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**FORCED MARRIAGE AND ASLYUM:  
PERCEIVING THE INVISIBLE HARM**

*Kim Thuy Seelinger*

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# FORCED MARRIAGE AND ASYLUM: PERCEIVING THE INVISIBLE HARM

Kim Thuy Seelinger\*

## I. INTRODUCTION

*A young woman in Guinea was forced to marry a wealthy man, thirty years her senior, who had two other wives. When she protested the marriage, her father bound and held her without food, whipped her on six different occasions, and locked her in her room for two days. After the marriage, her husband raped her almost daily. At least once when she tried to refuse sexual relations, he physically abused her. She was able to flee to a foreign country, but her husband located her. He called her, threatening to notify the authorities and have her returned. She then fled to the United States seeking asylum. Her case was denied by an asylum officer but granted by an immigration judge.<sup>1</sup>*

*A young Chinese woman was sold to a man to pay off her father's gambling debts. She went to the police for help but was*

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1. Center for Gender and Refugee Studies ("CGRS") Database Case # 283 (2001) (on file with CGRS). Contact CGRS through <http://cgrs.uchastings.edu/assistance> with inquiries regarding any case notes or decision materials referenced to CGRS database.

returned to her husband. When she finally escaped, she fell vulnerable to traffickers who promised her safety and work in the United States. Upon arrival to the United States, she was detained for over one year while her asylum case was pending before an immigration judge.<sup>2</sup>

A Guatemalan woman was raped at age sixteen by a much older family friend. She was forced to marry him. After years of continued abuse, she fled to Mexico, where she found herself in another abusive relationship. There, she was beaten with a belt and repeatedly locked in a house. She fled to the United States for safety and applied for asylum on the basis of forced marriage and domestic violence.<sup>3</sup>

Two months after her husband's death, a woman from Cameroon was told by her husband's family that she was to marry her deceased husband's older brother, who already had two wives. She was told she had to marry him or return the brideprice her family had accepted from the groom. When the woman indicated she had no money, her in-laws hit her until she fell to the ground. They told her that they would return for her in one month to collect the money, and that if she was unable to pay, she would be killed for refusing to marry the older brother. Her case was denied by an asylum officer, denied by an immigration judge, denied by the Board of Immigration Appeals, and remanded by the Eighth Circuit.<sup>4</sup>

\* \* \*

Forced marriage drives women from all corners of the globe to flee their homelands in pursuit of refugee protection. Some are being forced to marry someone against their will; others are trying to escape a marriage they have already been forced to enter. As illustrated above, these women often suffer or risk several harms related to the marriage they seek to escape—they may be raped, beaten, subjected to female genital cutting (“FGC”),<sup>5</sup> threatened, insulted, or more.

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2. CGRS Database Case # 3427 (2006) (on file with CGRS).

3. CGRS Database Case # 6194 (2009) (on file with CGRS).

4. CGRS Database Case # 2489 (Asylum Office 2001, IJ 2003, BIA decision date unclear), remanded by *Ngengwe v. Mukasey*, 543 F.3d 1029, 1031 (8th Cir. 2008).

5. Female genital cutting is also widely referred to as “female genital mutilation” and “female circumcision.” Among these variant terms, it is the position of the Center for Gender and Refugee Studies to refer to the practice as “female genital cutting” (“FGC”) in order to avoid the inappropriate comparison to male circumcision while also avoiding the stigmatization inherent in the word

In the world of gender-based refugee claims, forced marriage is a common form of harm suffered by women. Yet, because there is currently no precedent establishing forced marriage *per se* as a form of persecution, these women's claims often hinge more on risk of related harms which have already been found to constitute persecution—such as rape, physical beatings, or FGC. Where a forced marriage claim is broken down into these more concrete related harms, adjudicators often grant or deny the claim based on their assessment of those harms. The separate question of whether entry into, or suffering of, a marriage against one's will constitutes persecution is generally left unaddressed. Even where the question is raised by advocates, adjudicators either ignore the issue and focus on component harms, or they cast the marriage as an acceptable cultural arrangement or contractual matter. So, while many women fleeing forced marriage are found eligible for asylum on the basis of component harms, such as rape or physical beatings, the general neglect of both advocates and adjudicators in the United States to squarely address forced marriage itself as persecution reveals a blindspot, if not an outright failure, of our refugee system.

The Center for Gender and Refugee Studies (“CGRS”) is a national clearinghouse and resource center for gender asylum cases based at the University of California, Hastings College of Law. Through its unique technical assistance program, by which our attorneys provide advice and resources in support of gender-based asylum cases throughout the United States, CGRS is able to obtain consent to track cases as they move through the asylum offices and immigration courts—records for which are not published or otherwise publicly accessible. Such access to ground-level developments allows CGRS to discern patterns and challenges arising in hundreds of otherwise invisible gender-based asylum claims every year. This critical vantage point informs CGRS's advice, resource development, litigation, and policy advocacy.

There are currently no precedential decisions about forced marriage from the Board of Immigration Appeals (“BIA”), which reviews all agency asylum decisions across the United States before they can be appealed to the federal courts. Nor have any instructive published decisions regarding forced marriage and asylum issued from the federal courts. For these reasons, CGRS's ground-level information about these claims is of unique value when assessing the

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“mutilation.” However, the author fully supports the decision of advocates, clients, and adjudicators to use “female genital mutilation” or “FGM.”

treatment of forced marriage in asylum adjudications. As of mid-July 2009, CGRS had tracked more than 400 asylum cases involving women who had suffered or feared a forced marriage in their country of origin. Of these, CGRS was able to collect approximately two dozen actual decisions from the asylum office and immigration court level.<sup>6</sup>

After briefly defining forced marriage and tracing its limited appearance in published BIA and federal asylum cases, this Article steps into the world of unpublished cases involving forced marriage to explore the ways forced marriage is, and is not, analyzed in current asylum adjudications. By first reviewing hundreds of skeletal case outlines entered into the CGRS database by attorneys seeking CGRS technical assistance, and then roughly two dozen actual, unpublished agency decisions that some of those attorneys later provided at case conclusion, one can detect a troubling lack of appreciation of the full plight of asylum seekers fleeing forced marriage.<sup>7</sup>

## II. FORCED MARRIAGE: WHAT IT IS, WHAT IT IS NOT

### A. Forced Marriage, Defined

In Sierra Leone during the 1990s, thousands of women were abducted from their villages by rebel forces and forced to be the “bush wives” of rebel soldiers. These women were raped, beaten, branded, and forced to cook, clean, and bear children for their captors.<sup>8</sup> These marriages—“forced” in the clearest, most literal sense—were taken up by the Special Court for Sierra Leone, which was charged with bringing justice to parties most responsible for serious human rights violations committed in Sierra Leone since 1996. The Court found “forced marriage” to be a crime against humanity distinct from “sexual slavery.” On February 25, 2009, the Court convicted three former Revolutionary United Front leaders of

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6. Generally, the asylum offices do not issue written decisions. However, CGRS received one “Notice of Intent to Deny” in which the asylum officer’s reasoning was briefly outlined. See CGRS Database Case #3176 (2005) (on file with CGRS).

7. Case descriptions provided in this article are presented according to the permission of the client and attorney of record.

8. Michael P. Scharf & Suzanne Mattler, *Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone’s New Crime Against Humanity* (Case Research Paper Series in Legal Studies, Working Paper No. 05-35, 2005), available at <http://ssrn.com/abstract=824291>.

forced marriage as a crime against humanity for the first time in the history of international law.<sup>9</sup>

Most forced marriages, however, are quieter, subtler affairs: Fathers settle debts by selling their daughters; uncles promise young nieces to their friends; or rapists avoid punishment by marrying their victims. Forced marriages take myriad forms, including “early marriage” of girls younger than the age of consent; temporary marriages by which a man can pay to “marry” a woman for a few hours or a few months (“mut’a” or “siqueh”);<sup>10</sup> wife inheritance, by which a woman can be forced to marry her brother-in-law once her husband has passed away; and debt-rape, or compensation marriages, through which families settle tribal or inter-family disputes by giving a girl child in marriage.<sup>11</sup> Even where these unions may not be civilly registered, they are binding according to religious, traditional, or other prevailing social customs. Forced marriages are almost always facilitated by members of the victim’s family or community, and so physical, psychological, and even cultural duress is brought to bear on the young woman. Regardless of context, all forced marriages share an essential characteristic: the lack of meaningful consent by one or both parties—usually the bride.

In 2000, the United Kingdom Home Office presented a helpful definition of forced marriage: namely, “a marriage conducted without the valid consent of both parties, where duress is a factor.”<sup>12</sup>

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9. Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment, ¶ 2306 (Mar. 2, 2009); Sierra Leone: “Forced Marriage” Conviction a First, IRIN, Feb. 26, 2009, <http://www.irinnews.org/Report.aspx?ReportId=83160>; see also Sierra Leone: Marion Kargbo, “My Mother Gave Me to Them,” IRIN, Feb. 26, 2009, <http://www.irinnews.org/Report.aspx?ReportId=83162> (indicating that this is the first time a court has treated forced marriage as a crime against humanity).

10. Susanne Louis B. Mikhail, *Child Marriage and Child Prostitution: Two Forms of Sexual Exploitation*, 10 Gender and Dev. 43, 45 (2002); The Special Rapporteur on Violence Against Women, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, ¶ 63, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2002/83 (Jan. 31, 2002) (prepared by Radhika Coomaraswamy) [hereinafter *Gender Perspective*], available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.2002.83.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.2002.83.En?Opendocument).

11. *Gender Perspective*, supra note 10, ¶ 58; see also United Nations Population Fund, Virtual Slavery: The Practice of “Compensation Marriages” (July 16, 2008), [http://www.unfpa.org/gender/docs/fact\\_sheets/marriage.doc](http://www.unfpa.org/gender/docs/fact_sheets/marriage.doc) (demonstrating the use of compensation marriages to settle disputes).

12. U.K. Home Office Comm’n Directorate, A Choice By Right: The Report of the Working Group on Forced Marriage 6 (2000), available at <http://www.fco.gov.uk/Files/KFile/AChoiceByRightJune2000.pdf>.



The Home Office noted further that, “[the] more extreme forms [of forced marriage] can involve threatening behaviour, abduction, imprisonment, physical violence, rape, and in some cases, murder.”<sup>13</sup> In 2002, the U.N. Special Rapporteur on Violence Against Women adopted the Home Office’s definition of the practice in an assessment of cultural family practices harmful to women.<sup>14</sup>

The United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery includes forced marriage among “practices similar to slavery.”<sup>15</sup> It specifically targets any practice wherein: “(i) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (ii) the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or (iii) a woman on the death of her husband is liable to be inherited by another person.”<sup>16</sup>

### 1. Forced Marriage Versus Arranged Marriage

Forced marriage is *not* the same as arranged marriage. The former is a violation of human rights, while the latter is generally not. The U.K. Home Office offers a helpful distinction:

In arranged marriages, the families of both spouses take a leading role in choosing the marriage partner but the choice of whether or not to accept the arrangement remains with the potential spouses. They give their full and free consent. By contrast, in a forced marriage, one or both spouses do not consent to the marriage or consent is extracted under duress. Duress includes both physical and emotional pressure. The tradition of arranged marriage has operated successfully within many communities and many countries

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13. *Id.* at 11.

14. *Gender Perspective*, *supra* note 10, ¶ 57.

15. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *opened for signature* Sept. 7, 1956, art. 1, 18 U.S.T. 3201, 226 U.N.T.S. 3 (entered into force Apr. 30, 1957), *available at* <http://www2.ohchr.org/english/law/slavetrade.htm>.

16. *Id.*

for a very long time and remains the preferred choice of some people.<sup>17</sup>

The Home Office Report describes “arranged” and “forced” marriage as falling along a spectrum of relative consent, with “arranged marriage” at one end and “forced marriage” at the other. Decreasing degrees of consent lead closer and closer to the “forced marriage” end of the spectrum. For example, in the tradition of arranged marriages, the families of both spouses generally take a leading role in facilitating or arranging the marriage. However, the choice of whether to ultimately solemnize the proposed arrangement rests with the proposed bride and groom and can be exercised at any time.<sup>18</sup> In many cases, the parents arranging a marriage will move on from one prospective spouse to another if their child does not find the first (or second, or third) option acceptable. This interactive process, where the parents oversee the marriage process but the child’s consent is still determinative, is closer on the continuum to the consensual model of arranged marriage. However, as the amount of input parents accept from their child and the degree to which parents allow their child to make the decision decreases, and the pressure to marry a certain individual rises closer and closer to the level of duress, the marriage moves along the continuum from “arranged” to “forced.”

Recent training materials for the U.S. Asylum Office have taken a slightly different perspective on the relationship between forced and arranged marriages, defining the former as “an arranged marriage that is enforced against the victim’s wishes.”<sup>19</sup> Whether a semantic shift or an actual re-categorization, the central premise is the same as that of the U.K. Home Office: A forced marriage lacks the full and free consent of both parties. Of course, the cornerstone of “full and free consent” can itself be difficult to measure.

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17. U.K. Foreign & Commonwealth Office, *Forced Marriage: A Wrong, Not a Right* 7 (2005) (emphasis added), available at <http://www.fco.gov.uk/en/about-us/publications-and-documents/publications1/consultations1/closed>.

18. *Id.*

19. U.S. Immigration Officer Academy, *Asylum Officer Basic Training Course: Female Asylum Applications and Gender-Related Claims* 15 (2009), available at <http://www.uscis.gov/files/article/AOBTC%20Lesson%2026%20Female%20Asylum%20Applications%20and%20Gender-Related%20Claims.pdf>.

## B. Forced Marriage and Attendant Harms

On a macro level, forced marriage is often one aspect, or perhaps one result, of larger structures of gender inequality that exclude women and girls from education, financial independence, reproductive autonomy, and full political and civil participation. This is particularly striking in the subcategory of early marriages—those that take place before the age of consent of one or both of the parties.<sup>20</sup> For example, about sixty percent of Afghan girls are married off by their families before they reach the age of sixteen.<sup>21</sup> A significant number of these young brides suffer pregnancy-related complications before age fourteen due to the immaturity of their reproductive organs.<sup>22</sup> Moreover, early roles as wives and mothers, in combination with their families' conservative social and cultural values, preclude most girls from continued education.<sup>23</sup> This in turn contributes to an eighty percent illiteracy rate among Afghanistan's women.<sup>24</sup>

Even apart from early marriage, a correlation between lack of education and higher rates of forced marriage is indicated by studies such as one performed by a Turkish women's rights group in 2000. It found that in areas of east and southeast Turkey, where women's access to education was lower than in other parts of the country, fifty percent of women were married without their consent. Further, the study found that fifty-seven percent of women who had not completed

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20. For more information on early forced marriage, see FORWARD, Child Marriage and Forced Marriage, <http://forwarduk.org.uk/key-issues/child-marriage> (last visited Aug. 31, 2010); see also FORWARD, Ouagadougou Consultation and Declaration on Early & Forced Marriage & the Rights of Women & Girls (2003), <http://www.forwarduk.org.uk/news/events/24> (describing a consultation, and resultant declaration, among participants from six African countries in opposition to the practice of forced marriage).

21. Integrated Regional Information Networks, United Nations, Youth in Crisis: Coming of Age in the 21st Century 35 (2007), available at <http://www.irinnews.org/pdf/in-depth/Youth-in-crisis-IRIN-In-Depth.pdf>; see also UNICEF, Afghanistan's Maternal and Child Mortality Rates Soar (2005), [http://www.unicef.org/media/media\\_27853.html](http://www.unicef.org/media/media_27853.html) (indicating that forty percent of Afghan women marry before age 18); Video: Afghanistan's Child Brides (The Economist, August 14, 2009), [http://video.economist.com/?fr\\_story=f9a66be7c029e51f00595371f6d9f2e82040dfda](http://video.economist.com/?fr_story=f9a66be7c029e51f00595371f6d9f2e82040dfda) (describing the experience of a photographer who documented child brides in rural Afghanistan).

22. *Id.*

23. UNICEF, Afghanistan's Maternal and Child Mortality Rates Soar (2005), [http://www.unicef.org/media/media\\_27853.html](http://www.unicef.org/media/media_27853.html).

