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ANALYTICAL APPROACHES IN SEARCH OF
CONSISTENT APPLICATION: A COMPARATIVE
ANALYSIS OF THE SECOND CIRCUIT DECISIONS
ADDRESSING GENDER IN THE ASYLUM LAW
CONTEXT*

Pamela Goldberg[†]

INTRODUCTION

In the early summer of 1999, the Second Circuit Court of Appeals issued an important decision concerning gender-based persecution as a basis for seeking asylum in the United States. The decision in *Abankwah v. INS*¹ is sandwiched between a

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[†] Associate Professor of Law, City University of New York School of Law. The author thanks Elizabeth Higgins and Peggy Collen for their excellent research assistance, and Anne Pillsbury, Mark Kenmore, and Jon Rauchway for sharing parts of the records in the three circuit court cases discussed herein. The full records of the cases in *Melgar de Torres v. Reno* and *Abankwah v. INS* were obtained through the Second Circuit Court of Appeals record office at Foley Square, New York, New York and are also on file with the author. The full record of the case in *Gomez v. INS* is now in archives in Kansas and can be obtained through the Second Circuit Court of Appeals record room; the author does not have the full record of the *Gomez* case.

¹ 185 F.3d 18 (2d Cir. 1999). A discussion about the meaning of the term "gender-based" or "gender-related" persecution can be found *infra* at Part III. As this article went to press, three developments related to the issues and themes discussed herein occurred. First, the Department of Justice issued proposed regulations that would amend the existing asylum law regulations. Among the changes proposed are inclusion of important case law factors in determining what constitutes a particular social group, including expressly recognizing that gender could be a determinative factor. See 65 Fed. Reg. 75,688 (Dec. 7, 2000). Second, following the publication of these proposed regulations, Attorney General Janet Reno vacated the Board of Immigration Appeals (the "Board") decision in *In re R-A*, Interim Decision 3403 (BIA 1999), and remanded the case for the Board to reconsider once the proposed regulations become final. See *In re Matter of Rodi Alvarado Rena*, Order No. 2379-2001 (Jan. 19, 2001). In that case, the Board denied a claim based on severe domestic violence by finding, *inter alia*, that the applicant had failed to establish that the harm was on account of her political opinion or membership in a particular social group. Third, the *Washington Post* published an article asserting that Adelaide Abankwah, whose claim is discussed extensively in this Article, committed fraud in her asylum application, based on

much earlier case, *Gomez v. INS*,² where the Second Circuit first addressed gender issues in the asylum law context, and another 1999 decision, *Melgar de Torres v. Reno*,³ which followed closely on the heels of *Abankwah*. These three decisions—the only ones in the Second Circuit explicitly grappling with gender issues in asylum law—provide an opportunity to examine the court's approach to gender-based persecution over the past decade.

In these three decisions, the court had to confront the issues of rape and sexual assault,⁴ forced marriage, and forced female genital mutilation ("FGM").⁵ Since the court issued its first decision grappling with an asylum claim based on repeated rapes and assaults, both rape and FGM have been recognized internationally as grave human rights violations. FGM is considered by some to represent a hallmark of gender-based persecution,⁶ while rape is viewed as an egregious violation of

the Immigration & Naturalization Service (the "INS") investigation and separate investigation by the *Washington Post*. See William Branigin & Douglas Farah, *Asylum Seeker is Imposter*, WASHINGTON POST, Dec. 20, 2000, at A1. Although this account is troubling, it does not detract from the importance of the decision in *Abankwah*, 185 F.3d 18, as a matter of law worthy of scrutiny and analysis, nor does it support the view that the Second Circuit was wrong to rule as it did.

