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VIOLATING THE PROTECTIONS OF INTERNATIONAL LAW: EXAMINING METHODS TO COMBAT THE PRACTICE OF FEMALE GENITAL MUTILATION IN MALI

by *Angel R. Gardner**

I. Introduction

In 2021, the women's rights non-governmental organization ("NGO"), Equality Now, filed a lawsuit alongside other organizations¹ challenging Mali's failure to outlaw the practice of female genital mutilation ("FGM").² FGM involves the partial or total removal of the external female genitalia or other injury to female genital organs for non-medical

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1 The suit was filed by Equality Now, the Institute for Human Rights and Development in Africa (IHRDA), Association Malienne pour le Suivi et l'Orientation des Pratiques Traditionnelles (Malian Association for the Monitoring and Orientation of Traditional practices), and Association pour le Progrès et la Défense des Droits des Femmes (Association for the Progress and Defense of Women's Rights). *Women's Rights Organizations Challenge Mali's Lack Of Anti FGM Law At The ECOWAS Court Of Justice*, EQUALITY NOW (Apr. 12, 2021), https://equalitynow.org/press_release/mali_fgm_ecowas_2021/.

2 Nita Bhalla, *Mali's Failure to Ban FGM Challenged in West Africa's Top Court*, REUTERS (Apr. 12, 2021, 8:30 AM), <https://www.reuters.com/article/us-mali-women-trfn/malis-failure-to-ban-fgm-challenged-in-west-africas-top-court-idUSKBN-2BZ1EZ/>; Annie Risemberg, *Malian Women's Rights Groups Sue Government for Failing to End FGM*, VOA NEWS (Feb. 11, 2021, 3:14 PM), <https://www.voanews.com/a/episode-malian-womens-rights-groups-sue-government-failing-end-fgm-4575596/6114937.html>.

purposes.³ The practice of FGM traces back to an ancient ritual, however, current research reveals that it causes serious health problems.⁴ The case brought by these NGOs has the potential to create binding precedent against the practice of FGM across all the African States.⁵

This paper examines FGM in Mali to argue that the practice of FGM is a violation of human rights law. Furthermore, this paper argues that when Mali - and States with similar accountability mechanisms as Mali - do not adequately protect its citizens from the harm, international bodies should hold States accountable through enforcement of criminalization and education. Part II discusses the history of FGM and the individuals harmed by this practice. Part III analyzes relevant international and domestic laws as applied in Mali as a case study for a wider application of FGM. Part IV argues that Mali violates human rights laws and obligations by failing to address FGM. Part IV further discusses that Mali must criminalize the practice of FGM to adequately protect its citizens and discusses the avenues to address Mali's failure to do so. Part V concludes by analyzing how this can be expanded to other States.

II. The History & Practice of FGM

The exact origin of FGM remains widely unknown, but scholars believe that FGM stems largely from longstanding cultural traditions.⁶ There are five cited reasons for practicing FGM: (1) psychosexual, such as the belief that it is a way to control a woman's sexuality and ensure virginity before marriage; (2)

3 *Female Genital Mutilation*, WORLD HEALTH ORG. (Jan. 21, 2022), <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.

4 Bhalla, *supra* note 2. See, generally, Jewel Llamas, *Female Circumcision: The History, the Current Prevalance and the Approach to a Patient*, University of Virginia School of Medicine, (Apr. 2017), <https://med.virginia.edu/family-medicine/wp-content/uploads/sites/285/2017/01/Llamas-Paper.pdf>. ("[F]emale genital mutilation (FGM) . . . is practiced in many countries spanning parts of Africa, the Middle East and Southeast Asia.")

5 *Id.* (explaining that this case has the potential to establish a landmark in women and girls' rights in Africa).

6 See, e.g., Nawal M. Nour, *Female Genital Cutting: A Persisting Practice*, *Revs. In Obstetrics & Gynecology*, Summer 1(3), 135-9 (2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2582648/> (stating that FGM is an "ancient practice that predates the Abrahamic religions . . ."); Debangana Chatterjee, *Tracing the Origins of Female Genital Cutting: How It All Started*, SAHIYO (July 21, 2018), <https://sahiyo.com/2018/07/21/tracing-the-origins-of-female-genital-cutting-how-it-all-started/>.

sociological and cultural, such as the belief that FGM is a part of a girl's initiation into womanhood; (3) aesthetic, such as the belief that external female genitalia are dirty, ugly, and to be removed to promote sexual appeal and hygiene; (4) theological, as some people use religion to justify the practice; (5) economical, many communities use FGM as a prerequisite for marriage and economic necessity.⁷

FGM is still practiced in various countries in Africa, the Middle East, and Asia. The World Health Organization has identified four main types of FGM. Type I is the partial or total removal of the clitoral glans and or the clitoral hood.⁸ Type II is the partial or total removal of the clitoral glans and the labia minora with or without the removal of the labia majora.⁹ Type III is the narrowing of the vaginal opening, usually by stitching.¹⁰ Type IV includes all other harmful procedures to the female genitalia for non-medical purposes.¹¹ Generally, a respected elder within a community performs FGM, however, in some countries medical professionals have increasingly performed the procedure.¹²

III. Who is Harmed by FGM

Female genital mutilation is widely practiced in Mali, and roughly 70% of all people in the country believe that religion requires women to undergo FGM.¹³ In Mali, nearly eight million women and girls have undergone FGM, and overall 89 percent have been subjected to the practice.¹⁴ The practice of FGM

7 Ana Golden, *Female Genital Mutilation in Mali*, THE BORGES PROJECT (July 9, 2021), <https://borgenproject.org/female-genital-mutilation-in-mali/>; *Female Genital Mutilation (FGM) Frequently Asked Questions*, UNFPA (Feb. 2022), <https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions#why>.