24. FORWARD, Child Marriage and Forced Marriage, <http://forwarduk.org.uk/key-issues/child-marriage> (last visited Aug. 31, 2010).

primary education expected that their families would arrange their marriages, as compared to 9.3 percent of women who had completed secondary school.<sup>25</sup>

On a micro level, forced marriage is more than a violation of the fundamental right to freely consent to marriage—it is often accompanied by other forms of harm such as rape, domestic violence, and physical and verbal abuse. Rape within forced marriage is not difficult to find; it stands to reason that where a woman does not consent to a relationship to begin with, she generally does not consent to sex with that partner either. Other abuse often follows. Where a woman lacks agency to reject a husband, she likely occupies a position of subservience within that marriage once she enters it.

There are also harmful traditions related to marriage that individual women seeking asylum suffer. In some parts of Africa, for example, women are subjected to female genital cutting in order to ensure a woman's "cleanliness" and sexual restraint. As a result, a prerequisite for many forced marriages is the ritual cutting of the bride's genitals, either in childhood or soon before the wedding date.<sup>26</sup> Where polygamy and payment of brideprice are common, women can also suffer harms of unequal partnership and status as "purchased" chattel. In parts of South Asia, family members of spurned suitors throw scarring acid on women who reject marriage proposals.<sup>27</sup> In areas of the Middle East, women are forced to undergo virginity tests on their marriage night—failure of which can result in beatings or

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25. Pinar Ilkharacan, Exploring the Context of Women's Sexuality in Eastern Turkey, in *Women and Sexuality in Muslim Societies* 229, 237 (Pinar Ilkharacan ed., *Women for Women's Human Rights* 2000), in *Amnesty International, Turkey: Women Confronting Family Violence*, 10 (2004), available at <http://www.amnesty.org/en/library/asset/EUR44/013/2004/en/176dcc64-d5ed-11dd-bb24-1fb85fe8fa05/eur440132004en.pdf>.

26. For background information about FGC, see UNIFEM, *Eliminating Female Genital Mutilation: An Inter-Agency Statement 4–7* (2008), available at [http://www.unifem.org/attachments/products/fgm\\_statement\\_2008\\_eng.pdf](http://www.unifem.org/attachments/products/fgm_statement_2008_eng.pdf); see also World Health Organization, *Female Genital Mutilation and Obstetric Outcome: WHO Collaborative Prospective Study in Six African Countries*, *The Lancet*, June 3, 2006, at 1835, available at <http://www.who.int/entity/reproductivehealth/publications/fgm/fgm-obstetric-study-en.pdf> (summarizing recent research into FGC and national, regional, and international actions being taken to eliminate the practice).

27. The Special Rapporteur on Violence Against Women, *Integration of the Human Rights of Women and the Gender Perspective*, ¶ 57, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2002/83 (Jan. 31, 2002), available at [http://www.unhcr.ch/huridocda/huridoca.nsf/AllSymbols/42E7191FAE543562C1256BA7004E963C/\\$File/G0210428.pdf?OpenElement](http://www.unhcr.ch/huridocda/huridoca.nsf/AllSymbols/42E7191FAE543562C1256BA7004E963C/$File/G0210428.pdf?OpenElement).

even death.<sup>28</sup> Women in many areas of the world are also the victims of honor killings by their own fathers and brothers, because they are perceived to have brought shame upon their families—for discovery as a non-virgin, resistance to a forced marriage, or related trespasses.<sup>29</sup>

### C. Forced Marriage as a Human Rights Violation

As a threshold matter, forced marriage violates the fundamental right to freely consent to marriage. The right is recognized in numerous international human rights instruments, including Article 16(2) of the Universal Declaration of Human Rights, which affirms that “[m]arriage shall be entered into only with the free and full consent of the intending spouses.”<sup>30</sup> Similarly, Article 23 of the International Convention on Civil and Political Rights similarly provides that, “[n]o marriage shall be entered into without the free and full consent of the intending spouses,”<sup>31</sup> and Article 10(1) of the International Convention on Economic, Social, and Cultural Rights reiterates the right to consensual marriage.<sup>32</sup> Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women also forbids forced marriage.<sup>33</sup> “Early marriage,” where one or both parties are below the age of legal consent, is addressed in the Convention on the Rights of the Child, which recommends eighteen as the appropriate age of consent. The

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28. *Id.* ¶ 61.

29. Amnesty International USA, Culture of Discrimination: A Fact Sheet on “Honor” Killings (2005), [http://www.amnestyusa.org/women/pdf/Honor\\_Killings\\_Fact\\_Sheet.pdf](http://www.amnestyusa.org/women/pdf/Honor_Killings_Fact_Sheet.pdf); see also UNIFEM, Facts & Figures on VAW, Harmful Traditional Practices (2007) (citing The Secretary General, In-depth Study on all Forms of Violence Against Women: Report of the Secretary-General, U.N. Doc A/61/122/Add.1 (July 6, 2006), available at [http://www.unifem.org/gender\\_issues/violence\\_against\\_women/facts\\_figures.php?page=4](http://www.unifem.org/gender_issues/violence_against_women/facts_figures.php?page=4)).

30. Universal Declaration of Human Rights, G.A. Res. 217A, at 74, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

31. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 23, S. Exec. Doc. E, 95-2, at 30, 999 U.N.T.S. 171, 179 (entered into force Mar. 23, 1976).

32. International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 10, 993 U.N.T.S. 3, 7 (entered into force Jan. 3, 1976).

33. United Nations Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Mar. 7, 1966, art. 16, 1249 U.N.T.S. 13, 20 (entered into force Sept. 3, 1981).

African Charter on the Rights and Welfare of the Child reflects the same protection.<sup>34</sup>

### III. FORCED MARRIAGE AS PERSECUTION IN THE REFUGEE CONTEXT

#### A. Forms of and Requirements for Refugee Protection

The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (together, “the Refugee Convention”) define a refugee as, “[a] person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”<sup>35</sup>

In other words, an applicant for refugee protection must show not only risk of persecution in his or her country, but also that such persecution would be due to his or her race, religion, nationality, political opinion, or some other fundamental or unchangeable characteristic of identity or belief the applicant shares with a group of other people there.<sup>36</sup> Without this “nexus” to at least one of these five “protected grounds,” a claim for refugee status will fail.

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34. African Charter on the Rights and Welfare of the Child, adopted 1990, art. 21, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999) (“Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.”).

35. Convention Relating to the Status of Refugees, adopted July 28, 1951, art. 1, 19.5 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 152 (entered into force Apr. 22, 1954); United Nations Protocol Relating to the Status of Refugees, adopted Jan. 31, 1967, art. 1, 19.5 U.S.T. 6223, 6225, 606 U.N.T.S. 267, 268 (entered into force Oct. 4, 1967).

36. For a discussion of the protected ground of “membership in a particular social group” see text accompanying notes 144–150. Essentially, in the United States, a group’s members must be united by some shared immutable or fundamental characteristic and the group itself must be seen as somehow distinct within society. See *Matter of Acosta*, 19 I&N Dec. 211, 212 (BIA 1985) (emphasizing that members of a particular social group must share a common, immutable characteristic); see also *Matter of C-A-*, 23 I&N Dec. 951, 955–57 (BIA 2006) (applying *Acosta* in determining that “noncriminal informants” is too broad

Asylum is a subset of refugee protection, available to persons who have physically entered the country where they seek protection and wish to stay. As such, it is defined domestically by refugee-receiving governments. The United States ratified the 1967 Protocol in 1968 and sought to codify its provisions in the 1980 Refugee Act.<sup>37</sup> In the United States, credible establishment of a ten-percent chance of future persecution inflicted on account of one of the five “protected grounds” (race, nationality, religion, membership in a particular social group, or political opinion) can form the basis of an applicant’s asylum eligibility.<sup>38</sup>

Evidence of *past* persecution inflicted on account of a protected ground can give rise to a presumption of a well-founded fear of future harm. That presumption can be rebutted, however, where the government shows either that circumstances have changed such that the applicant is no longer at risk of harm for the reasons she was persecuted in the past, or that the applicant could “reasonably” relocate to safety somewhere else in the country of origin.<sup>39</sup> An applicant must also show that her home government cannot offer meaningful protection from the persecution feared.

Persons seeking asylum in the United States are also subject to the “one-year bar”—a filing deadline, instituted in 1996, that obliges applicants to apply within the first year of their arrival in the country.<sup>40</sup> If an applicant is statutorily precluded from asylum due to

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of a social group to be included within the definition of “refugee” under the Immigration and Nationality Act).

37. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1981), which was enacted with the intention of bringing the United States into compliance with the 1951 Refugee Convention and 1967 Protocol.

38. *Id.* § 201.

39. 8 C.F.R. § 208.13(b)(2)(ii) (2010).

40. Immigration & Nationality Act § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2006). The “one-year bar” was passed by Congress as part of 1996’s Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), Pub. L. No. 104-208, § 301(b), 110 Stat. 3009-546, 3009-576 (1996). The provision required anyone filing for asylum after April 1, 1998, to apply within one year of his or her last arrival in the United States. The bar can be waived in cases of “changed” or “extraordinary” circumstances relating to the applicant’s inability to file on time. “Changed circumstances” that give rise to a new fear of return may concern either the applicant’s personal situation or conditions relating to the country from which he or she is fleeing. Implementing regulations provide that, “extraordinary circumstances” for the purposes of bar exemption include “serious illness or mental . . . disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival.” 8 C.F.R. §208.4(a)(5)(i) (2010). The “extraordinary circumstances” must be directly related to the failure to file

failure to overcome the “one-year bar,” he or she may nonetheless be eligible for lesser forms of protection. Some may be eligible for “withholding of removal” under the Immigration and Nationality Act (“INA”) § 241(b)(3), which requires a more difficult showing of a “more-likely-than-not” risk of a threat to life or freedom on account of one of the same five grounds as asylum.<sup>41</sup> Other applicants precluded from asylum may be eligible for relief under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”) instead of the Refugee Convention if they can show they are more likely than not to be tortured in their countries of origin, regardless of connection to a protected ground.<sup>42</sup>

### B. Forced Marriage as Persecution under the Refugee Convention

“Persecution” within the meaning of the Refugee Convention is not well defined. However, it is understood both internationally and within the United States to include any “threat to life or

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within one year of arrival in the United States. The regulations further require that, where either “changed” or “extraordinary” circumstances are found to exist, any delay in filing must be “reasonable under the circumstances.” 8 C.F.R. §208.4(a)(5). It should be noted that waiver is discretionary and many bona fide refugees are denied protection because of their inability to overcome the filing requirement to the satisfaction of the asylum adjudicator. For background reading on the one-year bar and the effects of post traumatic stress disorder (“PTSD”) on many applicants’ ability to file for asylum on time, see Karen Musalo, *The Implementation of the One-Year Bar to Asylum*, 31 *Hastings Int’l & Comp. L. Rev.* 693, 703 (2008); Stuart Lustig, *Symptoms of Trauma Among Political Asylum Applicants: Don’t be Fooled*, 31 *Hastings Int’l & Comp. L. Rev.* 725, 728 (2008) (discussing the symptoms of PTSD and its impact on the credibility of witnesses in the courtroom).

41. See I.N.A. § 241(b)(3); see also 8 C.F.R. § 208.16(b) (2010) (discussing eligibility for withholding of removal under I.N.A. §241(b)(3)).

42. See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277, § 2242, 112 Stat. 2681, 2681–821 (1998); see also 8 C.F.R. §208.16(c) (2010) (discussing eligibility for withholding of removal under the Convention Against Torture). Torture, for CAT purposes, is defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, punish[ment] . . . or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, art 1, S. Treaty Doc. No. 100-20, at 19, 1465 U.N.T.S 85, 113–14 (entered into force June 26, 1987).



freedom” or other serious human rights violations.<sup>43</sup> As discussed above, the right to freely consent to marriage is considered a fundamental human right, violation of which should be seen as persecution in and of itself. Indeed, courts in France, Australia, Canada, New Zealand, and the United Kingdom have acknowledged forced marriage as a violation of human rights sufficient to constitute persecution under the 1951 Refugee Convention and its 1967 Protocol.<sup>44</sup>

The United States has been slower to acknowledge the deprivation of consent in marriage as persecution. The BIA has interpreted “persecution” to be “the infliction of suffering or harm upon those who differ in a way regarded as offensive.”<sup>45</sup> Accordingly, asylum adjudicators and federal courts have found harms ranging from beatings to rape to FGC to constitute persecution.<sup>46</sup> U.S. courts have also deemed non-physical harm such as verbal abuse, death threats, and even isolation and deliberate, severe economic disadvantage to constitute persecution.<sup>47</sup> American adjudicators tend

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43. Convention Relating to the Status of Refugees, art. 1(c), July 28, 1951, 19 U.S.T. 6260, 189 U.N.T.S. 137; UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 51, U.N. Doc. HCR/IP/4/Eng/Rev.1 (Jan. 1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437–39 n.22 (1987).

44. *See, e.g., Vidhani v. Canada*, [1995] 3 F.C. 60, ¶12 (Can.) (finding that forced marriage violates women’s basic human rights reflected in United Nations conventions to which Canada is party); V/96/04445 [1996] R.R.T.A. 2166, ¶52 (Austl.) (finding that 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).

45. *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).

46. *See, e.g., Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (finding FGC to be a form of persecution); *Shoafera v. INS*, 228 F.3d 1070, 1074 (9th Cir. 2000) (finding rape to constitute persecution); *Wang v. Ashcroft*, 341 F.3d 1015, 1020 (9th Cir. 2003) (finding forced abortion to be persecution *per se*).

47. *See, e.g., Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998) (finding that persecution does not require bodily harm); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004) (noting the constant fear and anxiety the petitioner experienced due to attacks and threats against her spouse and children, and holding that the economic harm and emotional trauma she suffered compelled a finding of persecution); *Kovac v. INS*, 407 F.2d 102, 106–07 (9th Cir. 1969) (holding that persecution encompasses both physical and mental suffering, and that by removing the qualifying word “physical” from the previous statutory definition of persecution, Congress intended to include mental suffering); *Lim v. I.N.S.*, 224 F.3d 929, 936 (9th Cir. 2000) (holding that especially menacing death threats may constitute persecution in certain extreme cases).

to focus on these “component harms” in their treatment of asylum claims based on forced marriages, instead of focusing on the forced marriage itself. Often only an applicant who suffered or feared component harms could be found eligible for asylum.

Nevertheless, U.S. immigration authorities recognized forced marriage itself as a possible form of persecution in gender guidelines issued as early as 1995.<sup>48</sup> More recently, the U.S. Department of State Foreign Affairs Manual 2007 stated that: “The Department considers a forced marriage to be a violation of basic human rights.”<sup>49</sup> This view was reiterated in the revised 2009 Asylum Officer Basic Training Course materials, which instruct:

“Forced marriages have been asserted, and may under some circumstances qualify, as a form of persecution . . . . The key question in determining whether a forced marriage might constitute persecution is whether the victim experienced or would experience the marriage, or events surrounding the marriage, as serious harm.”<sup>50</sup>

In its concluding section, the training materials explicitly state, “[f]orced marriage is an arranged marriage against the victim’s wishes and without the informed consent of both parties . . . . Forced marriage constitutes a human rights violation.”<sup>51</sup> Despite such clear articulations that forced marriage can constitute persecution if it results in—or is accompanied by—“serious harm,” recognition of forced marriage as persecution in itself has been slow to emerge among U.S. adjudicators.

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48. See U.S. Bureau of Citizenship & Immigration Services, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* 9 (May 26, 1995), available at <http://www.unhcr.org/refworld/docid/3ae6b31e7.html> (stating that marrying outside of an arranged marriage may result in harm, abuse, or harsh treatment, thus diminishing the civil, political, social, and economic rights of women).

49. *Id.*; see also U.S. Dep’t. St. Foreign Affairs Manual Vol. 7, 7 FAM 1450, at 10 (2005), available at <http://www.state.gov/documents/organization/86802.pdf> (stating that the Department considers forced marriage to be a violation of basic human rights).

