF participants, addressed as follows:

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