8 *Female Genital Mutilation*, WORLD HEALTH ORG. (Jan. 21, 2022), <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.

9 *Id.*

10 *Id.*

11 *Id.* (including but not limited to pricking, piercing, incising, scraping, or cauterizing the genital area).

12 Preston D. Mitchum, *Slapping the Hand of Cultural Relativism: Female Genital Mutilation, Male Dominance, & Health as a Human Rights Framework*, 19 WM. & MARY J. WOMEN & L. 585, 590 (2013).

13 2021 Country Reports on Human Rights Practices: Mali, U.S. DEP'T STATE at 25 (2021) [hereinafter 2021 Mali Country Report].

14 *Female Genital Mutilation in Mali: Insights from A Statistical Analysis*, UNICEF at 3 (Feb. 2022), <https://data.unicef.org/resources/female-genital-mutilation-in-mali/>.

remains legal in Mali, but authorities prohibit the practice in government-funded health centers.¹⁵ Many African communities view FGM as a rite of passage ceremony, and community members view girls who have not undergone FGM as “outcast[s], unsuitable for marriage, or impure.”¹⁶ Supporters of FGM believe that the removal of the clitoris transforms the girl into a woman.¹⁷ Many parents wish to avoid the stigma and social exclusion associated with girls who do not undergo FGM.¹⁸ FGM is more likely to occur before a girl reaches the age of five.¹⁹

There are many health risks and consequences associated with FGM, which include relatively short-term consequences such as pain, highly noticeable bleeding from the procedure, and physically restrictive recovery practices, such as tying legs together for days or weeks after undergoing FGM; and exceptionally long-term consequences such as infections, chronic pain, decreased sexual enjoyment, and psychological consequences such as post-traumatic stress disorder (“PTSD”), chronic psychosomatic ailment, depression, terror, anxiety, humiliation, and betrayal.²⁰ Women who have undergone FGM have a significantly increased risks for adverse events during childbirth.²¹ Further, the conditions when performing FGM are extremely unsanitary, increasing the risk of transmitting other infections and diseases such as HIV to the women.²²

IV. Protections Afforded under International Law

In 1948, the Universal Declaration of Human Rights (“UDHR”) was the first instrument in international law that sought universal protection

15 *Id.*

16 John Mukum Mbaku, *International Human Rights Law & the Tyranny of Harmful Customary & Traditional Practices on Women in Africa*, 52 CAL. W. INT'L L.J. 1, 40 (2021).

17 See Mitchum, *supra* note 12, at 590-91 (believing that the clitoris is the “masculine” part of a girl's body).

18 Mbaku, *supra* note 16, at 14, 40.

19 *Id.* at 40.

20 *Eliminating Female Genital Mutilation: An Interagency Statement*, WORLD HEALTH ORG. at 11 (June 16, 2008) [hereinafter WHO Report]; Jaimee K. Wellerstein, *In the Name of Tradition: Eradicating the Harmful Practice of Female Genital Mutilation*, 22 LOY. L.A. INT'L & COMP. L. REV. 99, 108 (1999).

21 *Id.* (noting there are higher incidences of caesarean section and post-partum hemorrhaging).

22 Jaimee K. Wellerstein, *In the Name of Tradition: Eradicating the Harmful Practice of Female Genital Mutilation*, 22 LOY. L.A. INT'L & COMP. L. REV. 99, 106 (1999).

of fundamental human rights.²³ The United Nations recognized the importance of promoting the development of friendly relations between nations and reaffirmed the dignity and worth of individual people, thus creating the basis for human rights laws today.²⁴ Article 2 of the UDHR establishes that “[e]veryone is entitled to all the rights and freedoms set forth [in the UDHR] without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or status.”²⁵ Article 3 states that all people have “the right to life, liberty, and security of person.”²⁶ Article 5 prevents individuals from being “subjected to torture or cruel, inhuman, or degrading treatment.”²⁷ Article 7 provides that all people “are equal before the law and are entitled without any discrimination to the equal protection of the law” and are entitled to equal protection against discrimination.²⁸

Almost twenty years later, in 1966, the United Nations adopted both the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”). Both built off of the rights that the UDHR established, which are to provide individuals protections of their civil and political rights as well as their economic, social, and cultural rights.²⁹ Article 7 of the ICCPR sets out that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment . . .” and that “[n]o one shall be subjected without his free consent to medical or scientific experimentation.”³⁰ Article 24 requires States, families, and society to protect every child based on their status as a minor.³¹ Article 26 recognizes that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”³² Article 10 of the ICESCR requires that States provide special protection and assistance to all children from

23 G.A. Res. 217 A (III), U.N. Doc. A/810 at 71 (Dec. 8, 1948) [hereinafter UDHR].

24 UDHR *supra* note 23, at 71.

25 UDHR *supra* note 23, art. 2.

26 *Id.* art. 3.

27 *Id.* art. 5.

28 *Id.* art. 7.