50. Asylum Officer Basic Training Course, Lesson 26: Female Asylum Applications and Gender-Related Claims 16 (2009), available at <http://www.uscis.gov/files/article/AOBTC%20Lesson%2026%20Female%20Asylum%20Applications%20and%20Gender-Related%20Claims.pdf>.

51. *Id.* at 38.

### C. Overview of U.S. Forced Marriage Jurisprudence

#### 1. Published Federal and Board of Immigration Appeals Cases

The only two published decisions directly addressing whether forced marriage itself constitutes persecution (one in the Second Circuit, and one by the BIA) were vacated in 2006 and 2007, respectively. This has left a void of clear jurisprudence regarding forced marriage as a form of persecution for the purposes of asylum.

*Gao v. Gonzales* was the only precedential federal case to directly address forced marriage until it was vacated on procedural grounds by the Supreme Court in 2007.<sup>52</sup> The applicant, a young Chinese woman, had fled a forced marriage to a man from whom her parents had accepted (and spent) payment for the union.<sup>53</sup> The immigration judge found simply that, while Ms. Gao was credible, her plight did not amount to persecution on account of a protected ground, but rather constituted a dispute between two families with respect to the enforceability of a marriage contract.<sup>54</sup> The judge ignored the fact that she had been twelve years old when the “contract” was entered, meaning that she could not have provided meaningful consent. The judge also found that the proffered social group, “females in arranged marriages in [her area of China]” was not cognizable because it lacked a common, immutable characteristic.<sup>55</sup> The judge also found that Ms. Gao could reasonably relocate to another part of China and that, in any event, the Chinese government would protect her from future harm at the hands of her rejected husband.<sup>56</sup>

The BIA affirmed the immigration judge’s decision without opinion despite Ms. Gao’s submission of a revised social group: “young women of Fuchow ethnicity, who have not had traditional marriage, arranged by parents and go-between, as practiced by that Fuchow ethnicity, and who oppose the arrangement and who do not

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52. *Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006), *vacated on procedural grounds* by *Keisler v. Gao*, 128 S. Ct. 345 (2007).

53. *Id.* at 64.

54. *Id.* at 70–71.

55. *Id.* at 70.

56. *Id.* at 71.

have protection against it.”<sup>57</sup> In reviewing the BIA’s decision, the Second Circuit considered *de novo* the mixed legal and factual questions of whether Ms. Gao would face persecution on account of a protected ground, reasonableness of relocation, and the existence of state protection. Notably, it found that “lifelong, involuntary marriage” constitutes persecution.<sup>58</sup> Further, the Court found that Ms. Gao would suffer persecution for her membership in a group the Court identified as, “women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable.”<sup>59</sup>

Remarkably, this decision addressed the entry into marriage without consent, and not merely on the presence of component or attendant harms such as marital rape or beatings. However, the United States Supreme Court vacated the decision in 2007, finding that, per *Gonzales v. Thomas*,<sup>60</sup> the circuit court should have remanded the question of whether Ms. Gao was persecuted on account of her membership in a particular social group back to the Department of Homeland Security, since the agency had not yet made this determination in the first instance.<sup>61</sup>

The only other published case directly assessing forced marriage itself as a form of persecution was *Matter of A-T*.<sup>62</sup> There, a Malian woman suffered FGC and also rejected marriage to her first cousin.<sup>63</sup> The bulk of the Court’s assessment of Ms. T’s claim

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57. Brief of Petitioner at 4 n.1, *Gao v. Gonzalez*, 440 F.3d 62 (2d Cir. 2006) (No. 04-1874), 2007 WL 6449000 (quoting Petitioner’s Brief to the BIA, at 10–11 (on file with CGRS)).

58. *Gao*, 440 F.3d at 70.

59. *Id.*

60. *Gonzales v. Thomas*, 126 U.S. 1613 (2006).

61. *Keisler v. Gao*, 552 U.S. 801, 801 (2007).

62. *Matter of A-T*, 24 I&N Dec. 296 (BIA 2007), *vacated and remanded by* 24 I&N Dec. 617 (A.G. 2008), *remanded by* 25 I&N Dec. 4 (BIA 2009).

63. Ms. T was found statutorily barred from asylum due to the one-year bar filing deadline. She had argued the existence of changed circumstances due to a letter received from her father in August 2003, in which he discussed his plans for Ms. T to marry her cousin and demanded that she return to Mali. The immigration judge and the BIA both doubted that the news of marriage plans could be considered “changed circumstances” warranting exception from the filing deadline because Ms. T had admitted that her family had joked about the union when she and her cousin were children. Even assuming the letter did contain new information or threat of danger, the BIA found that Ms. T’s filing for asylum in May 2004 was not within a reasonable period of time after receipt of her father’s letter. Therefore, Ms. T was found eligible to apply for withholding of removal

concerned the question of whether past FGC could be grounds for refugee protection. However, she had also received letters from her father, threatening harm should she fail to return to Mali to uphold the family honor by proceeding with the marriage to her cousin.<sup>64</sup> The BIA focused primarily on Ms. T's FGC claim, finding "changed circumstances"—namely, that once a woman has been subjected to FGC, she does not risk suffering it again and thus lacks a well-founded fear of future harm to support her eligibility for asylum.<sup>65</sup> The BIA then essentially dismissed the forced marriage aspect of the claim, summarily finding that, "an *arranged* marriage between adults is not generally considered *per se* persecution."<sup>66</sup> The Board went on to explain that refugee protection could not be granted on the basis of a "reluctant acceptance of family tradition over personal preference."<sup>67</sup> However, Attorney General Mukasey vacated *Matter of A-T* in 2008 based on BIA errors with respect to the FGC claim, and the BIA's subsequent decision did not address the forced-marriage aspect of Ms. T's claim.<sup>68</sup> Therefore, the agency's cursory treatment of forced marriage in *Matter of A-T* was extinguished.

The remaining published federal cases which involve forced marriage in some way illustrate the challenges posed by asylum applications based on forced marriage. Of course, many decisions simply neglected the forced-marriage claim and focused on component harms, such as FGC or rape.<sup>69</sup> In the few federal decisions that did directly treat the issue, the forced marriage claim was addressed in a variety of ways. Generally, claims based *solely* on forced entry into marriage have suffered challenges with both establishment of persecution and proving nexus to a protected ground. Where other forms of harm such as FGC or rape or beatings were suffered or feared, petitioners have fared better. The Tenth and

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and Convention Against Torture relief only. *Matter of A-T*, 24 I&N Dec. at 296–97.

64. *Id.* at 297.

65. For a more detailed discussion of the BIA's decision in *Matter of A-T* and other FGC-related asylum cases, see Lisa Frydman & Kim Thuy Seelinger, *Kasinga's Protection Undermined? Recent Developments in Female Genital Cutting Jurisprudence*, 13 *Bender's Immigr. Bull.* 1073, 1078 (2008).

66. 24 I&N Dec. 296 at 302 (emphasis added) (citing *Mansour v. Ashcroft*, 390 F.3d 667, 680 (9th Cir. 2004)).

67. 24 I&N Dec. 296 at 302–03.

68. *Matter of A-T*, 24 I&N Dec. 617, 623 n.6 (A.G. 2008).

69. See, e.g., *Haoua v. Gonzales*, 472 F.3d 227, 231–32 (4th Cir. 2007) (discussing only the risk of FGC upon return to home country while leaving untouched the issue of forced marriage).

Fourth Circuits have acknowledged the risk of forced marriage as indicative, at least, of risk of FGC, which is largely understood to be a prerequisite for marriage in many parts of the world.<sup>70</sup> In another case, the Second Circuit found that where a woman had already undergone FGC in the past, she could still be targeted for other harms based on the same reasons—depending on country conditions, this could implicitly include forced marriage.<sup>71</sup>

#### a. Claims Based Solely on Forced Marriage

*Lan Zhu Pan v. Gonzales*:<sup>72</sup> A young Chinese woman escaped an “arranged marriage (or some other kind of involuntary sexual relationship)” with her father’s creditor.<sup>73</sup> The BIA had found “young women from rural China” to be too broad a social group, and found no proof of targeting of “unmarried young women from rural China who have resisted being forced into marriage and sexual relationships by a person in power.”<sup>74</sup> The social group then proffered at the circuit-court level—“young unmarried women from rural China who have resisted forced marriages and forced sexual relationships by a person in power”—was entertained for the sake of analysis only.<sup>75</sup> Notably, the court denied asylum on factual grounds, finding that Ms. Pan’s “only evidence of persecution” was the attempted sale into arranged marriage or involuntary sexual relationship by her father to his business associate, and that after she escaped her “husband-to-be,” she did not face harm for over two years in China.<sup>76</sup> As to motive, the Court found that the record did not support a finding that persecutors specifically targeted women who have resisted forced sexual relationships.<sup>77</sup> Arguably, the court tacitly acknowledged that the arrangement for marriage or sex could constitute persecution, but ultimately found that there was no well-founded fear of future harm, and no proof of nexus to a protected ground.

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70. *Uanreroro v. Gonzales*, 443 F.3d 1197, 1207 (10th Cir. 2006) (noting, in some instances, a temporal connection between FGC and forced marriage); *Gomis v. Holder*, 571 F.3d 353, 364 (4th Cir. 2009) (Gregory, J., concurring in part and dissenting in part) (finding FGC to be a necessary prerequisite to marriage in the instant case).

71. *Bah v. Mukasey*, 529 F.3d 99, 115 (2d Cir. 2008).

72. *Lan Zhu Pan v. Gonzales*, 445 F.3d 60 (1st Cir. 2006).

73. *Id.* at 62.

74. *Id.*

75. *Id.* at 61–62.

76. *Id.* at 62.

77. *Id.* at 62–63.

b. Forced Marriage Acknowledged Mainly as Indicator of Risk of Other Harms

*Uanreroro v. Gonzales*:<sup>78</sup> A Nigerian woman fearing FGC and rejecting forced marriage to a chief priest was denied asylum. The immigration judge's adverse credibility finding was based on perceived factual inconsistencies, apparent discrepancy between testimony and outdated Department of State reporting on the practice and legality of FGC in Ms. Uanreroro's home state, and misrepresentations she had made upon entry into the United States. The BIA affirmed the underlying credibility determination. While the circuit court appreciated the connection between FGC and forced marriage in this set of facts (though using the terms "forced marriage" and "arranged marriage" interchangeably), it focused primarily on the applicant's well-founded fear of FGC.<sup>79</sup> The Tenth Circuit reversed on credibility and found that the immigration judge had failed to take full account of the applicant's individualized risk of harm by relying overly on generalized country conditions information. It deemed that the underlying denial of relief was not supported by substantial evidence and remanded the case for consideration of country conditions information the government should have submitted at the time of hearing.<sup>80</sup>

*Gomis v. Holder*:<sup>81</sup> A twenty-nine year old woman from Senegal's Djola tribe fled FGC and forced marriage to a man in his sixties, from whom her family had already accepted wedding gifts. Ms. Gomis filed for asylum beyond the one-year deadline, prompted by news that her family had forcibly subjected her younger sister to FGC.<sup>82</sup> The Fourth Circuit found that it lacked jurisdiction to review the one-year bar arguments related to her statutory eligibility for asylum.<sup>83</sup> It focused instead on Ms. Gomis' eligibility for withholding of removal, which requires proof of harm and motive similar to asylum, but which does not implicate the one-year bar. Though the court acknowledged the link between FGC as a prerequisite to marriage in the Djola tradition, it focused on the general prevalence of FGC in Senegal, which is far lower than in the Djola tribe. It found

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78. *Uanreroro v. Gonzales*, 443 F.3d 1197 (10th Cir. 2006).

79. *Id.* at 1209.

80. *Id.* at 1208 (finding the BIA had relied on outdated country reports and information).

81. *Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009).

82. *Id.* at 358.

83. *Id.* at 358–59.

that the risk that Ms. Gomis would suffer FGC upon her return was not “more likely than not,” which is required for withholding of removal.<sup>84</sup> In an articulate dissent, Circuit Judge Gregory clearly noted that an applicant’s family’s acceptance of brideprice or gifts could further increase her risk of FGC and forced marriage.<sup>85</sup> The one-year bar issue is currently the subject of a Supreme Court certiorari petition.<sup>86</sup>

c. Finding No Risk of, or Opposition to, Forced Marriage

*Manani v. Filip*:<sup>87</sup> A Kenyan woman who had undergone FGC feared the forced FGC of her daughters, forced marriage in the form of widow inheritance by her deceased husband’s brother, and harm based on her HIV-positive status. Her asylum application took various turns upon appeal. At the immigration court level, Ms. Manani identified herself as a member of two social groups: “Mkisii women subjected to wife inheritance” and “HIV-positive Kenyans.”<sup>88</sup> The immigration judge denied her claims for relief based partly on the fact that Ms. Manani had avoided wife inheritance for two years after her husband’s death, and her daughters—left in Kenya without her—had similarly managed to avoid FGC.<sup>89</sup> The immigration judge also denied based on the failure to file for asylum within a reasonable time after extraordinary circumstances (discovery of HIV-positive status in United States fourteen months before applying for asylum) and adverse credibility.<sup>90</sup>

At the BIA, Ms. Manani maintained her membership in the group of “Kenyans who are HIV-positive” but modified her other group to be “Kenyan widows opposed to wife inheritance and to the performance of FGM on their daughters.”<sup>91</sup> Regarding asylum, the BIA affirmed the immigration judge’s findings of adverse credibility and statutory ineligibility.<sup>92</sup> Moving on to withholding of removal, the

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84. *Id.* at 362 (Gregory, J., dissenting).

85. *Id.*

86. Petition for Writ of Certiorari at 16, *Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009) (No. 09-194) (arguing jurisdiction exists over claims challenging fact-based rulings on statutory exceptions to a one year filing deadline).

87. *Manani v. Filip*, 552 F. 3d 894 (8th Cir. 2009).

88. *Id.* at 897.

89. *Id.* at 898.

90. *Id.*

91. *Id.* at 901.

92. *Id.* at 901–02.



BIA affirmed the immigration judge's finding that Ms. Manani did not face a clear probability of wife inheritance since she had avoided it for two years after her husband's death.<sup>93</sup> The Eighth Circuit upheld the BIA's adverse credibility findings largely due to inconsistencies about how many times and occasions Ms. Manani had been slapped by her in-laws—which went “to the heart” of her claim of persecution as a Kenyan widow.<sup>94</sup> The court also noted that Ms. Manani had not offered sufficient credible evidence of persecution based on her widowhood or opposition to wife inheritance to compel a reversal of the BIA's ruling.<sup>95</sup>

d. Opening the Door (Slightly) to Forced Marriage as Persecution?

*Bah v. Mukasey*:<sup>96</sup> Here, the Second Circuit considered the consolidated claims of three Guinean women, all of whom had already suffered FGC and been denied refugee protection. The BIA found that the women lacked a well-founded fear of future harm because FGC had already been inflicted and thus could not be repeated.<sup>97</sup> Such circumstances, the BIA reasoned, rebutted the presumption of well-founded fear based on past persecution.<sup>98</sup> The Second Circuit held in part that future harm presumed on the basis of past persecution could include *any* related persecution a woman might face on account of the same protected characteristics that had once marked her for FGC; there was no regulatory requirement that the future harm feared be identical to the past harm suffered.<sup>99</sup> Because FGC is a prerequisite to marriage in many applicants' communities, *Bah* can be taken as opening the door for consideration

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93. *Id.* at 902.

94. *Id.*

95. *Id.* at 902–03. As to other Withholding of Removal aspects of her case, the BIA concluded that Ms. Manani's fears of harm based on HIV-positive status in Kenya did not amount to a threat to life or freedom warranting relief. *Id.* at 903. The Eighth Circuit found it lacked jurisdiction to review Ms. Manani's statutory eligibility for asylum and thus focused on her withholding and CAT claims. *Id.* at 903–04. It disposed of her own past FGC claim, which was not raised beyond her application for asylum. *Id.* The court also found that Ms. Manani would not face deliberate harm in Kenya on account of her HIV-positive status. *Id.* at 903.

96. *Bah v. Mukasey*, 529 F.3d 99 (2d Cir. 2008).