First, the only charge that seems clearly supported is that Adelaide Abankwah is not her real name. Branigin & Farah, *supra*, at A1. The other issues raised in the article, such as the chief of her tribe denying that they are looking for her or that they do or would forcibly practice FGM against members of the tribe, are unsupported and, in some cases, self-serving on the part of the party who made them. In *Abankwah*, favorable credibility findings were made. *Abankwah*, 185 F.3d at 21. The court of appeals must base its review on the record it is supplied with. There is nothing in this new information that would have compelled the court to rule other than it did based on the facts and the record before it. Perhaps most importantly, however, is that the asylum law process is rigorous and difficult and, even so, there are occasions when people get through it who might not have been eligible. Of greater concern for many is the unknown number of people who faced real harm in their home country and who were denied asylum or were turned back without having had the opportunity to request asylum in this country. See generally KAREN MUSALO ET AL., CENTER FOR HUMAN RIGHTS AND INTERNATIONAL JUSTICE, UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW: THE EXPEDITED REMOVAL STUDY: REPORT OF THE FIRST THREE YEARS OF IMPLEMENTATION OF EXPEDITED REMOVAL (May 2000).

² 947 F.2d 660 (2d Cir. 1991).

³ 191 F.3d 307 (2d Cir. 1999).

⁴ *Gomez*, 947 F.2d at 662; *Melgar*, 191 F.3d at 312.

⁵ *Abankwah*, 185 F.3d at 20. FGM is also referred to as female circumcision or female genital surgery, depending on how one views the practice—any of this terminology might be used to describe the practice from which Abankwah fled. In *Abankwah*, the practice is consistently referred to as FGM. *Id.*

⁶ See generally *In re Fauziya Kasinga*, Int. Dec. 3278 (BIA June 13, 1996);

women's human rights, and, in some contexts, as a violation of humanitarian law.⁷ The Second Circuit does not treat these violations equally, nor does it employ the same analytical approach in the different cases. An examination of these three decisions, rendered over an eight year period, reveals that although the court's understanding of gender-based harm has evolved on a certain level, in other important regards, it does not seem to have changed, or at least not enough. The Second Circuit's uneven approach to gender-based asylum claims raises a number of questions and concerns: What led the Second Circuit to view the issues raised in the *Abankwah* case differently from those raised in *Gomez* and *Melgar*? Why did the *Melgar* court, rendering its decision eight years after *Gomez* and only weeks after *Abankwah*, employ an approach more similar to that taken in *Gomez* than in *Abankwah*? Can the different findings in these three cases be reconciled? What can be learned about the understanding and meaning of gender-based harm in the asylum law context from a comparison of these three decisions? This Article will explore these issues.

Unlike the appeals in *Gomez* and *Melgar*, the appeal in *Abankwah* was sustained and the case remanded to the Board of Immigration Appeals (the "Board")⁸ for reconsideration in light of the court's rulings.⁹ Yet the *Abankwah* court defined its role as the reviewing body in the most circumscribed

Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, U.N. ESCOR Commission on Human Rights, 54th Sess., Provisional Agenda Item 9(a), at sec. III.B.1, U.N. Doc. E/CN.4/1998/54 (1998); NAHID TOUBIA, *FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION* (1993).

⁷ See, e.g., Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 HOFSTRA L. & POL'Y SYMP. 87, 94 (1999); see also *infra* notes 40 & 86. For a recent discussion of rape as a form of persecution in the asylum law context, see *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1096-98 (9th Cir. 2000).

⁸ The Board is the administrative body charged with, *inter alia*, reviewing the determinations of immigration judges in administrative hearings as to whether to grant or deny a request for asylum. See 8 C.F.R. § 3.1(b)(9) (2000).

⁹ *Abankwah*, 185 F.3d at 26. The Board, in turn, granted *Abankwah*'s claim in a *per curiam* decision. *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999), *rev'd per curiam*, *In re Abankwah*, A# 74-881-776 (BIA 1999). Just prior to this decision, the INS agreed to release her from detention where she had been languishing for two and a half years. See *Federal Court Update: Summaries of Recent Immigration Decisions: Asylum and Withholding of Deportation*, 76 INTERPRETER RELEASES 1328, 1328 (Sept. 3, 1999).