29 G.A. Res. 2200 A (XXI), at 49 (Dec. 16, 1966).

30 International Covenant on Civil & Political Rights, 999 U.N.T.S. 175, art. 7 (Mar. 23, 1976) [hereinafter ICCPR].

31 ICCPR *supra* note 30, art. 24 (noting that there is no discrimination based on race, color, sex, language, religion, national or social origin, and property or birth)

32 *Id.* art. 26.

“economic and social exploitation.”³³ Article 12 recognizes the right of everyone to enjoy the “highest attainable standard of physical and mental health.”³⁴ Article 15 requires State Parties to recognize the right of people “[t]o enjoy the benefits of scientific progress and its applications.”³⁵

The UDHR, ICCPR, and ICESCR, the latter two often referred to as “the International Covenants,” are considered the International Bill of Rights and paved the way for many other treaties establishing more specific protections of human rights.³⁶

On December 18, 1979, the United Nations adopted the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”).³⁷ Article 2 states that State Parties “condemn discrimination against women in all its forms.”³⁸ Article 4 establishes that “temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination.”³⁹ Article 5 states that all State Parties shall take appropriate measures “to modify the social and cultural patterns of conduct . . . with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles . . .”⁴⁰ Article 12 requires State Parties “appropriate measures to eliminate discrimination against women in the field of health care in order to ensure . . . access to health care services, including those related to family planning”⁴¹ Article 14 ensures that State Parties shall take appropriate measures to eliminate discrimination in rural areas and ensure that women have access to adequate health care facilities.⁴²

In 1987, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

33 International Covenant on Economic, Social & Cultural Rights, 993 U.N.T.S. 7, art. 10 (Dec. 16 1966) [hereinafter ICESCR].

34 ICESCR *supra* note 33, art. 12.

35 *Id.* art. 15.

36 UNHCR, *What are Human Rights: International Bill of Rights*, <https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights> (last visited Jan. 10, 2024).

37 G.A. Res. 34/180 (Dec. 18, 1979) [hereinafter CEDAW].

38 CEDAW *supra* note 37, art. 2.

39 *Id.* art. 4 (explaining that the measures will be discontinued when the objectives of equality of opportunity and treatment are achieved).

40 *Id.* art. 5.

41 *Id.* art. 12.

42 *Id.* art. 14.

Punishment (“UNCAT”) entered into force. Article 1 defines torture as any act, “. . . for any reason based on discrimination of any kind, when such pain or suffering is inflicted by . . . [an] other person acting in an official capacity.”⁴³ Article 2 requires States to take “effective” measures “to prevent acts of torture.”⁴⁴ Article 4 ensures that State Parties will identify torture as an offense under domestic criminal law.⁴⁵ Article 14 insists that State Parties redress victims of torture, including adequate compensation.⁴⁶ Article 16 requires State Parties to prevent other cruel, inhuman, or degrading treatment that does not amount to its definition of torture.⁴⁷

Next, in 1989, the United Nations recognized that children require protection and assistance to fully assume responsibilities within the community and established certain rights under the Convention on the Rights of the Child (“CRC”). Article 1 sets forth that a child includes “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”⁴⁸ Article 3 requires State Parties to ensure that a child has adequate protection and care necessary for their wellbeing.⁴⁹ Article 19 establishes that State Parties will take adequate measures to protect children “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.”⁵⁰ Article 24 recognizes the right of the child to enjoy “the highest attainable standard of” healthcare.⁵¹ Article 37 requires State Parties to ensure that “[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”⁵²

Although not binding, the United Nations has also reaffirmed in its General Assembly resolution the need to eliminate the practice of FGM globally and reaffirmed that States need to intensify global

43 Convention Against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. art. 1 [hereinafter UNCAT].

44 UNCAT *supra* note 43, art. 2.

45 *Id.* art. 4.

46 *Id.* art. 14.

47 *Id.* art. 16.

48 Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. X art. 1 [hereinafter CRC].

49 CRC *supra* note 43, art. 3.

50 *Id.* art. 19 (subpart 1 continues: “. . . while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”).

51 *Id.* art. 24.

52 *Id.* art. 37.

efforts to eliminate FGM. Relying on the ICCPR, ICESCR, CEDAW, CRC, UNCAT, and other relevant international human rights treaties, the Human Rights Council recognizes that FGM constitutes a human rights violation stemmed in gender inequality and discriminatory social norms.⁵³ Further, it notes that the practice of FGM has “no documented health benefits, and may, on the contrary, increase” long-term health ailments.⁵⁴ The resolution places on the States the “primary responsibility” to prevent and eliminate the practice of FGM by achieving a “zero tolerance for the practice.”⁵⁵

Beyond stated protections and resolutions by international bodies like the United Nations, there are also regional treaties based on geographical delineations such as by continents. The African Union (“AU”) is composed of fifty-five member states from the African continent.⁵⁶ Adopted on July 1, 2003, and entered into force on November 25, 2005, The Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (“Maputo Protocol”) provides extensive rights to African women and girls.⁵⁷ Article 2 requires all State Parties to combat “all forms of discrimination against women through legislative, institutional, and other measures.”⁵⁸ Articles 3 and 4 ensures that State Parties will “adopt and implement appropriate measures” to protect women from all forms of violence, with special care to address “sexual and verbal violence.”⁵⁹ Article 5 requires State Parties to “prohibit and

53 G.A. Res. 44/16, U.N. Doc. A/HRC/RES/44/16, at 1-2 (July 17, 2020).

54 *Id.* at 2.