97. *Id.* at 104.

98. *Id.* at 105.

99. *Id.* at 115.

of forced marriage as a source of future persecution related to FGC, even where FGC has already occurred.

*Ngengwe v. Mukasey*:<sup>100</sup> In this case, a Cameroonian widow was at risk of being forced into marriage to her late husband's brother, in accordance with "wife inheritance" customs of her in-laws' tribe. The Eighth Circuit joined the BIA in rejecting the applicant's originally-offered social group, "widowed Cameroonian female member[s] of the Bamileke tribe, in the Southern region that belongs to a family or has in-laws from a different tribe and region, the Bikom tribe in the Northwest province, who have falsely accused her of causing her husband's death."<sup>101</sup> However, it then found that the BIA had erred in rejecting the simpler social group of "Cameroonian widows." Noting that, "[t]he question of whether forced marriage constitutes persecution is an open issue," the Court of Appeals found that the immigration judge and the BIA had not properly considered whether the Hobson's choice of forced marriage, death, or paying an impossible bride's price constituted persecution. Further, the Court found that the agency had not evaluated whether the evidence of physical and non-physical harm visited upon the widowed applicant (e.g., her in-laws had confiscated all of her property and threatened to take her children away) might constitute persecution.<sup>102</sup> The case was remanded to the BIA.

*Bi Xia Qu v. Holder*:<sup>103</sup> In this very recent and unusual case, a twenty year old Chinese woman had been kidnapped, detained, and subjected to attempted rape and threats by her father's creditor. The man demanded that Qu marry him if her father could not repay his loan. Qu escaped from him after two weeks. The immigration judge had originally denied her claim for asylum, withholding, and Torture Convention relief, but then *sua sponte* reopened the case and granted asylum.<sup>104</sup> The BIA overturned the decision.<sup>105</sup> The Sixth Circuit

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100. *Ngengwe v. Mukasey*, 543 F. 3d 1029 (8th Cir. 2008).

101. *Id.* at 1034.

102. *Id.* Interestingly, the court also found that Ms. Ngengwe lacked a well-founded fear of forced marriage in the future because once working outside of Cameroon, she could have sent enough money home to repay her bride-price. *Id.* at 1037. It is unclear whether the court was implicitly acknowledging that forced marriage was a form of future persecution that Ms. Ngengwe could prevent.

103. *Bi Xia Qu v. Holder*, No. 09-3118, 2010 WL 3362345 (6th Cir. Aug. 27, 2010).

104. *Id.* at \*2.

105. *Id.*

vacated and remanded the case, with narrow instruction that the BIA reconsider whether Qu was a member of a particular social group.<sup>106</sup> The court specifically provided that, should Qu be found to belong to a cognizable group, she should be granted asylum since she had met all other requirements for relief.<sup>107</sup> Though it is a sympathetic decision, the Sixth Circuit's analysis of Qu's claim is convoluted and perhaps not a helpful precedent.

As to persecution, the Court noted that,

Unlike cases in which women fear being forced into marriage or prostitution because they have been threatened by potential perpetrators and it is a common practice in their country, Qu has suffered a severe form of the practice—she was kidnapped for two weeks until she escaped, her perpetrator attempted to rape her, and he threatened to send her to prison if she did not marry him.<sup>108</sup>

The distinction the Court seemed to draw between women who fear forced marriage or prostitution and those who have actually already suffered it is problematic for at least two reasons. First, it would preclude women who have strictly prospective fears. Second, assuming that the “practice” to which the Court referred is “being forced into marriage or prostitution,” it is factually questionable; the facts presented in the decision do not clearly establish that Qu had yet been forced into either. As such, it is unclear what “practice” the Court deemed her to have suffered. Further, though the Court seemed to accept Qu's “forced marriage” to be persecution, it only found sufficient severity because Qu suffered kidnapping, attempted rape, and threats of imprisonment. The Court missed an opportunity to find that simply being forced into marriage without consent can itself constitute persecution.

Regarding social group membership, the Court noted, “it appears that Qu has shown that she was a member of a particular social group of women in China who have been subjected to forced marriage and involuntary servitude.”<sup>109</sup> However, the contemplated social group is only assessed for its common immutable and fundamental characteristics and is not evaluated for more recent social group requirements of social visibility and particularity.

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106. *Id.* at \*5.

107. *Id.*

108. *Id.* at \*4. It is unclear what social group, if any, was actually proffered by Qu.

109. *Id.* at \*3.

Further, it does not serve to explain “nexus,” or *why* Qu was targeted for harm in the past—it would be circular and illogical to argue that her father’s creditor kidnapped or attempted to force Qu into marriage *because* she was a “woman who had been subjected to forced marriage.” Finally, the Court offered a slightly muddled discussion of Qu’s future harm and what would motivate it. It relied on the presumption of future harm where past harm on account of a protected ground has been established without rebuttal. However, since the only social group discussed does not properly explain the motives behind Qu’s *past* harm, the automatic assumption of Qu’s well-founded fear of future harm is premature.<sup>110</sup> The case is currently on remand to the BIA.

The BIA has seen a number of claims touching on forced marriage, but has repeatedly ignored the issue or dismissed that aspect of the particular claim. None of the main published decisions provide useful guidance: The facts of *Matter of Kasinga* did present a forced marriage claim along with its better known FGC claim, but the forced marriage aspect of Ms. Kasinga’s persecution was not directly addressed by the Board’s decision.<sup>111</sup> A number of more recent unpublished BIA decisions have addressed forced marriage. Those in which CGRS has provided technical assistance will be discussed below.

#### IV. UNPUBLISHED AGENCY DECISIONS: FORCED MARRIAGE ASYLUM CASES IN THE CGRS DATABASE

As of July 2009, the CGRS technical assistance database had tracked 454 asylum cases lodged at some level of the immigration service (asylum office, immigration court, BIA) that involved some aspect of forced marriage. Of the 447 cases in which CGRS received information about country of origin, 320 concerned asylum applicants from Africa (71 percent), 53 from Asia (12 percent), 42 from the Middle East (9 percent), 25 from the Americas (5 percent), and seven from Europe and the Pacific Islands combined (1.5 percent). The overwhelming majority of applicants fleeing persecution were

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110. Though it is difficult to know what Qu had actually argued to the court, a safer analysis based on the contemplated social group of “women in China who have been subjected to forced marriage and involuntary servitude” might have simply used her past harm as strong indicators of future risk of harm on this basis—namely, Qu’s risk of being hunted down and punished because she was a woman who had escaped a forced marriage.

111. *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

women—only two were men.<sup>112</sup> Of the 454 cases logged by clients' attorneys seeking CGRS's technical assistance, the database features information about 208 case outcomes (see Table 1). Of these unpublished cases,<sup>113</sup> the following numbers were available as of July 2009: At the Asylum Office level, 56 had been granted (63 percent of decided cases), 32 denied (36 percent of decided cases), and 101 were pending. At the Immigration Court level, 63 had been granted (65 percent of decided cases). The BIA had decided sixteen cases, denying all but one. Only fourteen of the cases recorded in the CGRS database reached the federal circuit courts—of these, three were granted, five were denied, and seven were pending as of July 2009.<sup>114</sup>

It should be noted that the above statistics necessarily paint a misleading picture of the success of lodging an asylum claim involving forced marriage at the asylum office and immigration court levels. These relatively high grant rates likely reflect: (1) a determination based on a harm other than the forced marriage itself, as discussed below, and (2) generally increased chances of success where the applicant is represented by an attorney who takes the time to seek CGRS case assistance.<sup>115</sup>

Statistical bias aside, tracking forced marriage asylum cases in the CGRS database still permits comparison of both the numbers and types of claims emanating from different regions of the world. Designation as a case involving forced marriage generally comes directly from the attorneys making an initial request for technical assistance through the CGRS website. However, the information entered may or may not reflect what was ultimately presented or

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112. The fact that only two of the forced marriage cases reflected in the CGRS database involved male applicants does not in and of itself indicate the actual percentage of forced marriage claims lodged by men across the United States. It is possible that male applicants (and their attorneys, where represented) did not seek CGRS's assistance on their asylum cases due to CGRS's focus on women's claims.

113. For discussion of cases which are not included in these statistics, see *supra* text accompanying notes 52, 62, and 96.

114. CGRS Database Cases # 4397, 3547, and 754 were granted at the federal court level; CGRS Database Cases # 3246, 795, 782, 574, and 369 were denied; CGRS Database Cases # 5614, 5606, 4768, 4677, 3675, 2884, and 1104 were pending as of July 31, 2009.

115. CGRS does not possess the written decisions for many of the cases reported as denied by the BIA. However, it seems that the considerable shift in grant rate at the BIA does not necessarily indicate that only the weakest cases have moved up to appeal. Rather, the combination of troubling analysis below and summary BIA "affirmances without opinion" is a likely factor.

**Table 1: Known Case Outcomes from CGRS Technical Assistance Database, as of July 2009**

<b>Level</b>	<b>Granted</b>	<b>Denied</b>	<b>Known Outcomes</b>	<b><i>Pending</i></b>
Asylum Office	56	32	88	<i>101</i>
Immigration Court	63	33	96	<i>121</i>
BIA	1	15	16	<i>15</i>
Federal Court	3	5	8	<i>7</i>
Total	123	85	208	<i>244</i>

briefed to the adjudicator. Still, the collective background information provided affords insight into a wide world of unpublished case profiles of applicants fleeing forced marriage.<sup>116</sup>

#### A. Regional and Factual Patterns

As noted above, the vast majority of the tracked cases involving forced marriage were from Africa. The leading sources of Africa's 320 claims were: Guinea (71 cases), Kenya (35), Mali (31), and Nigeria (25). Of the 53 cases originating in Asia (including South and Central Asia), most came from China (24 cases) and Pakistan (13). The 42 Middle Eastern cases stemmed largely from Yemen (11), Iran (9), and Jordan (4). Most of the 25 cases from Latin America and the Caribbean, Central, South America and the Caribbean were from Guatemala (13) and Mexico (3). From Europe, there was one case each from Armenia, Poland, Russia, and the former Yugoslavia. Fiji and Tonga accounted for the source of the remaining three claims.<sup>117</sup> To some rudimentary extent, the case descriptions that attorneys

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116. Information provided to attorneys seeking technical assistance affords CGRS two levels of insight. First, information provided by attorneys themselves when describing their cases directly onto our technical assistance form online (<http://cgrs.uchastings.edu/assistance>) or in communication with CGRS attorneys affords a global snapshot of claims involving forced marriage. From this, we can track facts, legal theories, and outcomes, as reported by hundreds of attorneys; we can also discern recurring challenges or patterns in forced marriage claims. Second, from the reports of the actual oral decisions, or copies of the written decisions some attorneys provide to CGRS upon case completion, we can see the actual "reasoning" behind the adjudicator's decision—and whether the issue of forced marriage was addressed. This is invaluable in terms of identifying blindspots from the bench and honing responsive legal strategies.

117. This distribution of cases does not reflect the actual relative prevalence of forced marriage in the world—it merely reflects the number of cases in which attorneys have contacted CGRS for technical assistance.

enter into the CGRS database when requesting technical assistance allow some overarching universal and regional patterns to be discerned. For example:

1. The vast majority of asylum applicants fleeing forced marriage were women;
2. “Early marriages” of women under the age of legal consent derived from all regions of the world;
3. All over the world, family members—whether parents or members of extended family—were largely responsible for forcing marriage upon the asylum applicant;
4. Economic need drove forced marriages all over the world, however this was a more common or explicit aspect in Chinese forced marriage claims than elsewhere;
5. In no area of the world was there a showing of meaningful police intervention in issues concerning “private family matters” such as forced marriage, FGC, domestic violence, marital rape, etc.; and
6. The one-year bar was a recurrent obstacle for many claims to asylum.

#### 1. Regional Observations: Africa<sup>118</sup>

The vast majority of forced marriage claims from African countries also involved some element of cultural traditions closely related to marriage. Specifically, most African forced marriage cases reported to CGRS (228 out of 320, or 71 percent) involved past or feared FGC due to the traditional relationship between FGC and a woman’s presumed marriageability in many parts of Africa. Many applicants had been subjected to FGC as children, according to the customs of their tribes. However, many had not been and were expected to undergo the rite before the intended marriage could be effected, thus inextricably linking the two harms. Many African cases also involved a traditional payment to the bride’s family (commonly called “dot”) which ranged from small symbolic tokens to large sums of money or land.

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118. Defined as Sub-Saharan and West Africa, including Mauritania.

In African claims, the forced marriage was generally initiated by the applicants' fathers—or other powerful male relatives—either when the applicant was a child, or later in life upon the death of her husband (in the form of “wife inheritance” by her brothers-in-law or other male relatives.) Not only was “early marriage” commonplace, but many cases involved forced marriage to men significantly older than the applicant, often with an age difference of several decades. Attempts to resist entry into forced marriage in Africa were generally met with beatings and confinement by the applicants' father, uncles, or brothers; attempts to escape a forced marriage already entered frequently led to return by the applicants' family (if they sought refuge with them) or even being tracked down by family members who either perceived escape as a dishonor to the family, or who were concerned that they would be forced to return any brideprice received.

## 2. Regional Observations: Asia<sup>119</sup>

With approximately half of the region's relevant claims originating in China, one can roughly discern two profiles of “Asian” forced marriage claims: Chinese and non-Chinese. Chinese forced-marriage claims overwhelmingly involved either the sale of a daughter by parents in order to satisfy some economic debt to a business partner, or pressure to accede to marriage to a son of a local chief or other authority figure. These scenarios largely affected young women from rural areas. In relatively few cases was rape indicated as part of the past harm suffered. Several forced marriage claims from South Asia involved a threat of “honor killing,” where an applicant was perceived to have brought shame upon her family—either by resisting a forced marriage or having sexual relations outside of marriage.

## 3. Regional Observations: The Middle East<sup>120</sup>

Like several South Asian cases, Middle Eastern cases were notable for reports of early marriage and threats of honor killings. One case from Syria, in particular, presented testimony about the practice of honor killings there—explaining how the police treat such violence as a family matter, and where prosecutions of the murderers

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119. Defined as East Asia, China, Central Asia, and South Asia.

120. Defined as the region customarily referred to as the Middle East, plus Afghanistan and the predominantly Arab portions of North Africa.



under “dignity laws” do ensue, sentencing is lenient because it privileges the preservation of family honor over harm to a woman seen to violate it.<sup>121</sup>

#### 4. Regional Observations: The Americas

Most forced-marriage cases in the CGRS database that originated in Central or South America came from Guatemala and Mexico. In these countries, there is no discernible tradition of forced, or even arranged, marriage. Instead, many of the cases present factual patterns in which women who had been raped—by a soldier, a neighbor, a stranger—were forced to marry their rapists. This phenomenon seems to come about for one of two reasons: either the rape took place in a country where a rapist could avert prosecution and conviction by marrying his victim, or where societal norms deem survivors of sexual abuse to be unmarriageable and thus the woman’s family hoped to marry their daughter off to “spare her” a life of spinsterhood and stigmatization.<sup>122</sup>

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121. CGRS Database Case # 456 (2000) (on file with CGRS).

122. In Algeria and Libya, for example, a perpetrator of rape against a minor can be excused from criminal prosecution if he is willing to marry his victim, thereby allowing the judge to lower the minimum age for marriage. See Rangita de Silva de Alwis, *Child Marriage and the Law 31* (2007) (unpublished working paper), available at [http://www.unicef.org/policyanalysis/files/Child\\_Marriage\\_and\\_the\\_Law.pdf](http://www.unicef.org/policyanalysis/files/Child_Marriage_and_the_Law.pdf). In Cameroon as well, a perpetrator of rape can be exonerated so long as his victim is over the age of puberty at the time of the rape. See Comm. on African Affairs, N.Y. City Bar Ass’n, *Gender-Based Violence Laws in Sub-Saharan Africa* 30 (2007), available at <http://www.nycbar.org/pdf/report/GBVReportFinal2.pdf>. A similar provision exists in Morocco, where women’s rights activists are currently fighting for its annulment. See Morocco Rape Law Oppresses Women: Activists, Al Arabiya News Channel, Sept. 7, 2009, <http://www.alarabiya.net/articles/2009/02/07/65922.html>. Until recently, similar exculpatory provisions existed in Ethiopia, Lebanon, Egypt, Turkey, Peru, Uruguay, and Costa Rica. U.N. Secretary-General, Background Documentation for: 61st Session of the General Assembly: Item 60(a) on Advancement of Women: Secretary General’s Study on Violence Against Women: Forthcoming as Document A/61/122/Add.1, at 87, available at <http://www.un.org/womenwatch/daw/vaw/violenceagainstwomenstudydoc.pdf>; see also Amberin Zaman, *Where Girls Marry Rapists for Honor*, L.A. Times, May 24, 2005, at 9 (discussing a thirteen year-old girl in Turkey who was forced to marry the man who raped her in order to “cleanse her honor”). For an excellent discussion of the current laws on the avoidance of rape convictions in Guatemala, see the expert affidavit of Hilda Morales Trujillo, available upon request through <http://cgrs.uchastings.edu/assistance>.

