

# Forced Migration

Class 7: gender I

John Palmer

Brooklyn Law School

September 12, 2012

## Gender and Asylum

Gender in International Law

Issues relating to motive

Issues relating to protected ground

Issues relating to the definition of persecution

# Gender in International Law

## UN Charter

Preamble: “WE THE PEOPLES OF THE UNITED NATIONS DETERMINED . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . .”

Article 1: “The Purposes of the United Nations are: . . . To achieve international co-operation in . . . encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . .”

# Gender in International Law

## Universal Declaration of Human Rights

Article 2: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

# Gender in International Law

## ICCPR

Article 3: “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”

Article 26: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

# Gender in International Law

## CEDAW

Article 1: “For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

# Gender in International Law

## Refugee Convention

Article 1: A refugee is any person who, “owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion . . . .”

Article 3: “The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.”

## Issues relating to motive

### The significance of D-V-

#### **Campos-Guardado v. INS, 809 F.2d 285 (5th Cir. 1987):**

Applicant was Salvadoran woman who was raped by armed men after they killed her uncle, the chairman of a controversial agricultural coop, along with her cousin. The men were accompanied by an older woman who shouted political slogans during the rape.

IJ denies asylum, reasoning that the rape “was more because she was a female convenient to a brutal soldier acting only in his own self-interest.”

BIA assumes veracity of Ms. Campos’s account of the events, and that the attack resulted from her uncle’s political views, but it affirms IJ because Ms. Campos “had not shown that the attackers harmed her in order to overcome any of her own political opinions.”

Fifth Circuit denies petition for review.

# Issues relating to protected ground

Kasinga

**IJ decision:** “She’s not being singled out for circumcision. Apparently all members of her ethnic Tribal group are being pressured into being circumcised.”

# Issues relating to protected ground

Kasinga: how to define the social group

**Kasinga's brief to BIA:** “young women of the Tchamba-Kunsuntu tribe who are opposed to the tribal practices of FGM and forced polygamous marriages, and have no protection against it”

**INS brief to BIA:** “young women of the Tchamba Kunsuntu people who have not been circumcised in accordance with tribal custom”

**BIA majority:** “young women of the Tchamba Kunsuntu people who have not had FGM, as practiced by that tribe, and who oppose the practice”

**Rosenberg concurrence:** “girls and women of a given tribe, some perhaps of marriageable age, whose members are routinely subjected to the harm which the majority finds to constitute persecution”

# Issues relating to the definition of persecution

Kasinga: punitive intent?

**INS brief to BIA:** “We support the notion that ordinarily any action that constitutes persecution is taken with an intent to do harm to the victim. But in some circumstances, the intention of the actor pales in significance in the face of evidence about the nature of the practice itself. Such occasions should be rare, but they occur when the practice, visited upon a resisting recipient, is so extreme as to shock the conscience of the society from which asylum is sought.”