55 *Id.* at 3. Put simply, and stated shortly after the initial 2012 resolution, there is an understanding that “[z]ero tolerance to Female Genital Mutilation (FGM) means the practice should not be tolerated for any reason, no matter the type, who is doing it and on whom” has prevailed; *see also* Binta Bah, *Zero Tolerance to FGM Means FGM Should Not Be Tolerated*, Daily News (Feb. 22, 2012), <http://dailynews.gm/africa/gambia/article/zero-tolerance-to-fgm-means-fgm-should-not-be-tolerated-1> [<https://web.archive.org/web/20140202101301/http://dailynews.gm/africa/gambia/article/zero-tolerance-to-fgm-means-fgm-should-not-be-tolerated-1>].

56 *About the African Union*, AFRICAN UNION, <https://au.int/en/overview> (last visited Dec. 10, 2022).

57 *Protocol to the African Charter on Human & People’s Rights on the Rights of Women in Africa*, OHCHR, <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/ProtocolontheRightsofWomen.pdf> [hereinafter Maputo Protocol] (last visited Mar. 18, 2024).

58 *Id.* art. II.

59 Maputo Protocol *supra* note 57, art. III(4); IV.

condemn all forms of harmful practices which negatively affect the human rights of women which are contrary to recognized international standards,” including the unambiguous prohibition of FGM.⁶⁰ Article 14 ensures women’s right to health, including sexual and reproductive health.⁶¹

Further, the African Charter on the Rights and Welfare of the Child, adopted in July 1990, and entering into force on November 29, 1999, seeks to protect children of African nations “in conditions of freedom, dignity and security.”⁶² Article 3 ensures that all children “shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child’s or his/her parents’ or legal guardians’ race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.”⁶³ Article 4 requires that “in all actions concerning the child undertaken by any person or authority the best interest of the child shall be the primary consideration.”⁶⁴ Article 14 ensures that all children have access to necessary medical assistance and are provided primary health care.⁶⁵ Article 16 requires State Parties to protect children from torture and any form of child abuse.⁶⁶ Article 20 lists the parents’ primary responsibility to ensure that the best interest of the child is their basic concern at all times.⁶⁷ Article 21 provides that State Parties “shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, and normal growth and development of the child”⁶⁸

V. Protections Afforded under Mali’s Domestic Law

The Republic of Mali approved its most recent constitution in 1992, and although it was briefly suspended following a military coup in 2012, it was quickly reinstated.⁶⁹ Title I of the Mali Constitution outlines the rights and duties of human dignity.

60 *Id.* art. V.

61 *Id.* art XIV.

62 African Charter on the Rights & Welfare of the Child, African Union, Preamble, Nov. 29, 1999 [hereinafter ACRWC].

63 *Id.* at art. 3.

64 *Id.* at art. 4.

65 *Id.* at art 14.

66 *Id.* at art. 16.

67 *Id.* at art. 20.

68 ACRWC *supra* note 62, art. 21.

69 *Mali: Government & Society*, BRITANNICA (last updated Nov. 1, 2022), <https://www.britannica.com/place/Mali/Transportation-and-telecommunications#ref54987>.

Under the Mali Constitution, Article 1 provides every individual with the “right to the life, to the liberty, to the security and to the integrity of his person.”⁷⁰ Article 2 of the Mali Constitution establishes that all “Malian[s] shall be born and remain free and equal in rights and obligations.”⁷¹ Article 2 also prohibits any form of discrimination based on “social origin, color, language, race, sex, religion, or political opinion.”⁷² Article 3 protects citizen against torture or other cruel, inhumane, degrading, or humiliating treatment; violators of this provision shall be punished.⁷³ Article 17 lays out that among other things, “health, and social protection shall constitute recognized rights.”⁷⁴ Under Article 24, every citizen and person living within the territory must respect the provisions laid out in the constitution.⁷⁵

Further, Title XIV of the constitution articulates Mali’s obligations in relation to treaties and international agreements. Article 116 states, “treaties and accords that are properly ratified or approved have, from the time of their publication, superior authority over laws of the State.”⁷⁶ Lastly, the Preamble of the Malian Constitution subscribes to both the Universal Declaration of the Rights of Man (1948) and the African Charter of the Rights of Man and the People (1981).⁷⁷

A. Avenue for Remedies Under the Law

Internationally, there are a few ways to lodge a complaint for violations of one’s human rights. Under the UN’s Human Rights Council’s Complaint Procedure, an individual may make a complaint against a State Party by alleging a violation of a treaty right to the body of experts monitoring the treaty.⁷⁸ The “treaty bodies” are committees composed of independent experts selected by States who are Parties to the relevant treaty.⁷⁹ However, most of the treaty-body-based complaint mechanisms have not

70 CONST. OF MALI (1992), art. 1.

71 *Id.* at art. 2.

72 *Id.* at art. 2.

73 *Id.* at art. 3.

74 *Id.* at art. 17.

75 *Id.* at art. 24.

76 CONST. OF MALI (1992), art. 116.

77 *Id.* at preamble.

78 UNITED NATIONS, *Individual Communications: Hum. Rts. Treaty Bodies*, <https://www.ohchr.org/en/treaty-bodies/individual-communications#overviewprocedure> (last visited Dec. 11, 2022).