### 5. Regional Observations: Europe

There were very few cases from Europe identified as involving forced marriage. The three that were reported involved sex trafficking and mail-order brides, a complicated variation of forced marriage that will not be discussed at length in this article.

### B. Other Correlations Among Tracked Cases

The CGRS database permits attorneys seeking technical assistance to check certain boxes that correspond to types of harm appearing in their cases. While the boxes checked do not necessarily reflect the entirety of the claim (many attorneys learn more about their clients' histories after they fill out the initial request for CGRS assistance, for example; in other cases, clients simply neglect to answer all the intake questions), the data collected does provide some indication of the types of harm that accompany forced marriage in asylum claims. Many of these overlapping forms of harm are illustrated by this Article's introductory "case snapshots."

In terms of numbers, more than half of the 454 reported forced marriage claims involved either past or feared FGC—evidently due to the large number of African cases. The other highly correlated harms appearing in forced marriage cases were "domestic violence," which was affirmatively indicated in 176 cases, "rape/sexual violence," which was indicated in 72 cases, and "threat of honor killing," indicated in 52 cases. Eight cases involved HIV—either the applicant believed she had contracted HIV in the context of abuse and forced marriage, or she feared exposure to the virus if sent back to submit to the forced marriage.

There were also eight cases involving sexual orientation—originating from countries in Africa, Asia, and South America. These cases concerned lesbians exclusively, who either had been forced into marriage, or feared such a fate, at the hands of families seeking to "cure" them of their homosexuality. Though the sample is small, it is noteworthy that these cases were all granted. This overwhelming success rate may be attributable to findings that persecution (in the form of forced marriage or rape, for example) was motivated by membership in a clear social group (based on sexual orientation). It may also reflect the assumption that marriage and sexual relations entered against a person's sexual orientation—not just against their consent—must be categorically forced and, therefore, persecutory.

Finally, in 66 of the 454 cases in the CGRS database, attorneys indicated that their clients had missed the one-year filing deadline for asylum and would seek to assert exception from the statutory bar to asylum.

### C. Legal Patterns in Cases Where Unpublished Decisions Are Available

Though the CGRS database includes substantial information provided by attorneys about the facts, theory, and decision rationale of hundreds of cases, meaningful analysis of outcomes can best be derived from the roughly two dozen actual decisions provided to CGRS. Although this sample is small, these decisions still represent the largest available window into the world of unpublished asylum office, immigration court, and BIA decisions concerning forced marriage. Through them, one receives a raw glimpse of how forced marriage is being treated at the invisible levels of asylum adjudication in the United States.

Of the cases logged in the CGRS database which indicated some element of forced marriage in the applicant's personal details, CGRS received 20 immigration court decisions. Of these, five (25 percent) were granted, while 15 (75 percent) were denied. Based on additional information received about these cases, it appears that at least 14 were appealed to the BIA. Of these, six (53 percent) were ultimately denied, one (6 percent) was granted, and six (40 percent) were still pending as of July 31, 2009. (*Matter of A-T*, not counted among these unpublished decisions, was vacated by Attorney General Mukasey, as discussed above.)<sup>123</sup>

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123. IJ grants: CGRS Database Cases # 196, 276, 283, 998, 3116; IJ denials: # 369, 574, 699, 795, 1104, 1298, 2489, 2820, 3163, 3246, 3301, 3744, 4079, 4677, 6217. BIA grant: # 3744; BIA denials: # 369, 574, 1015, 3163, 4677, 6217 (Motion to Reopen pending); Pending: # 456, 699, 2489, 3116, 3301, 4079. Of these, Case # 3163 was appealed to the circuit court, then remanded back down to the immigration judge to evaluate: (1) the cognizability of the social group, "Ugandan women sold into arranged marriage"; (2) the ability of the Ugandan government to protect victims of domestic violence/forced marriage; and (3) the existence of a well-founded fear of persecution. The immigration judge granted the case. See Jenner & Block Attorneys Help African Woman Rebuild Her Life in the U.S., Center for Gender and Refugee Studies Newsletter (Univ. of Calif., Hastings Coll. of the Law/Ctr. for Gender & Refugee Studies, San Francisco, Calif.), Spring 2007, available at [http://cgrs.uchastings.edu/newsletter/spring07/news\\_spring07\\_1.html](http://cgrs.uchastings.edu/newsletter/spring07/news_spring07_1.html).

Of the unpublished BIA decisions regarding forced marriage in the CGRS database, only one was granted: *Matter of S-F-*. S-F-, an educated woman from Senegal, fled a forced marriage to her relatively poor, unschooled cousin as demanded by her traditional father, a career diplomat. S-F-'s religious beliefs differed from those of her father and cousin; she supported a version of Islam that allowed for women's rights, while her father and husband-to-be were strictly conservative Muslims who had different views of women's roles. To stall the marriage, S-F- had repeatedly begged extension of her graduate studies in France—which her father had begrudgingly permitted on the conditions that she live with his strictly conservative brother near the university, and that she return to Senegal in May 2006 for the scheduled marriage.

The immigration judge denied S-F-'s case, finding her “not credible” (see discussion below) and concluding that the marriage she would enter without consent did not amount to persecution. S-F- appealed the decision, with CGRS entering as *amicus curiae* before the BIA. The CGRS Brief argued in part that the immigration judge's credibility finding was based on baseless conjecture, and that he improperly rejected corroborating evidence and expert witness testimony. It also argued that S-F- had suffered past persecution on account of feminist political opinion and membership in the particular social group of “young, single daughters from the XXX ethnic group in Senegal who oppose forced marriage.” CGRS further argued that forced marriage, rape, enslavement, and serious physical abuse all constitute persecution under international and domestic law, and that S-F- would face them all on account of her feminist political opinion, moderate Islamic religion, and membership in the particular social group of “Senegalese women from the XXX ethnic group who have been sold into marriage (whether or not the marriage has taken place.)”<sup>124</sup>

The BIA reversed the immigration judge's decision in June 2009. It held that S-F- had a well-founded fear of persecution due to her moderate religious beliefs, which conflicted with those of her father and intended husband. The BIA stopped short of explicitly stating that forced marriage (or punishment for having refused it) constituted persecution—but as this is the precise harm S-F- feared, it is clear that forced marriage is the “persecution” the BIA meant.

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124. A redacted version of the CGRS *amicus* brief in *Matter of S-F-* is available upon request through the CGRS website's Technical Assistance feature, <http://cgrs.uchastings.edu/assistance>.

From the remaining agency decisions, it is clear that very few adjudicators at any level directly addressed forced marriage claims in a meaningful way. Many adjudicators who did assess the nature of the proposed or suffered marriage characterized the union as “arranged” rather than “forced.” In doing so, the persecutory effect of forced marriage was easily ignored or downplayed. More often than not, though, adjudicators ignored the resisted marriage entirely and instead focused on its component harms, such as rape, FGC, or physical abuse.

Across the board, applicants struggled to show persecution, or a well-founded fear of persecution, on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>125</sup> In only a few decisions was credibility at issue. More frequently, the forced marriage described was either not seen as persecutory, or it was not seen to have been motivated by the applicant’s possession of protected characteristics. Many adjudicators insisted that *de jure* outlawing of forced marriage in the applicant’s home country indicated the government’s willingness and ability to protect the applicant. Several adjudicators felt that relocation within the country of origin would be reasonable. Finally, from the sample of decisions in the CGRS database, it is clear that the one-year bar to asylum has affected many cases involving forced marriage.

The following subsections will discuss some of the legal patterns discernible from the decisions in which unpublished decisions are available.

### 1. Credibility

Credibility issues are certainly not unique to asylum claims involving forced marriage. Very few of the nearly two dozen forced-marriage-related decisions in the CGRS database present an adverse credibility finding. Though it is difficult to assess the determinations with certainty without having access to the full record of testimony, it seems safe to say that of these negative credibility findings, most seem to stem from a lack of understanding about forced marriage as actually practiced—the custom is simply not well comprehended by U.S. adjudicators. Difficulties tend to arise in the following contexts:

*Recognizing the validity (and socially binding nature) of an unregistered, common-law marriage:* For example, an immigration

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125. See 8 U.S.C. § 1101(a)(42) (2006); 8 C.F.R. § 1208.13(b) (2010).

judge did not believe that a Turkish woman had fled a forced common-law marriage turned violent because the marriage itself was uncorroborated by legal documentation, reasoning that, “[s]he claims that this is somehow considered a valid marriage in society, but it is not a marriage recognized by the Turkish government, and she has essentially no evidence that this marriage even actually occurred or is recognized.”<sup>126</sup> Though it is clearly reasonable to request corroboration of any marriage at issue, narrow insistence upon legal documentation or government recognition of a marriage may lead to undue discrediting of socially-binding, common law marriages—or customary, polygamous marriages which were never civilly registered in countries where polygamy is illegal.

*Understanding a family’s refusal to help an applicant escape a forced marriage:* In several cases, adjudicators seemed skeptical that the applicant’s family would not help her escape a marriage in which she was raped or beaten. Often, the family’s reluctance to interfere was based on the fact that they had already accepted (and even spent) brideprice payment or were otherwise unwilling to back out of the agreement due to social pressures.

*Accepting the lapse of time between the sealing of a marriage “agreement” and either efforts to enforce the union or the applicant’s actual discovery of her fate:* This was one of many credibility hurdles in the above-mentioned *Matter of S-F-*, which was ultimately granted in an unpublished BIA decision in 2009. The immigration judge first did not believe that S-F-’s father would permit her to repeatedly extend her studies in France for a total of nine years if he had long ago promised her in marriage to her cousin.

*Evaluating other “illogic” based on Western worldviews or cultural ignorance:* For example, despite expert testimony about the tradition of giving an eldest daughter freedom to study while still marrying her off before the younger ones, the immigration judge in *Matter of S-F-* deemed it implausible that S-F-’s younger sister (twenty-six years old at the time) was spared pressure to marry in a country where most women are reportedly married by the age of twenty-eight. An expert witness also explicitly noted that there was no inconsistency as to S-F-’s father’s willingness to support his eldest daughter’s education while still marrying her off without respect for

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126. CGRS Database Case # 6217 (2007) (on file with CGRS).

her wishes, since a woman's education can also increase her value. Nonetheless, the immigration judge found S-F- not credible.<sup>127</sup>

## 2. Persecution

A far more common challenge than credibility was the way in which the forced marriage, where addressed directly, was not seen as persecution.<sup>128</sup> Adjudicators often failed to appreciate the degree of duress faced by applicants fearing or rejecting forced marriage (which often led to the conflation of "forced marriage" with "arranged marriage"). Other times, adjudicators declined to address whether the forced marriage itself was persecutory, instead granting or denying the asylum claim based on its component harms—rape, FGC, or physical abuse—already accepted to constitute persecution. Part of the responsibility may lie with advocates, who do not sufficiently develop the facts showing duress and suffering surrounding the marriage itself, instead choosing to emphasize its component harms. Such a strategy is certainly rational in light of the absence of positive forced marriage jurisprudence. However, failure to rigorously develop the facts and argument around an applicant's coerced marriage may contribute to the trend whereby most adjudicators inclined to grant asylum did so not based on the marriage itself, but on the basis of an applicant's history or fear of other harms. While the end may be favorable in these cases, the result is the continued submersion of forced marriage as an acknowledged form of persecution.

## 3. Duress, Underappreciated

As stated in an immigration court decision of a minor applicant who suffered past beatings and ongoing threats in China: "While the right to marry the person of one's choice is regarded as fundamental to residents fo [sic] the United States under United

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127. The immigration judge had two additional reasons for his adverse credibility finding, but they are not relevant or particular to forced marriage itself.

128. Case profiles in the CGRS database indicate the existence of another reason as well: where the fact of marriage without one's consent (aside from any accompanying harms) was not explicitly argued as a form of persecution by advocates to begin with, it would not have been considered by the adjudicator. However, because the scope of the decisions is limited to the arguments that were presented, this omission on the part of applicants' attorneys is obviously difficult to track.

States constitutional jurisprudence, *Loving v. Virginia*,<sup>129</sup> the Court does not find the denial of that right, in and of itself, constitutes ‘persecution’ . . . .<sup>130</sup> As already discussed, however, the right to consent to one’s own marriage has been asserted in numerous international human rights instruments to which the United States is a party. Physical, psychological, financial, or social duress eviscerates a woman’s ability to freely consent to a marriage. Without fully comprehending the duress that can mark a forced marriage at its inception—and keep a woman captive once married—adjudicators are less able to see marriage without consent as a human rights violation or as persecution.

In a case from Guinea, a woman was told that she would marry her uncle’s friend, who was fifty years older and already had four wives. When she objected, her uncle beat her. She escaped briefly, but upon her return was again beaten before the imam and then before the tribal elders, all of whom instructed her to proceed with the marriage. In addition, her uncle threatened to kill her should she persist in her refusal. The woman was finally able to escape and apply for asylum in the United States. Despite her credible testimony, the immigration judge denied the woman’s claim, focusing on her past FGC alone and finding that she had no well-founded fear of future FGC. He did not address the various forms of coercion being brought to bear upon her, or whether a marriage entered under such duress would constitute future persecution.<sup>131</sup>

At times, the fact that a woman may have stayed in a forced marriage, and even borne children with her unchosen husband, can be construed by an adjudicator as indicating the absence of duress. For example, when a woman from Mali explained that she feared being forced into marriage the same way as her sister had been, the immigration judge was not moved by the sister’s plight. In his decision, he repeatedly used quotation marks around the word “forced,” indicating his skepticism as to whether the described union was actually coercive for the applicant’s sister.<sup>132</sup> However, given the

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129. *Loving v. Virginia*, 388 U.S. 1 (1967).

130. CGRS Database Case # 1298 (2004) (citations omitted) (on file with CGRS).

131. CGRS Database Case # 3301 (2005) (on file with CGRS).

132. CGRS Database Case # 795 (2002) (“[Applicant] stated that her sister had been widowed previously, and that following her compliance with a mourning period was ‘forced’ into marriage with the younger brother of her deceased husband and ‘forced’ to have 12 children as a result of this marriage.”) (on file with CGRS).



high prevalence of marital rape within forced marriage and the extreme social pressures to remain in a marriage, whether a woman has borne children with her husband does not indicate her consent or acquiescence to the relationship.

Another aspect of duress that adjudicators routinely overlook is the age of the applicant at the time she became subjected to the marriage agreement. In at least half of the decisions CGRS possesses, the asylum applicant was under eighteen—the age of consent provided by the Convention of the Rights of the Child (and usually domestic law)—when her parents sought to effect the marriage.<sup>133</sup> If asylum adjudicators accept the premise that a child cannot meaningfully consent to marriage, then it would seem that duress automatically exists in any marriage of an underage applicant and would constitute a human rights violation.

#### 4. Conflation of “Arranged” and “Forced” Marriage

Whether intentional or not, many adjudicators faced with testimony signaling duress and coercion to marry still refer to the marriage as “arranged” rather than “forced.” In only two of the decisions submitted to the CGRS database did adjudicators grant asylum after casting the coercive union as an “arranged” marriage. One, an oral decision, indicated that the aggregate harms of repeated rape, beatings, and threats showed this “arranged marriage” to be persecution.<sup>134</sup> The other decision acknowledged the “arranged marriage” but granted on the basis of risk of future FGC.<sup>135</sup> It should be noted, however, that in neither case did the adjudicator grant asylum based on the forced marriage itself.