terms.¹⁰ Although the court did grapple with significant issues of gender-based persecution,¹¹ upon closer scrutiny, however, the decision, perhaps more so than the decisions in *Gomez* and *Melgar*,¹² rests specifically on the court's interpretation of the standard of review and the measure of the sufficiency of the evidence to support overturning an administrative decision.¹³ Because all three cases raise the issue of gender-related harm, it is important to discern what distinguishes the claim in *Abankwah* from the claims in *Gomez* and *Melgar*.¹⁴ To interpret the Second Circuit's views on gender in the asylum law context, it is essential to have an understanding of the similarities and the distinctions between these three decisions, the underlying claims, and the issues raised on appeal. Through a comparative analysis of these cases, it may be possible to gain some insight into the court's recognition and understanding of gender-based persecution. This insight may, in turn, be useful in considering ways to frame such claims that may be heard by the Second Circuit in the future. Moreover, this analysis may also contribute to the development of a more contextual approach to assessing gender-based persecution in asylum law.¹⁵

¹⁰ *Abankwah*, 185 F.3d at 22-23.

¹¹ This case raises female genital mutilation, forced marriage, and forced participation in tribal ritual as significant aspects of the factual basis for the asylum request. *Abankwah*, 185 F.3d at 20-21; see also *infra* text accompanying notes 54-61.

¹² Both *Melgar* and *Gomez* involve occurrences of violent rape and sexual assault against the asylum applicant. *Melgar*, 191 F.3d at 312; *Gomez*, 947 F.2d at 662. *Gomez* frames the rape as an essential aspect of her claim, see *Gomez*, 947 F.2d at 662, 663, while *Melgar*, by comparison, shifts the focus away from the rape and onto other factual allegations. *Melgar*, 191 F.3d at 309-11. For a full discussion of the facts in each of these cases, see *infra* notes 54-61, 103-106, 112-113 and accompanying text.

¹³ See 8 U.S.C. § 1252(b)(4) (2000). For a thoughtful, if brief, discussion of the standard of review in asylum cases, see KAREN MUSALO ET AL., *REFUGEE LAW AND POLICY: CASES AND MATERIALS* 859-67 (1997).

¹⁴ In the asylum law context, decisions are highly fact-specific. Nevertheless, at the level of the circuit court of appeals, where the court is bound by the record below, the focus of the inquiry is on matters of law and, where appropriate, on appropriate exercise of discretion. See *supra* note 34 and accompanying text.

¹⁵ In addition to a number of decisions rendered in a variety of circuit courts over the past decade, there have also been a handful of decisions rendered by the Board, over this same time period, that specifically address gender in the asylum law context. See *In re S-A*, Interim Decision 3433 (BIA 2000); *In re R-A*, Interim Decision 3403 (BIA 1999); *In re Fauziya Kasinga*, Interim Decision 3278 (BIA 1996); *In re D-V*, Interim Decision 3252 (BIA 1993).

Part I of this Article briefly explains the eligibility requirements for asylum, the administrative and court procedures for seeking such relief, the standard of review, and other issues related to a petition for review to the Second Circuit. Part II discusses the importance of gender in the asylum law context, providing some background and locating gender issues in current human rights and refugee law discourse. Part II also provides a definition of some key terms. Part III examines the three Second Circuit decisions: *Gomez*,¹⁶ *Melgar*,¹⁷ and *Abankwah*.¹⁸ Part III also provides background information on the legal and political climate surrounding the *Gomez* decision, which was rendered over nine years ago. Part IV is a comparative analysis of the three cases, placing the decisions in context and assessing the future implications of the treatment of asylum cases that raise gender-related concerns as the sole or principal basis for the claim.

I. UNITED STATES ASYLUM LAW

Twenty years ago, the U.S. Congress passed the Refugee Act of 1980 (the "Refugee Act" or the "Act").¹⁹ With the passage of this Act, Congress legislated U.S. compliance with the treaty obligations it had undertaken twelve years previously. In 1968, the United States ratified the 1967 Protocol to the International Convention relating to the Status of Refugees²⁰

¹⁶ 947 F.2d 660.

¹⁷ 191 F.3d 307.

¹⁸ 185 F.3d 18.

¹⁹ Pub. L. No. 96-212, 94 Stat. 103 (1980). The provisions of the Refugee Act governing the law of asylum are incorporated into the current Immigration & Nationality Act. See 8 U.S.C. § 1158 (2000) (rewritten in its entirety by Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 604, 110 Stat. 3009 (1996) (codified in scattered sections of 8 and 18 U.S.C.)).