79 *Id.*

entered into force, meaning that they may not be able to address a complaint.⁸⁰ A person may submit a complaint after they have successfully exhausted all domestic remedies.⁸¹ Once a person submits their complaint, it is submitted to the State so that the State can respond, then the complaint goes through an admissibility and merits stage.⁸²

Another international avenue for redress is through the African Court on Human and Peoples' Rights ("AfCHPR"), which was established through Article 1 of the Protocol to the African Charter on Human and Peoples' Rights.⁸³ NGOs and individuals may submit cases before the AfCHPR as long as the State to which they are making a complaint against recognizes the AfCHPR's jurisdiction to hear these cases.⁸⁴ The AfCHPR has jurisdiction to hear cases relating to violations of human rights contained in the African Charter on Human and Peoples' Rights or any other human rights instrument ratified by the State.⁸⁵

Domestically, Mali's court systems are governed by the Mali constitution and are nominally independent from the executive and legislative authorities.⁸⁶ Mali's highest court is the Supreme Court consisting of a judicial section, an administrative section, and an accounts section.⁸⁷ Below the Supreme Court of Mali, there is a Constitutional Court that guarantees the fundamental rights of the human person and civil liberties.⁸⁸ The final court in Mali is the High Court of Justice, tasked with judging high treason of government officials.⁸⁹ The Mali courts have a backlog of cases, and judges are severely overwhelmed with high caseloads.⁹⁰ Issues existing

80 *Id.* (the ICCPR, CEDAW, UNCAT, ICESCR, and CRC Committees may receive and consider individual communications alleging violations).

81 *Id.*

82 *Id.*

83 *The African Court in Brief*, AFRICAN CT. HUM. & PEOPLES' RTS., <https://www.african-court.org/wpafc/basic-information/> (last visited Dec. 11, 2022).

84 *How to File a Case*, AFRICAN CT. HUM. & PEOPLES' RTS., <https://www.african-court.org/wpafc/how-to-file-a-case/> (last visited Dec. 11, 2022).

85 *Id.*

86 *Mali: Freedom in the World 2022*, FREEDOM HOUSE, <https://freedomhouse.org/country/mali/freedom-world/2022> (last visited Jan. 11, 2024) ("The judiciary is beholden to the executive, despite constitutional guarantees of judicial independence.").

87 CONST. OF MALI (1992), art. 83.

88 *Id.* at art. 85.

89 *Id.* at art. 95.

90 Dr. Annie Barbara Chikwanha, *Issue Paper—Mali's Criminal Justice System*, AFRICA CRIM. JUST. REFORM (Nov. 2008), [https://](https://dullahomarinate.org.za/acjr/resource-centre/Malis%20Criminal%20Justice%20System.pdf)

within the domestic courts include undue influence by the executive branch, bribery, and knowledge about access to justice.⁹¹

VI. Analysis

A. Mali violates both domestic and international obligations by failing to protect women and girls from FGM.

Mali has an affirmative duty to protect the rights of its citizen both through its Constitution and through signing and ratifying various international treaties. These treaties established various rights, some of which include the right to adequate health care, the right to be free from discrimination, and the right to be free from torture and violence. Mali is obligated to abide by the treaties it signed and ratified under Article 116 of its Constitution.⁹² It states that "Treaties or agreements regularly approved or ratified shall have, from their publication, an authority superior to that of laws, under the reservation for each treaty or agreement of application by the other party."⁹³ This means that any treaty that Mali ratifies becomes law within Mali and must be enforced. By failing to abolish or criminalize FGM, Mali violates various human rights protections and its duty to its citizens.

B. Women and girls have a right to health, and the practice of FGM violates that right.

The right to health is codified in various international treaties and is also a right recognized under the Mali Constitution. The UDHR establishes the right to health under Article 25, establishing the "right to a standard of living adequate for the health and well-being and well-being of himself . . ."⁹⁴ Article 12 of the ICESCR ensures that women have access to health care services.⁹⁵ By allowing the practice of FGM, Mali does not protect women's

dullahomarinate.org.za/acjr/resource-centre/Malis%20Criminal%20Justice%20System.pdf (noting judges can have up to 1,000 cases).

91 *Id.* (explaining that ignorance of the law prevents women from seeking justice).

92 CONST. OF MALI (1992), art. 116.

93 *Id.* (emphasis added).

94 UDHR, *supra* note 23, art. 25.

95 ICESCR *supra* note 33, art. 12.

rights to adequate health care because of the various health complications that result from FGM.⁹⁶ Many women suffer from long-term health complications including reproductive difficulties, yet the State has not taken adequate measures to prevent the practice of FGM.⁹⁷ The practice further violates a woman's right to health because the community leaders perform the procedure in unsanitary and unsafe conditions.⁹⁸

C. Under international, regional, and domestic formulations, women and girls have a right to be free from discrimination, and the practice of FGM violates that right.