The sample of decisions in the CGRS database shows that conflation of terms can occur even *before* a decision is rendered. Several decisions reflect use of “arranged marriage” by advocates. For example, the lawyers in one Senegalese case used “arranged” in the definition of the social group proffered, even though the intended marriage was clearly “forced” as indicated by the applicant’s clear opposition to marrying her cousin, the FGC it would first require, and the lack of professional or personal freedom that would follow. The immigration judge referred to the woman’s pending “arranged

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133. United Nations Convention on the Rights of the Child, art. 1, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

134. CGRS Database Case # 283 (2001) (on file with CGRS).

135. CGRS Database Case # 276 (1999) (on file with CGRS).

marriage” twice: “[Respondent’s] father apparently still has designs for her to be married in an *arranged* marriage,” and, elsewhere in Senegal, “it does not appear that she would have those problems dealing with an *arranged* marriage or FGM.”<sup>136</sup> In this instance, the judge was focused on well-founded fear and the applicant’s countrywide risk of harm, but it is clear that the use of “arranged marriage” indicated a lack of understanding of the relationship at issue.

That said, the use of “arranged marriage” is not always fatal to an asylum case. In one case, the denial of a Ugandan woman’s claim was marked by language about her “arranged marriage” where facts indicating rape, coercion and forced FGC were presented. In this case, the advocates themselves had put forth the particular social group: “unmarried Ugandan females opposed to *arranged* marriage.”<sup>137</sup> On appeal, the BIA declined to address the social-group construction because it denied her claim for other reasons. When the case was appealed to the circuit court, the government moved to remand to the BIA, acknowledging that past persecution had been established.<sup>138</sup> The BIA then remanded the case to the immigration judge with instructions to evaluate (1) whether the social group “Ugandan women sold into arranged marriage” was cognizable; (2) whether the government of Uganda would protect victims of domestic violence/forced marriage; and (3) whether the client had a fear of future persecution. The case was granted in 2007.<sup>139</sup>

##### 5. Focus on Component Harms Often Submerge Forced Marriage Claims

In most of the cases reviewed, the asylum seeker had suffered or feared many harms in addition to forced marriage. While many systemic harms—such as poverty, lack of education, or forced labor—disproportionately affect women and support the tradition of forced marriage, these are not generally recognized as grounds for asylum *per se*. As already discussed, forced marriage claims are also often

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136. CGRS Database Case # 4079 (2005) (emphasis added) (on file with CGRS).

137. CGRS Database Case # 3163 (2007) (emphasis added) (on file with CGRS).

138. For additional information, see Center for Gender and Refugee Studies, Spring 2007 Newsletter, [http://cgrs.uchastings.edu/newsletter/spring07/news\\_spring07\\_1.html](http://cgrs.uchastings.edu/newsletter/spring07/news_spring07_1.html).

139. CGRS Database Case # 3163 (2007) (on file with CGRS).

marked by other specific and individual acts of harm—some considered persecutory and some not. Ironically, the close relationship between forced marriage and component harms can have the effect of obscuring the persecutory nature of the forced marriage itself.

Certain component harms—such as FGC, rape, physical abuse, and death threats—have been deemed to be persecution in many federal circuit courts. In the unpublished cases submitted to the CGRS database, adjudicators frequently sidestepped the question of whether forced marriage itself constitutes persecution and focused instead on the harms already established as persecution in jurisprudence. For example, an immigration judge found that a Nigerian woman had presented credible testimony about facing a forced marriage to her father's business partner and being subjected to FGC according to her own tribe's customs. The judge granted asylum purely on the basis of the well-founded fear of FGC.<sup>140</sup> In another case, a Turkish woman had been raped and feared forced marriage. The immigration judge was silent regarding the forced-marriage claim, acknowledging instead that the rape constituted persecution; however, the judge denied asylum because he found no nexus to a protected ground.<sup>141</sup>

Sometimes the forced marriage is acknowledged for the limited purpose of indicating the likelihood of a related harm. For example, in one case presenting the risk of both forced marriage and FGC, the immigration judge discussed the former but based her grant of asylum on the latter, stating:

The Respondent stated that her fear of being subjected to FGM if returned to Ivory Coast or Benin is heightened by the fact that her father's family has already arranged a marriage for her and that by accepting goods for the marriage, they have ensured the marriage agreement and will be more determined to present a circumcised bride for the marriage . . . A review of the evidence reveals that arranged and forced marriages are common in both the Ivory Coast and Benin. *The evidence also confirms the Respondent's testimony that in these areas, FGM is seen as a 'cleansing' ritual that must be preformed [sic] before marriage.* The Respondent stated that when a traditional

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140. CGRS Database Case # 998 (2002) (on file with CGRS).

141. CGRS Database Case # 6217 (2007) (on file with CGRS).

marriage is arranged . . . men will often only accept a wife who has been circumcised in the traditional manner.<sup>142</sup>

Here, the expectation of forced marriage merely contributed to the likelihood of FGC—and thus, of persecution in *that* form. So, while the case outcome was favorable, the question of whether forced marriage itself constituted persecution was still left unanswered.

## 6. Protected Grounds and Nexus

The roughly two dozen decisions in the CGRS database mirror the larger sample of all tracked forced-marriage cases insofar as the asylum applications were based on the applicant's membership in a "particular social group." The other protected grounds were much less commonly argued. Forced marriage as persecution based on the grounds of political opinion, religion, nationality, or race was argued to a far lesser degree.<sup>143</sup> Review of adjudicators' (often incomplete) reasoning also reveals several challenges advocates face in showing that forced marriage was motivated by a protected ground.

As a threshold matter, a few disturbing decisions cast the forced marriage at issue not as a violation of the woman's human rights, but as a valid, enforceable contract between willing families wherein a daughter (or, occasionally, niece) is exchanged in marriage for cash or other assets. This has implications for whether a nexus to *any* protected ground can be established. In one Chinese case, the applicant's parents had accepted tax breaks and a gold ring in exchange for giving the applicant in marriage to the mayor's son, but then supported her attempts to cancel the marriage. Though the family suffered violent attacks in the wake of the daughter's refusal to go forward with the marriage, the immigration judge denied the claim, reasoning:

The respondent was not kidnapped or sold into a forced marriage. An arranged marriage is not necessarily a forced marriage. In this case, we have one party, the mayor, who wants to enforce the terms of a valid contract; while the other side, the respondent and her family, wants to void the terms of the contract. This case would be better litigated in

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142. CGRS Database Case # 276 (1999) (emphasis added) (on file with CGRS).

143. There were certainly cases in which a woman fearing forced marriage also possessed a separate fear of other persecution based on non-social group grounds.

civil court rather than Immigration Court. If respondent's family was persecuted after she left [China], it was because they breached the terms of the contract and not because of the mayor's intention to punish them for one of the five enumerated grounds in the Act.<sup>144</sup>

Alternately, adjudicators may interpret the harms surrounding forced marriage to be based on *personal* retaliation or punishment for resistance—and find no nexus to a protected ground. Consider a case from Guinea, where the immigration judge stated: “[T]he abuse the respondent suffered resulted solely from her uncle's desire to punish her for disobeying his request [to marry]. The abuse constituted a personal retaliation, not an act of persecution directed at a member of a particular social group.”<sup>145</sup>

#### a. Forced Marriage as Persecution Based on Membership in a Social Group

Persecution on account of one's membership in a “particular social group” can be grounds for asylum where, as a threshold matter, members of that group share an immutable or fundamental characteristic.<sup>146</sup> It is no surprise that, like most gender-asylum claims, most of the decisions regarding forced marriage reflect arguments based on this ground. Women may certainly suffer forms of gender-based violence due to their race, nationality, religion, or political opinion, but in many cases, their gender alone renders them vulnerable to violence. However, despite the fact that gender is a fundamental, immutable characteristic that can mark an applicant for harm, gender was not designated as an independent, protected ground by the drafters of the 1951 Refugee Convention. For this reason, most women fleeing gender-based persecution are forced to make use of the catch-all category of “membership in a particular social group” in order to explain the nexus between the gender-based harm they risk and the reasons they risk it.

As early as 1985, the BIA acknowledged that gender alone could technically constitute a particular social group.<sup>147</sup> However, since then, successful gender-based social groups have been

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144. CGRS Database Case # 369 (1999) (on file with CGRS).

145. CGRS Database Case # 3301 (2005) (on file with CGRS).

146. See *Matter of Acosta*, 19 I&N Dec. 211, 233–34 (BIA 1985).

147. In its seminal *Matter of Acosta* decision, the BIA ruled that the term “particular social group” could include groups defined by immutable or fundamental characteristics, including sex. *Id.* at 233.

comprised of multiple contributory characteristics: gender *plus* some other, narrowing feature of identity such as nationality, tribal affiliation, or religious or political belief. “Gender-plus” social groups have been accepted since 1996, when the BIA acknowledged the narrowly constructed group of “women of the Tchamba-Kunsuntu tribe who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice.”<sup>148</sup> Circuit courts have followed, accepting “gender-plus” social groups ranging from “women of the Benadiri clan who oppose the practice of FGM,” and “Somali females” in the Ninth Circuit to simply, “Somali women” in the Eighth Circuit.<sup>149</sup>

Beginning in 2006, the BIA also began to require that a proposed social group exhibit “social visibility” and “particularity” in addition to the longstanding requirement of shared immutable, fundamental characteristics.<sup>150</sup> The majority of decisions in the CGRS database predate the “social visibility” or “particularity” requirements, so it is difficult to predict how groups formerly deemed cognizable would fare under today’s standards.<sup>151</sup>

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148. Matter of Kasinga, 21 I&N Dec. 357, 357 (BIA 1996).

149. See, e.g., Mohammed v. Gonzales, 400 F.3d 785, 798 (9th Cir. 2005) (finding that woman who was victim of FGC was a victim of a manner of persecution that gives rise to a presumption of fear concerning future persecution); see also Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir. 2007) (finding that Somali woman was subject to FGM persecution as well as fear of future persecution).

150. See, e.g., Matter of C-A-, 23 I&N Dec. 951, 959 (BIA 2006), *aff’d*, Castillo-Arias v. U.S. Att’y Gen., 446 F.3d 1190, 1194 (11th Cir. 2006) (explaining that social visibility requires a showing that the “attributes of a particular social group . . . [are] recognizable and discrete”); Matter of S-E-G-, 24 I&N Dec. 579, 586 (BIA 2008) (noting that particularity requires proof that the group is not amorphous and diffuse, but that it is “sufficiently distinct” to be recognized “in the society in question, as a discrete class of persons”).

151. It should be noted that the UNHCR guidelines do not interpret the 1951 Refugee Convention or 1967 Protocol as requiring “social visibility,” but instead as suggesting consideration of the “social perception” of the proposed groups as an *alternative* where a group’s members do not share immutable, fundamental characteristics. See *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002). A 2007 *amicus* brief submitted by the UNHCR to the Third Circuit reiterates the proper relationship between the immutability and social visibility tests: “Given the varying approaches and the protection gaps which can result, UNHCR concluded that the two dominant approaches should be reconciled and has adopted a single standard that incorporates both: ‘[A] particular social group is a group of persons who share a

In asylum applications, careful social-group construction is key to successfully accounting for the gender-related reasons an applicant risks harm in her own country. An interesting challenge arises when evaluating the full constellation of characteristics that may have marked a particular applicant for forced marriage: Should “opposition to forced marriage” be included as a social group characteristic? It depends. Generally speaking, most women facing forced marriage are probably not targeted for the marriage *at the outset* because of any known opposition to the union, but rather for baseline identifiers such as their gender, age, and family or tribal affiliations.

However, recurrent fact patterns indicate that, once expressed or understood, opposition to forced marriage *can* motivate harm to the asylum applicant. Opposition to an already-negotiated marriage can itself result in punishment, retaliation, and even heightened efforts to marry off a “troublesome” or “disobedient” young woman.<sup>152</sup> Punishment for refusal of a forced marriage—which often takes the form of beatings, confinement, rape, and threats of other bodily harm—may also constitute persecution. The challenge in these cases lies in showing that the applicant’s opposition was known to the persecutor, and that it motivated him or them to harm her at some point in time.

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common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society.” Brief of the United Nations High Commissioner for Refugees as *Amicus Curiae* in Support of the Petitioner at 13–17, *Valdiviezo-Galdamez v. Attorney Gen.*, 502 F.3d 285 (3d Cir. 2007) (quoting UNHCR Guidelines). For Judge Richard Posner’s incisive critique of increasingly troubling interpretations of the BIA’s “social visibility” standard, see *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009).

152. For example, consider evidence about the consequences of opposition to forced marriage in Mali. In 2007, the Immigration and Refugee Board of Canada (“IRB”) reported that early marriage was believed to be a common practice in Mali, where it was estimated that 22 percent of Malian women were married by age fifteen. The president of a Malian NGO explained to the IRB that a girl’s refusal of an early, forced marriage could have myriad consequences, including psychological problems, abuse from their families, vulnerability to prostitution if denied family protection, and even illness where angered families refuse to provide their daily needs. See Immigration and Refugee Board of Canada, *Mali: Prevalence of Forced Marriages and the Consequences of Refusing*, MLI102425.FE, at 2 (Mar. 12, 2007), available at <http://www.unhcr.org/refworld/docid/469cd6a0c.html>.

### b. Social Groups Deemed Cognizable

*Cameroonian widows:* This group was accepted on appeal in a case where a female member of the Bamileke tribe lost her husband in a car accident. Her in-laws had then attempted to marry her to his brother according to tribal customs of wife-inheritance, since she could not pay back her brideprice. Both the immigration judge and the BIA had initially rejected this social group, but the Eighth Circuit remanded it for consideration.<sup>153</sup>

*Ugandan women sold into arranged marriage:* While pending at the circuit court, this case was remanded on government motion by the BIA for, *inter alia*, consideration of this proposed social group. Originally, the immigration judge had characterized the applicant's social group as "unmarried Ugandan females opposed to arranged marriage" instead of "[Ugandan] women subjected to arranged marriage"—although the applicant herself had not asserted that her opposition to the forced marriage had motivated her persecutor. On remand, the immigration judge granted the case, finding the proper social group to be cognizable.<sup>154</sup>

*Unmarried women of the Igbo tribe of Nigeria who refuse to accept an arranged polygamous marriage:* The judge agreed that the characteristics of being a woman and a member of the Igbo tribe are immutable, and that, "Respondent's opposition and resistance to an arranged polygamous marriage based on religious convictions is fundamental to Respondent's individual identity or conscience, which she should not be required to change." The immigration judge found the applicant had established a well-founded fear of both FGC and forced marriage.<sup>155</sup>

*Persons in Malinke tribe of marriageable age opposed to arranged marriage:* From notes taken from an oral decision in this Guinean case, it appears that an immigration judge found this social group to be comprised of immutable and fundamental shared characteristics, though he mentioned that tribal membership played a minimal role.<sup>156</sup>

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153. CGRS Database Case # 2489 (IJ 2003) (on file with CGRS), *remanded by Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008).

154. CGRS Database Case # 3163 (IJ 2001, BIA 2004, IJ 2007) (on file with CGRS).

155. CGRS Database Case # 998 (2002) (on file with CGRS).

156. CGRS Database Case # 283 (2001) (on file with CGRS).



*Unmarried Chinese women, who have been subjected to arranged marriages for money according to feudal practices, and who oppose such practices:* The immigration judge found the group to be bound by common, immutable characteristics and that the applicant's membership in the group was clear from the facts presented. The judge noted specifically that, "[R]espondent's resistance to take part in her imminent involuntary marriage is something that she should not be required to change."<sup>157</sup>

### c. Social Groups Found Not Cognizable

Social groups in forced marriage cases suffered many obstacles to cognizability. Opposition to the practice (where opposition was indicated as a trait that the persecutor targeted in the applicant) was rarely accepted as a motivating characteristic. Also, ironically, the immutability of the characteristic of "unmarried" status was challenged. Decisions issued after the introduction of the social-visibility and particularity requirements reflected additional hurdles: "opposition to forced marriage" was found to lack "social visibility," and adjudicators have interpreted "social visibility" to mean that the individual herself—instead of her described group—would suffer negative treatment by members of society.

*Young women in Senegal facing forced marriage:* This group was deemed to lack social visibility as per *Matter of C-A*.<sup>158</sup> The judge conceded that being young, female, and Senegalese were highly visible characteristics, but that "Respondent failed to show how Senegalese who do not know her personally will identify her as a person facing forced marriage." The immigration judge also found the social group to be circular and defined partly by the persecution which the applicant feared.<sup>159</sup>

*Guinean Fulani women who oppose forced marriage:* The immigration judge found that this group lacked cognizability, writing, "The respondent has presented no evidence indicating that women who oppose forced marriage are a cognizable social group within Guinean Fulani society, representing a faction that is recognizably distinct from other factions within that society . . . . Additionally, the respondent has not offered any

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157. CGRS Database Case # 196 (2000) (on file with CGRS).

158. *Matter of C-A*, 23 I&N Dec. 951, 961 (BIA 2006).

159. CGRS Database Case # 3744 (2006) (on file with CGRS).

evidence indicating that other Guinean Fulani women who oppose forced marriage suffered from similar threats or harm.”<sup>160</sup>

*Females who are in arranged marriages:* The group, the status of whom was argued in a Chinese case, was not found to possess immutable characteristics. But the immigration judge provided no real discussion of social group or nexus because the forced marriage was deemed to be a contractual dispute between two families and not persecution.<sup>161</sup>

*Women in Mali who object to, or have been forced into, polygamous marriages:* The immigration judge found no evidence in the record that there is a wider group of women in Mali who have objected to or been forced into polygamous marriage, despite testimony which discussed the applicant’s sister as another example of such a person.<sup>162</sup>

A Chinese asylum applicant, the youngest of three children, fled abuse from parents who resented the fines that her birth had incurred under China’s one-child policy. She also resisted forced marriage to an older man, from whom her parents had accepted money. Her attorney argued three social groups:

*Daughters in applicant’s family:* This group was found to possess immutable characteristics, but the group itself was “not socially recognizable” since,

There is no evidence to suggest that anyone outside of Respondent’s family would recognize the social group she claims. Family groups *have* been found to be ‘social groups’ . . . . However, each of these cases involved finding the *entire* family to be a social group, not just certain family members. Allowing ‘daughters in a family’ or ‘sons in a family’ or ‘cousins in a family’ to become a social group would open the door for almost [sic] person to fit into some type of social group.

*Chinese girls from rural families born in excess of the one-child policy:* This group was found to be socially unrecognizable as well, and deemed indistinct from girls born in urban areas in excess of the one-child policy, or boys born in excess of it. Further, the court found no evidence that all children born in excess of the one-child policy in China are mistreated by their parents.

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160. CGRS Database Case # 3301 (2005) (on file with CGRS).

161. CGRS Database Case # 4677 (2003) (on file with CGRS).

162. CGRS Database Case # 795 (2002) (on file with CGRS).

*Unmarried Chinese girls from rural China whose parents have sold them into marriage and who oppose such practices:* The immigration judge found this group to be lacking a shared immutable characteristic since members could eventually marry and would no longer be unmarried. The judge reasoned that, “young girls who resist arranged marriages, seems [sic] to have little to do with the way other Chinese [sic] would identify a group with a particular characteristic or trait within their own culture or society.” The judge rejected comparison to the social group accepted in *Matter of Kasinga*—“young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice”—finding that the applicant at hand had not shown that arranged marriages are pervasive in China the way FGM is in the Tchamba-Kunsuntu tribe, nor does arranged marriage have the same cultural importance.<sup>163</sup>

#### d. Nexus to a Particular Social Group

Where a cognizable social group has been established, adjudicators still do not necessarily find that it captures the persecutor’s motives. In other words, there is no nexus between the social group to which the applicant belongs and the motives behind the persecutory harm. For example, in the previously-discussed Cameroonian widow case, the immigration judge had initially found that, “[t]he fact that the respondent refused to marry her deceased husband’s older brother and was unable to pay back the ‘bride’s price’ as they demanded, does not show that she was being threatened with persecution on account of membership in a particular social group.”<sup>164</sup> Also, in the previously-discussed Guinean Fulani case, where “Guinean Fulani women who oppose forced marriage” was not found to be a cognizable group, the immigration judge found that even if the group were cognizable, membership therein did not motivate harm: “Rather, the abuse the respondent suffered resulted solely from her uncle’s desire to punish her for disobeying his request. The abuse constituted a personal retaliation, not an act of persecution directed at a member of a particular social group.”<sup>165</sup>

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163. CGRS Database Case # 1298 (2004) (on file with CGRS).

164. CGRS Database Case # 2489 (on file with CGRS). This finding was critiqued on appeal in *Ngengwe v. Mukasey*, 543 F.3d 1029, 1037 (8th Cir. 2008) (remanding to the BIA the issue of whether the non-physical actions of Ngengwe’s in-laws can constitute past persecution on account of her social group).

165. CGRS Database Case # 3301 (2005) (on file with CGRS).

In the Senegalese case of *Matter of S-F-*, which was eventually granted by the BIA in 2009, the immigration judge had originally found that the applicant's father had not targeted her for harm based on the characteristics defining her proposed social group (youth, gender, nationality, and opposition to forced marriage) because he had not forced her younger sisters of the same gender, nationality, and general age into forced marriage in the same way:

Respondent's father did not allegedly abuse her because of her gender, age, and nationality. Instead, Respondent indicated that her father and extended family enthusiastically supported her undergraduate and graduate education and encouraged her career goals, even though she was young female, and from a conservative background in Senegal. Moreover, Respondent's two sisters also are young and female Senegalese, and her 26-year old sister specifically indicated that she did not receive the same treatment by her father. What distinguishes Respondent from her sisters was her claim that her father was forcing her into a marriage that she objected to.<sup>166</sup>

An immigration judge *did* find a nexus where a woman had proposed the group of "unmarried Chinese women, who have been subjected to arranged marriages for money according to feudal practices, and who oppose such practices" because when the applicant's sister had also tried to escape a forced marriage, she was beaten into compliance by their mother. The applicant had also submitted letters from her father, clearly insisting on local tradition and demanding that she return and obey his wishes, since the family had already accepted the suitor's money. The asylum applicant also presented live testimony from two experts (a professor of anthropology and a psychiatrist) as well as written opinion from an expert on access to legal aid in China.<sup>167</sup>

#### e. Forced Marriage as Persecution Based on Political Opinion

Though the vast majority of forced-marriage-based asylum claims in the CGRS database were based on persecution due to membership in a particular social group, political opinion was

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166. CGRS Database Case # 3744 (2006) (citations omitted) (on file with CGRS). On appeal, the BIA found that the immigration judge had overlooked considerable expert testimony which accounted for the practice of educating an eldest daughter well before marrying her off ahead of her younger sisters. *Id.*

167. CGRS Database Case # 196 (2000) (on file with CGRS).

occasionally offered as an alternative ground for persecution. The political opinion frequently reflected the social group with which it was presented—namely, feminism, belief in women’s rights, opposition to forced marriage, or polygamy. For example, in a case from Guinea, the applicant’s brief explained:

Ms. X also holds a political opinion which is closely related to her membership in a particular social group; she believes males should not dominate females and that both sexes should have equal rights, to be able to marry freely, to have independent careers, and to reject traditional cultural practices like female genital mutilation.<sup>168</sup>

When considering a political opinion-based asylum claim, a few adjudicators have imposed unduly harsh standards or definitions of what constitutes a political opinion and its expression. For example, a political opinion claim in another Guinean case failed because the judge found no evidence that the applicant was active in a political way or that a political opinion could have been imputed to her by those wishing to force her into marriage. He granted her asylum claim based on social group membership instead.<sup>169</sup>

Another immigration judge in a Chinese case imposed the same troubling standard upon the applicant’s political opinion claim, stating:

Neither the respondent nor any member of her family belonged to a political organization or were politically active in China. It may be true that the respondent’s persecutor was the mayor, a political figure, however it does not appear that he [sic], the mayor, or any of his henchmen, were attempting to punish respondent or her family for their political opinions or for possessing a belief or characteristic the mayor found offensive.<sup>170</sup>

#### f. Forced Marriage as Persecution Based on Religion

Religion was raised as a ground for persecution in a small number of cases in the CGRS database. From the few cases in which decisions are available, it appears that religion was most commonly raised when an African applicant, usually Muslim, expressed fear of

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168. Applicant’s Brief, CGRS Database Case # 5398 (2008) (on file with CGRS).

169. CGRS Database Case # 283 (2001) (on file with CGRS).

170. CGRS Database Case # 369 (1999) (on file with CGRS).

forced marriage due to pressure from more conservative, Muslim parents who wished her to enter into a polygamous marriage with a significantly older man.

For example, in a Senegalese case granted by the BIA in an unpublished decision, the immigration judge initially ignored the applicant's claim based on religion and instead focused on rejecting her proposed social group. On appeal, however, the BIA reversed the immigration judge's adverse credibility finding and granted her asylum based on religion. The BIA seemed to appreciate the dramatic difference between the applicant's more moderate views of Islam and those of her conservative father.<sup>171</sup>

Another case with similar facts went the other way, however. In the aforementioned Guinean Malinke case, the applicant had claimed that though she was Muslim like her parents, she did not pray at the mosque and she did not agree with the Koran's permission of multiple wives. Notes from the immigration judge's oral decision reveal that the judge found that the religion-based persecution claim "fell short"; he found that the Respondent and her father shared the same religion, and that it was unclear whether the Koran permitted polygamy. Finally, the judge indicated that opposition to polygamy could be a non-religious belief. Though the judge dismissed the religion claim, he granted asylum based on social group.<sup>172</sup>

From the small sample of forced marriage-related decisions in the CGRS database, no clear trend is evident regarding how religion factors into forced marriage as a ground of persecution. However, it seems that where religious views can be clearly articulated and presented, religion can be a helpful alternative argument, supporting particular social group claims—particularly where an applicant's religious beliefs relating to marriage differ from her more conservative or fundamentalist persecutors. Alternatively, if a woman opposes a forced marriage for religious reasons, she may be targeted for punishment on account of her religious beliefs.

#### 7. Government Willingness and/or Ability to Protect

Another major obstacle that advocates face in presenting asylum claims based on forced marriage is proving that the government in the applicant's home country is unwilling or unable to

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171. CGRS Database Case # 3744 (2006) (on file with CGRS).

172. CGRS Database Case # 283 (2001) (on file with CGRS).

control the asylum applicant's persecutors. Often, applicants' home countries have laws aimed at protecting women from gender-based harm—criminalizing rape, domestic violence, forced marriage, or FGC. While the existence of such laws may indicate government willingness to protect the rights of women, it is a poor indicator of the government's ability to do so. Some judges appreciate the difference between *de jure* and *de facto* protections; others find the existence of legislative protections to prove both government willingness and ability to protect. Most commonly, judges base their findings on passages from the relevant U.S. Department of State Human Rights Reports.<sup>173</sup>

The case of a Malian asylum seeker fleeing FGC and forced marriage illustrates this problematic conflation of *de jure* and *de facto* government efforts to protect women. The immigration judge found that,

While the Country Reports [for Mali] do indicate that there is discrimination against women, *it also provides that there is legislation providing equal rights regarding property, traditional practice*. It also notes that both parties must consent to a marriage when a marriage is undertaken whether that is monogamous or polygamous.<sup>174</sup>

The judge specifically stated that he had considered both the 1999 and 2001 State Department Reports for Mali. It is puzzling to see how the judge could reach the conclusion that the government of Mali was willing and able to protect this woman from the harm she feared, considering the following passage from the 1999 Report:

Violence against women, including wife beating, is tolerated and common. Traditional practice discriminates against women in inheritance matters. There are numerous active women's groups that promote the rights of women

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173. The United States Department of State submits annual reports to Congress concerning the human rights situations in other countries ("Country Reports on Human Rights Practices") in compliance with the Foreign Assistance Act of 1961, 22 U.S.C. §§ 2151, 116(d), 502B(b) (2000). The Reports provide primary evidence of country conditions, and are offered by both applicants and the U.S. Immigration Service in asylum cases. They are available at Department of State, Human Rights Reports, <http://www.state.gov/g/drl/rls/hrrpt/> (last visited Sept. 7, 2010), catalogued by year and by country.

174. CGRS Database Case # 795 (2002) (emphasis added) (on file with CGRS). The Sixth Circuit denied a petition for review in *Keita v. Gonzales*, 175 F. App'x 711, 714 (6th Cir. 2006) (upholding the BIA decision that Keita did not meet her burden of showing harm that rose to the level of persecution and that the harm inflicted was not from a group the government could not control).

and children. Women have very limited access to legal services. They are particularly vulnerable in cases of divorce, child custody, and inheritance rights, as well as in the general protection of civil rights.<sup>175</sup>

The 2001 Report similarly contradicts the immigration judge's finding.<sup>176</sup>

In another case, a Senegalese woman provided credible testimony of feared FGC and forced marriage to her cousin. Though the CGRS database entry does not include the evidentiary record, the immigration judge specifically mentioned having considered the "Profile" and "Country Report" for Senegal. He cites to FGC statistics from 1988, though the asylum hearing occurred in 2005.<sup>177</sup> The U.S. Department of State Reports for both 1999 and 2005 address the recent criminalization of FGC in Senegal, clearly stating that protective legislative measures concerning violence against women generally lacked any meaningful enforcement:

There are credible reports that violence against women, usually wife beating, is common. Several women's groups have formed to address this problem. Police usually do not intervene in domestic disputes, and most people are reluctant to go outside the family for redress . . . . Despite constitutional protections, women face extensive societal discrimination, especially in rural areas where Islamic and traditional customs, including polygamy and Islamic rules of inheritance, are strongest, and women generally are confined to traditional roles. By law, women have the right to choose when and whom they marry; however, in some areas, traditional practice can restrict a woman's choice. There is no minimum age of consent to marry, marriages are sometimes arranged in some communities, and in

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175. U.S. Department of State Country Reports on Human Rights Practices: Mali (1999) (emphasis added), *available at* <http://www.state.gov/g/drl/rls/hrrpt/1999/259.htm>.

176. U.S. Department of State Country Reports on Human Rights Practices: Mali (2001), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2001/af/8391.htm>. It should be noted that CGRS does not possess the full administrative record of this case. However, given that the immigration judge explicitly stated he had considered both the 1999 and 2001 Department of State Reports on Human Rights Practices for Mali, it is assumed that this relevant text was part of the record.

177. CGRS Database Case # 4079 (2005) (on file with CGRS).



polygamous unions women do not have the right of notification or approval prior to a subsequent marriage.<sup>178</sup>

Despite the applicant's stated fear of gender-based violence *beyond* FGC, and the immigration judge's stated consideration of the State Department's findings, the judge nevertheless found that the woman had not established government unwillingness to protect her. He reasoned:

*FGM* has been banned or criminalized by the laws of Senegal at this point. And certainly in some of the small outlying tribal villages the law is not being enforced . . . . But more and more there are non-government organizations and other agencies that are championing the rights of women, *especially in regards to FGM*, in Senegal.<sup>179</sup>

Focusing only on FGC, the judge failed to address the full scope of harms feared by the applicant—even though the very same State Department Reports clearly noted the Senegalese government's failure to protect women from forced marriage, wife beating, and other related harms.

It is clear from the sample of decisions in the CGRS database that, while not all cases display in-depth treatment of country conditions information, the bare minimum of the relevant Department of State Country Reports is offered in most cases. Information about whether laws exist to protect women from gender-based harms, including forced marriage, is frequently cited by judges in support of findings of government willingness to protect the applicant. However, the second prong of the inquiry—government *ability* to protect—is either left unanswered by the evidence or is directly contradicted by it. Frequently, adjudicators neglect this step of the analysis and base their decisions simply on the existence of protective, though potentially ineffective, legislation.