Under Mali's Constitution, people are equal under the law and States have a duty to protect people from discrimination, both direct and indirect discrimination.⁹⁹ Direct discrimination is when a person of a protected class is treated less favorably than another person in a similar situation.¹⁰⁰ Indirect discrimination occurs when an outwardly neutral practice, rule, or requirement has a disproportionate effect on one of the protected classes.¹⁰¹ The practice of FGM is directly discriminatory because it stems from the belief of female inferiority. One of the cited reasons that people practice FGM is because they believe that the woman's body is dirty and unfit for marriage unless her body is mutilated to cleanse it.¹⁰² By failing to outlaw FGM, Mali directly violates its obligation to prohibit discrimination on the basis of sex to its citizens under the Mali Constitution.¹⁰³ Although the government is not the one performing FGM on the women and girls of Mali, it allows this discriminatory practice to continue which can be seen as a silent approval for the continued practice.

96 See WHO Report, *supra* note 20, at 11 (indicating that there are both long-term physical and mental health problems stemming from FGM including chronic pain, infections, lack of enjoyment of sex, and PTSD).

97 *Id.*

98 Mitchum, *supra* note 12, at 592 (explaining that practitioners use razor blades and broken glass to perform the procedure).

99 DANIEL MOECKLI, SANGEETA SHAH, & SANDESH SIVAKUMARAN, INTERNATIONAL HUMAN RIGHTS LAW, 155 (David Harris ed., 3rd ed. (2018)).

100 *Id.*

101 *Id.* at 156.

102 Golden, *supra* note 7; UNFPA, *supra* note 7.

103 CONST. OF MALI, art. 2 ("All Malians are born and live free and equal in their rights and duties. Any discrimination based on social origin, color, language, race, sex, religion, or political opinion is prohibited.").

Beyond the domestic protection against discrimination, many international treaties also reinforce the right to be free from discrimination, and as a party to these treaties, Mali is obligated to take steps to ensure that this right is protected. Mali is violating its treaty obligations under the UDHR by failing to prevent or punish the practice of FGM.¹⁰⁴ As a State Party to the ICCPR, ICESCR, and the Maputo Protocol, Mali has an obligation to prohibit discrimination based on sex among other things.¹⁰⁵ The ICCPR also ensures children retain additional protection against discrimination based on their minor status, but Mali fails to protect this right for young girls by allowing adults to perform FGM on these young girls.¹⁰⁶

D. Under international, regional, and domestic treaty obligations, women and girls have a right to be free from torture, and FGM constitutes a form of torture.

It is a violation of both Malian domestic law and international laws to commit actions that would amount to torture, and FGM should constitute a form of torture. Under the UNCAT, torture 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 from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for

104 See CONST. OF MALI, Preamble (agreeing to protect the provisions set out in the UDHR); UDHR, *supra* note 23, art. 7 ("All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.").

105 *View the Ratification Status by Country or by Treaty*, UNITED NATIONS (URL omitted) (last visited Dec. 15, 2022) (Mali ratified the ICCPR and ICESCR on Jul. 16, 1974) [hereinafter Mali Ratification Status]; *List of Countries which have Signed, Ratified/ Acceded to the Protocol*, AFRICAN UNION, <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> (last visited Dec. 15, 2022) (Mali ratified the Maputo Protocol on January 13, 2005).

106 ICCPR, *supra* note 30, art. 24; see also Mitchum, *supra* note 12, at 589 (performing the procedure on girls between the ages of seven to ten).

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*.¹⁰⁷

Generally, the UNCAT is intended to prohibit torture committed by public officials; however, it also identifies individuals acting in an official capacity.¹⁰⁸ One shortcoming of the UNCAT is that it limits torture to actions committed by the State. However, the State's inaction and knowledge of torture should constitute a violation of the State's obligation to prevent torture. Beyond the UNCAT, many other treaties and the Mali Constitution also protect individuals from torture, inhuman or degrading treatment.¹⁰⁹ The definition of torture is not as specific as in the UNCAT, and individuals can argue that FGM should be torture based on a broader definition of torture.

E. Women and girls have a right to be free from harmful practices, and FGM violates that right.

Several treaties have identified that people have a right to be free from harmful practices. The Maputo Protocol specifically identifies FGM as a harmful practice and requires State Parties to prohibit and condemn the practice.¹¹⁰ Mali directly violates its treaty obligation because FGM is not criminalized in the State. Further, Mali has an obligation to create public awareness of harmful practices through information, education, and outreach.¹¹¹ The state has failed to create public awareness around the harm caused by FGM because seventy percent of the population believes that religion requires FGM.¹¹²

Social exploitation is one of the many ways that the practice of FGM remains harmful to women and girls. The ICESCR establishes special protections on behalf of children against social exploitation.¹¹³

107 UNCAT, *supra* note 43, art. 1 (emphasis added).

108 *See id.*

109 *See generally*, CRC, *supra* note 48, art. 37(a); *see also* Maputo Protocol, *supra* note 55, art. 4 (protecting women's rights to life, integrity, and security of the person); CONST. OF MALI, art. 3.

110 Maputo Protocol, *supra* note 59, art. 5.

111 *See id.*

112 *See* 2021 Mali Country Report, *supra* note 13, at 25.

113 ICESCR, *supra* note 95, art. 10(3) ("Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable

The practice of FGM can be classified as social exploitation because the community will exclude a girl if she has not undergone the procedure.¹¹⁴ Further, this constitutes social exploitation because parents likely feel pressured to mutilate their daughter's genitals to be accepted by the community.¹¹⁵

Also, State Parties are obligated to take measures to abolish traditional practices harmful to children's health. Article 24 of the CRC and Article 2 of the Maputo Protocol require States to abolish or modify cultural and traditional practices that are harmful to women and children.¹¹⁶ Because FGM is harmful to children, Mali is required to enforce abolishing the practice, and while Mali forbids the practice in government-funded health centers, it still allows community members to perform FGM.¹¹⁷ Forbidding the practice in government-funded health centers does not go far enough to protect a child's right to be free from harmful traditional practices because this practice still occurs at alarming rates.¹¹⁸

i. The argument that cultural or religious rights protect the practice of FGM fails because the act destroys other protected rights

Proponents of FGM often cite religion as a recognized right under international law as a justification for the practice, however, that argument is unfounded. Each of these treaties also recognizes the right of freedom of religion. For example, the UDHR states that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in

by law.").

114 *See* Mbaku, *supra* note 16, at 40.

115 *See id.* at 14.

116 *See* CRC, *supra* note 48, art. 24(3) ("States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children."); *see also* Maputo Protocol, *supra* note 95, art. 2(2) ("States Parties shall commit themselves to modify the social and cultural patterns of conduct . . . with a view to achieving the elimination of harmful cultural and traditional practices.").

117 2021 Mali Country Report, *supra* note 13, at 25 (indicating that Mali forbids the practice in government-funded health centers). *C.f.*, Mitchum, *supra* note 12, at 590 (describing that a respected elder in the community will perform the procedure).

118 2021 Mali Country Report, *supra* note 13, at 25 (identifying that 89% of women ages fifteen to forty-nine in Mali have undergone FGM).

public or private, to manifest his religion or belief in teaching, practice, worship and observance.”¹¹⁹ Many religious advocates and leaders defend the practice and use it as a primary justification for continuing FGM.¹²⁰ Similar to the UDHR, the ICCPR protects ethnic, religious, or minority persons right to enjoy their own culture or to profess and practice their own religion.¹²¹ Supporters of FGM unfoundedly believe that their right to religion allows them to practice FGM.¹²² However, each of these treaties includes an article that establishes that any right that infringes or destroys another right is not permitted. For example, the UDHR establishes that “[n]othing in this Declaration may be interpreted as implying for any State, group, or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”¹²³ Similarly, the ICCPR limits one’s freedom to manifest their religion in order to protect public safety, order, health, morals, or fundamental rights and freedom of others.¹²⁴ Using religious rights as the basis to continue the practice of FGM fails because it directly infringes upon numerous rights, and this is strictly prohibited in various human rights treaties.¹²⁵

F. Individuals and NGOs may seek remedies both in domestic courts and international or regional tribunals

When a violation of a protected right occurs, individuals may seek remedies at the domestic, regional or international level. Sometimes an individual may attempt to seek the remedies concurrently, but often, international bodies require the exhaustion of domestic remedies before intervening.¹²⁶ This often results in long, drawn-out

119 UDHR, *supra* note 23, art. 18.

120 See Mitchum, *supra* note 12, at 593.

121 See ICCPR, *supra* note 30, art. 27.

122 See Mitchum, *supra* note 12, at 593.

123 UDHR, *supra* note 24, art. 30.

124 See ICCPR, *supra* note 30, art. 18(3).

125 See UDHR, *supra* note 23, art. 30; see also ICCPR, *supra* note 30, art. 5; see also ICESCR, *supra* 95, art. 5; see also discussion Section IV(A) (discussing how FGM violates the right to health, the right to be free from discrimination, the right to be free from torture, and the right to be free from harmful practices).

126 See *Exhaustion of Domestic Remedies*, INT’L JUST. RSCH. CTR., <https://ijrcenter.org/exhaustion-of-domestic-remedies/> (last visited Dec. 16, 2022) (explaining that a victim must first use the judicial or administrative complaint procedure available under national law).

proceedings that often require an individual to relive their trauma in front of the court systems. There are pros and cons to each system, but a major flaw of the entire process is the time it takes to remedy the harm caused by a state’s inaction on protecting an individual’s rights.

i. Malian domestic courts will not result in equal protection of women because there are concerns over the legitimacy of the court

If an individual were to lodge a complaint about the violation of their human rights at the domestic level, they would need to abide by the procedure set out in the Mali Constitution. The Constitution allows individuals to file complaints with the Constitutional Court which guarantees the fundamental rights of the human person and civil liberties.¹²⁷ An individual could raise a complaint that FGM violates their right to be free from gender discrimination, right to be free from torture, and right to health care.¹²⁸ A remedy that an individual could seek would be the criminalization of the practice of FGM. This would ensure that no one is permitted to practice FGM in Mali, and people who break that law would face criminal punishment.

While individuals would be able to file complaints within the domestic courts, there is a genuine concern about the legitimacy of the Mali courts. Many Malian citizens are concerned with the justice system because it is corrupt and subject to influence by the State’s most powerful.¹²⁹ This raises questions about whether the court would rule fairly on individuals’ human rights violations under domestic law. Because a person would need to exhaust all available remedies domestically before they could lodge a complaint at the international level, they would need to go through the process of the Malian court system even if there are concerns of corruption. Once the person does not receive resolution at the domestic level, they can seek international intervention.