## 8. Reasonable Relocation

Another significant challenge reflected in the CGRS database cases on forced marriage is the issue of “reasonable relocation” as required by 8 C.F.R. 208.13(b)(1)(i)(B) and (b)(2)(ii). Where an asylum seeker has established past persecution, he or she stands to

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178. U.S. Department of State Report on Human Rights Practices: Senegal (1999), available at <http://www.state.gov/g/drl/rls/hrrpt/1999/268.htm>.

179. CGRS Database Case # 4079 (2005) (emphasis added) (on file with CGRS).

benefit from the presumption of well-founded fear of persecution. The government can rebut this presumption by showing either that circumstances have changed such that the applicant no longer has a fear of harm or that the applicant could live safely in another part of her country. The standard for relocation is whether it would be “reasonable” in light of factors such as health, age, level of education, and family ties.<sup>180</sup> In cases involving past persecution, the government carries the burden to prove that an asylum applicant could reasonably relocate within the country of persecution;<sup>181</sup> nonetheless, adjudicators often improperly attribute this burden to the applicant.

The question of relocation has frequently stymied forced marriage-based asylum cases. As with many claims involving gender-based harm, or even harm by a nonstate actor, an applicant may be perceived as only fearing one undesired husband, or in danger from one set of immediate family members who demand that she marry. Adjudicators frequently find that an applicant fleeing forced marriage could safely live away from the hostile spouse or family, but fail to consider whether it would be reasonable for the applicant to relocate. From the decisions, two dominant veins of relocation challenges emerge: one for Chinese cases and one for African cases.

#### a. Chinese Cases

Perhaps the sheer vastness and population density of the Chinese state contributes to adjudicators’ general incredulity that an applicant could not live safely far away from her persecutors.<sup>182</sup> In Chinese forced marriage cases, judges have frequently cited to the U.S. Department of State Reports, which mention a “floating population” of “economic migrants” as if to indicate that the applicant could move and work elsewhere.

In one case, where a minor applicant had sought refuge with her aunt for a period before fleeing to the United States, the judge found that “it is not unreasonable to expect Respondent to return to China where she could continue to live with her Aunt or seek employment in a larger city as many others of the ‘floating

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180. 8 C.F.R. § 1208.13(b)(3) (2007) (asylum); 8 C.F.R. § 1208.16(b)(3) (2007) (withholding of removal).

181. 8 C.F.R. § 1208.13(b)(3)(ii) (2007).

182. China is over nine million square kilometers and has an estimated population of 1,321,851,888 inhabitants. U.S. Department of State, Background Note: China (2009), available at <http://www.state.gov/r/pa/ei/bgn/18902.htm>.

population' . . . ."<sup>183</sup> In another case, where the applicant was smuggled to the United States by her family after their attempts to renege on a marriage contract had failed, the judge made a similar finding regarding the ability to relocate. He reasoned that:

[N]o efforts were made to internally relocate the respondent. Unlike in the past, the lives of present-day Chinese citizens are not nearly as structured. The Department of State's Country Reports . . . reveals at page 1 a 'floating population' of as many as 130 million Chinese. It seems to me that the respondent's family might well have considered relocating her somewhere else in that vast country rather than subjecting her to the not inconsiderable perils of being smuggled to the far side of the world.<sup>184</sup>

Even relying exclusively on a State Department Report, such a finding of "reasonableness" of relocation based merely on the existence of a "floating population" is incomplete. The cited State Department Report also indicates that these migrants lack official residence status, which is required for full access to social services, and that they are generally restricted to performing the most undesired work available in their "host" communities and have little recourse when abused by employers and local officials. They are also routinely rounded up, detained, harassed, and expelled by local authorities prior to politically "sensitive anniversaries."<sup>185</sup> Even these limited facts call into question these findings on the reasonableness of in-country relocation.

#### b. African Cases

Though some of the countries from which African asylum applicants fled forced marriages are geographically vast, these cases are characterized by a slightly different form of relocation challenge than their Chinese counterparts. Obvious restraints on relocation involve situations in which large parts of the applicant's country are conflict regions or otherwise restrict free passage through the state, as with large sections of Cote d'Ivoire, the Democratic Republic of Congo, and the Central African Republic. Commonly, where applicants have suffered or feared harm at the hands of their

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183. CGRS Database Case # 1298 (2004) (on file with CGRS).

184. CGRS Database Case # 1104 (2002) (citations omitted) (on file with CGRS).

185. U.S. Department of State, Country Reports on Human Rights Practices: China (2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18239.htm>.

families in a certain town or province, adjudicators have routinely found that they can move to the capital or another rural province and enjoy safety in anonymity. There is no need, in the adjudicator's eyes, for the applicant to return to her home village. Consider the words of one judge in a Senegalese case:

The Court . . . finds it difficult to believe that this educated woman feels that she can only live in her home village of K\_\_\_ in Senegal . . . She may have difficulties if she went back to her small village of K\_\_\_ where there are only apparently about 100 families and apparently where her father still resides. And her father apparently still has designs for her to be married in an arranged marriage. But as long as she stays away from K\_\_\_, it does not appear that she would have those problems dealing with an arranged marriage or FGM.<sup>186</sup>

However, the challenges of independent movement for women in Africa can be quite dramatic. Where a woman moves to an area in which her tribe is well represented, she can be easily identified and tracked down. Where a woman moves to an area in which her tribe is *not* represented, she may find she has no place in society and thus cannot access common resources, employment opportunities, or protection. These cultural realities are occasionally acknowledged by adjudicators:

Respondent has addressed the issue of Nigeria's relatively large population in her testimony, explaining that for a woman of her tribe, it is very difficult to move around the country independent of family and tribal associations due to social and cultural constraints. The reasonableness of Respondent's relocation is placed into question by such cultural considerations. Respondent has testified that in her culture, a woman lives at home until she is married. This significantly limits her relocation options. She also stated that even in a large metropolitan area such as Lagos, there would be no way to hide, as Nigerians associate in tribal groups, and she could not live in Lagos without associating with her tribal group . . . Lastly, Respondent points out that she cannot relocate to Northern Nigeria, as the Muslim states there have adopted the Islamic law of Sharia, which, among other things, forces single women to marry.<sup>187</sup>

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186. CGRS Database Case # 4079 (2005) (on file with CGRS).

187. CGRS Database Case # 998 (2002) (on file with CGRS).

Finally, information submitted to the CGRS database suggests that female applicants in countless countries who attempt to relocate away from their families or live alone risk being perceived as prostitutes. In light of the real challenges posed by relocation as a single woman in many areas of Africa, where family and tribal affiliation often influence a person's access to resources, housing, and protection, it is difficult to find relocation to be reasonable based on the existence of distant urban centers or faraway provinces.

### 9. The One-Year Bar

The “one-year bar,” which requires applicants to file for asylum within one year of their entry into the United States, poses a challenge in all kinds of asylum cases—including those involving forced marriage.<sup>188</sup> Women affected by forced marriage have frequently been found statutorily ineligible for asylum due to a late filing. The delay may be due to the nature of the harms they suffered at their families' or husbands' hands, or it may be the result of their lack of education or inclination to seek government protection for these harms.

Of all the forced marriage cases in the CGRS database, sixty-five were marked by attorneys as involving a one-year bar issue. Fact patterns sketched out by advocates on CGRS's technical assistance website indicate various reasons for having missed the application deadline: lack of knowledge about asylum; traumatization from past harm rendering the applicant unable to present the facts of her claim; or lack of access to resources required to file for asylum. In some cases, new circumstances in the applicant's life have created a sudden fear of harm in her country of origin and thus triggered the need to file for asylum where one may not have existed before.

The impact of the one-year bar on forced marriage claims is significant insofar as failure to overcome the bar will render an applicant ineligible for asylum, restricting her to other types of refugee protection for which the standard of future harm is higher.<sup>189</sup> In addition, a barred applicant is ineligible for a special form of asylum (“humanitarian asylum”), which can be granted on the basis of past persecution alone. “Humanitarian asylum” does not require a future fear of harm where an applicant has suffered particularly severe and atrocious past harm. Often, women fleeing forced

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188. 8 U.S.C. § 1158(a)(2)(B)(2006).

189. 8 C.F.R. § 208.16(b)(2) (2010).

marriages have suffered a heightened degree of past harm in the form of FGC, brutal rape, or beatings, but their persecutors may now be deceased or have otherwise abandoned their intent to harm them. In these cases, women who were subjected to severe and atrocious harm in the course of a forced marriage, but who are barred by the one year deadline, lose this critical avenue of relief.

The one-year bar can be waived in cases of “changed” or “extraordinary” circumstances relating to the applicant’s inability to file on time.<sup>190</sup> The extraordinary circumstances must be directly related to her failure to file within one year of arrival in the United States. If changed or extraordinary circumstances are found, the applicant must then prove that her delay in filing was reasonable under the circumstances.<sup>191</sup>

#### a. Extraordinary Circumstances

One relatively straightforward “extraordinary circumstance” proffered in a few Chinese forced marriage cases was that of minor status, where the applicant fled underage marriage and entered the United States while still a minor.<sup>192</sup> This exception has become less relevant with the passage of the Trafficking Victims Protection Reauthorization Act, which exempts “unaccompanied minors” from the one-year bar to asylum.<sup>193</sup>

More commonly, advocates representing applicants fleeing forced marriage have sought to overcome late filing by showing that the applicant suffered psychological harm. Often, the harms an applicant has already suffered in the course of resisting a forced marriage can create severe mental health consequences. Advocates seeking to justify late filing by arguing mental health issues as “extraordinary circumstances” must show that the client suffers a condition that did in fact affect her ability to submit a timely asylum application. This is typically done by submitting the testimony or affidavit of a mental health expert who has evaluated the applicant and a reached diagnostic conclusion as to her psychological conditions and their relevant effects.

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190. 8 C.F.R. § 208.4(a)(5) (2010).

191. See *supra* note 40 and accompanying text regarding the one-year bar.

192. CGRS Database Case # 369 (1999) (on file with CGRS).

193. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”), Pub. L. No. 110-457, § 235(d)(7)(A), 122 Stat. 5044, 5080–81 (2008).

Some adjudicators rejected psychological assessments that did not clearly state that respondent suffered from post-traumatic stress disorder (“PTSD”) but rather just that she “suffered from ‘symptoms’ of PTSD.” In one case, the judge determined that an applicant who had been functional enough to take care of a child in the United States could not have been too traumatized to file for asylum.<sup>194</sup> The widespread skepticism among many adjudicators regarding the use of psychological evidence to excuse late filing is not limited to forced marriage cases; judges have raised the same issues in other cases.

#### b. Changed Circumstances

Some forced marriage claims involve specific changed circumstances that may excuse late filing under 8 C.F.R. § 208.4(a)(4). For example, where an applicant has recently learned of her family’s plans to marry her to an undesired suitor, she may in theory overcome the filing deadline if she applies within a reasonable period of time after learning of the new development. However, the varying degrees of “knowledge” of a family’s plans can prove complicated.

One example of how discovery of a pending forced marriage can affect an applicant’s eligibility for asylum due to the one-year bar was presented in the recently vacated BIA case of *Matter of A-T*.<sup>195</sup> The asylum seeker had entered the United States in October 2000. In August 2003, she received a letter from her father demanding that she return to Mali to marry her first cousin. Because the woman had testified that her family had, in truth, always joked that one day she and this cousin would wed, the BIA found that the August 2003 letter did not constitute “changed circumstances” as the applicant had foreknowledge of the “arrangement” before she ever came to the United States. The BIA further found that even if the August 2003 letter *had* brought news of previously unknown danger, the applicant’s delay of nine months before actually applying for asylum was not “reasonable.”<sup>196</sup>

Regardless of whether the BIA adjudicated this point fairly, the dispute does highlight a challenge in prospective forced marriage

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194. CGRS Database Case # 3301 (2005) (on file with CGRS).

195. *Matter of A-T*, 24 I&N Dec. 296 (BIA 2007), *vacated and remanded by* 24 I&N Dec. 617 (A.G. 2008), *remanded by* 25 I&N Dec. 4 (BIA 2009).

196. *Id.* at 301.

claims. Where family plans—and even steps taken towards formalization of marriage—can span years in many communities, these applicants struggle to prove the point at which they realize the threat of forced marriage is real and decide to seek asylum protection.

Another issue is raised in cases where a change in an applicant's own behavior increases the risk of harm. In one case, a Turkish asylum applicant fled forced marriage and failed to file for asylum within one year of arrival in the United States. Before the year was over, though, she became pregnant with a child out of wedlock—a fact that she believed would expose her to new danger in the form of honor killing by her family. The immigration judge wrote:

Frankly, the Court does not find that in the regulations that the birth of the child would necessarily meet the definition of changed circumstances because that is not a change in conditions in the respondent's country of nationality. However, the regulation does state that it could be a change in the applicant's circumstances materially affecting eligibility for asylum. However, the respondent claims that she fled to the United States because she was fleeing a marriage that she did not want to be in, which would indicate to the Court that she was fleeing persecution. In any event . . . she applied for asylum . . . more than one year after the child was born. Furthermore, the respondent was pregnant for a period of nine months, and she certainly could have applied for asylum well before the one-year filing deadline knowing that she was going to give birth to a child out of wedlock . . .<sup>197</sup>

The judge's point that the applicant could have anticipated the risk caused by having a child out of wedlock nine months before actually giving birth is well taken. However, there is some irony in the rest of the judge's conclusions. He appears to concede that the applicant's initial flight from forced marriage was indeed a flight from persecution, but that the change in personal circumstances did not "materially affect" the applicant's eligibility.

## V. CONCLUSION

In February 2008, when the Appeals Chamber of the Special Court for Sierra Leone found that forced marriage constituted a

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197. CGRS Database Case # 6217 (2007) (on file with CGRS).



“crime against humanity” distinct from that of sexual slavery, it broke ground in international law. However, finding forced marriage to be a violation of human rights should not be limited to marriages that occur in conflict zones. Marriage can still be forced—and thus constitute a violation of a fundamental human right—in the absence of brute abduction by rebel soldiers under slavery-like conditions.

From hundreds of case profiles and two dozen unpublished decisions provided through the CGRS technical assistance database, it is clear that forced marriage is frequently a more private, nuanced event brought to bear by families and communities. Such marriages deprive countless women of the fundamental right to freely consent to marriage, and are frequently accompanied by myriad forms of physical and non-physical abuse. As such, forced marriage should be considered a form of persecution under international and domestic refugee law.

Nonetheless, the issue of asylum based on forced marriage as persecution remains largely unaddressed, and the jurisprudence is underdeveloped in the United States. The sample of case profiles and decisions available through the CGRS technical assistance database shows that adjudicators often lack the necessary understanding of the duress and realities surrounding forced marriage. In some cases, this results in an adverse credibility finding; in other cases, the applicant is seen as credible but the adjudicator does not deem marriage without consent to constitute persecution. Often, adjudicators base findings of persecution not on the forced marriage itself, but rather on its component harms—such as rape, FGC, or physical abuse. For this reason, forced marriage as a persecutory practice in and of itself frequently eludes analysis.

In many other cases, the applicant may be found to have a well-founded fear of persecution based on forced marriage or component harms, but the adjudicator does not find such persecution to have a nexus to a protected ground. Recurrent challenges to claims based on “membership in a particular social group” show the proposed social group failing for circularity, lack of social visibility, or inaccurate inclusion of “opposition” to the marriage as a motivating factor to the persecutor.

Finally, many applicants’ claims are barred by the one-year filing deadline, which can dramatically affect gender-based asylum claims in general, particularly where “changed” or “extraordinary” circumstances relating to forced marriage can be difficult to prove.

Certainly, rough statistics gleaned from the CGRS database of unpublished cases reflect the grant bias one might expect from cases in which the attorney has taken time to contact CGRS for technical support. Even despite this inflation, however, the database information makes it clear that forced marriage-based asylum claims are rife with legal challenges, factual underdevelopment, and adjudicator misapprehension. Where claims can be granted on the basis of related forms of persecution better appreciated by asylum adjudicators, the individual applicant may certainly prevail, but the jurisprudence, which still fails to directly acknowledge forced marriage itself as a form of persecution, suffers.