127 See CONST. OF MALI, art. 85.

128 See *id.* art. 2, 3, 17.

129 See Chikwanha, *supra* note 85, *Court Structure, Traditional Policing*; Robert Pringle, *Democratization in Mali: Putting History to Work, The Just. Sys.*, U.S. INST. PEACE, at 24 (Oct. 2006) <https://www.usip.org/sites/default/files/PWOct2006.pdf>.

ii. Individuals who have been subjected to FGM should raise violations of their human rights to international bodies because it creates a precedent for accountability on a global scale

There are both international and regional bodies that could hear an individual's complaint once they have exhausted domestic remedies. The rationale behind the exhaustion of domestic remedies stems from the idea that a State should have an opportunity to remedy the human rights violation before the relevant treaty body addresses the issue.¹³⁰ When seeking a remedy, it must both be "available" and "effective."¹³¹ International bodies consider a domestic remedy unavailable if there is no legal process under the national law to protect the rights allegedly violated.¹³² If an individual were to lodge a complaint against the practice of FGM, they can cite to the violation of their right to health, their right to be free from torture, their right to be free from discrimination and their right to be free from harmful practices.¹³³ A remedy that individuals could seek would be international pressure for the criminalization of FGM in Mali.

An individual could bring their complaint before various United Nations Committees to address violations under the ICCPR, the ICESCR, the CEDAW, the UNCAT, or the CRC. Mali currently accepts the individual complaint procedure for the ICCPR and CEDAW.¹³⁴ A person would likely be unsuccessful if they were to file a complaint through the ICESCR, UNCAT, or the CRC because Mali has not accepted the individual complaint procedure for each of those treaties.¹³⁵ Some benefits to filing a complaint with the United Nations is that if the Committee finds that an individual's case has merit, once it issues a decision, it is final.¹³⁶ The Committee will offer recommendations to the State Party and conduct follow-up procedures to see if the State Party

implements the recommendations.¹³⁷ If the Committee concludes that a violation of the treaty occurred, the State may provide information within 180 days on the steps it takes for implementation.¹³⁸ A major problem associated with filing a complaint with the United Nations is that Mali has not accepted the jurisdiction of the complaint procedure for a majority of the treaties that it has agreed to and thus limits a claimant's access to available remedies.

At the regional level, individuals may launch a complaint with the African Court on Human and Peoples' Rights. Under this system, an individual is required to exhaust all domestic remedies unless the procedure would be "unduly prolonged."¹³⁹ A procedure is "unduly prolonged" depending on the time frame that the local procedure remedy started compared to when the State's judicial system began to look at the issue.¹⁴⁰ One obstacle to bring a case before the AfCHPR is that a State Party must subscribe to the jurisdiction of the court to allow NGOs and individuals to lodge complaints.¹⁴¹ In this case, individuals could lodge a complaint in this system because Mali authorized the Court to hear individual complaints.¹⁴²

Another regional solution is to petition in front of the Economic Community of West African States ("ECOWAS"). Equality Now and other NGOs have already filed a complaint with the ECOWAS Court of Justice African Court seeking anti-FGM laws in Mali.¹⁴³ The Court has jurisdiction to determine violations of human rights that occur in any of the Member States.¹⁴⁴ ECOWAS is able to consider all treaties, conventions, protocols, and regulations adopted by State Parties, which may be beneficial for individuals looking to file a complaint.¹⁴⁵ Another benefit is that the decisions of ECOWAS are binding on all Member States, not just the State violating the

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Exhaustion of Domestic Remedies in the United Nations Sys.*, INT'L JUST. RES. CTR., *supra* note 126, at 9.

¹⁴⁰ *Id.* at 10.

¹⁴¹ *African Court on Hum. & Peoples' Rts.*, INT'L JUST. RSCH. CTR. (URL omitted) (last visited Dec. 17, 2022).

¹⁴² *Id.*

¹⁴³ Bhalla, *supra* note 2.

¹⁴⁴ *Mandate & Jurisdiction*, CMTY. CT. JUST., <http://www.courtecawas.org/mandate-and-jurisdiction-2/> (last visited Dec. 17, 2022).

¹⁴⁵ *ECOWAS At A Glance*, CMTY. CT. JUST., at 4, (2021) <http://www.courtecawas.org/wp-content/uploads/2021/11/At-A-Glance-English.pdf>.

¹³⁰ *Exhaustion of Domestic Remedies in the United Nations Sys.*, INT'L JUST. RES. CTR., *supra* note 126, at 4.

¹³¹ *Id.* at 8.

¹³² *Id.*

¹³³ See discussion *supra* Section IV(A).

¹³⁴ Mali Ratification Status, *supra* note 105 (accepting ICCPR on Oct. 24, 2001 and accepting CEDAW on Dec. 5, 2000).

¹³⁵ *Id.*

¹³⁶ *What Happens Once a Committee Decides a Case?*, OHCHR, <https://www.ohchr.org/en/treaty-bodies/individual-communications> (last visited Mar 18, 2024).

rights.¹⁴⁶ By filing their case with ECOWAS, if their case is decided favorably, it could effectively ban FGM in fifteen countries. However, one downside to filing a complaint with ECOWAS is that the decision is not appealable.¹⁴⁷

VII. Conclusion

Until States criminalize the practice of FGM within their domestic laws, the States will continue to violate women's human rights. The practice of FGM violates women's and girls' human rights, and Mali must take affirmative steps to ensure that its citizens enjoy equal rights. Mali needs to criminalize FGM to ensure that women's and girls' right to health, right to be free from discrimination, right to be free from torture, and right to be free from harmful practices are protected.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (stating that if there are new facts, the Court may entertain applications for a revision).