²⁰ United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter "Protocol"]. The Protocol incorporated through reference the entire 1951 Convention with two exceptions. The purpose of the Protocol was to eliminate both the geographical and temporal restrictions contained in the 1951 Convention. The Convention, promulgated as an early order of business of the then newly formed United Nations, was originally drafted to address the issue of refugees in the aftermath of World War II and, as such, it contained specific references to the time frame and location of those refugees. Since 1967, those limitations have been extracted from the refugee definition, and most nation states that ratified the Convention have since ratified the 1967 Protocol.

and, through incorporation by reference, the 1951 Convention itself.²¹ The Refugee Act adopted virtually verbatim the refugee definition contained in the 1967 Protocol,²² stating, in relevant part, that a refugee is:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.²³

Under the Refugee Act, an individual must establish that she satisfies this definition of a refugee to qualify for asylum protection in the United States.²⁴ A number of the components of this statutory definition have been interpreted over the years, some even reaching the U.S. Supreme Court. For example, the Court has interpreted the quantum of proof necessary to establish the "well-founded fear" component of the refugee standard to require a "reasonable possibility" of harm.²⁵ Insofar as the degree of risk of future harm can be

Some states, notably the United States, never did ratify the Convention itself, but by ratifying the 1967 Protocol, they became bound by the entire Convention as modified. For a discussion of the history and meaning of the Refugee Convention and Protocol, see generally GUY S. GOODWIN-GIL, *THE REFUGEE IN INTERNATIONAL LAW* (2d ed. 1996); ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* vols. 1 & 2 (1984); JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* (1991).

²¹ United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter "Refugee Convention"].

²² That definition was modified by the Protocol from the original 1951 definition. See *supra* note 21. By the time of the Protocol in 1967, it was widely recognized that the need for refugee protection existed beyond the parameters of those World War II refugees, and the geographic and temporal restrictions were lifted. See *supra* note 21.

²³ 8 U.S.C. § 1101(a)(42) (2000). In 1996, the refugee definition of persecution on account of political opinion was amended to explicitly state resistance to subjugation to certain coercive population controls, such as forced abortion or forced sterilization, as a political opinion for purposes of asylum law. *Id.*

²⁴ U.S. law also recognizes refugees abroad, under separate statutory provisions and with a distinct process. *Id.* § 1157. A discussion of the distinctions between obtaining refugee status abroad and seeking asylum in the United States is beyond the scope of this Article. See MUSALO, *supra* note 14, at 69-84.

²⁵ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (citing *INS v. Stevic*, 467 U.S. 407, 424-25 (1984)).

numerically measured, one need only establish a "one in ten" chance of suffering persecution.²⁶ The Court has also interpreted the meaning of the requirement that the persecution be "on account of" one of the five enumerated grounds, ruling that it calls for a showing, by either direct or circumstantial evidence, that the persecutor's motive for harming the victim is connected to one of those statutory grounds.²⁷ Other aspects of the definition that have been interpreted by the circuit courts²⁸ include, among others, the meaning of persecution,²⁹

²⁶ *Id.* ("There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening") (citation omitted). Prior to this decision, the Court had ruled that the relief of what was then known as withholding of deportation (with the 1996 amendments, now termed withholding of removal), where the standard calls for a showing that the individual's "life or freedom would be in danger," required a showing of a clear probability of harm or that it was "more likely than not" to occur. *INS v. Stevic*, 467 U.S. 407, 424 (1984). A full discussion of the differences and similarities of this remedy with that of asylum is beyond the scope of this Article.

²⁷ See *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). Most recently, in *INS v. Aguirre-Aguirre*, the Court interpreted whether certain conduct alleged to be political constituted a "serious nonpolitical crime outside the United States," one of the potential bars to what was, at the time the claim was first presented, withholding of deportation under 8 U.S.C. § 1253(h). 526 U.S. 415, 432 (1999) (holding that Aguirre-Aguirre's participation in organized trafficking stoppages, including, *inter alia*, rounding passengers off buses and then setting fire to the buses in protest against the Guatemalan government, did not constitute political activity but rather serious nonpolitical crimes statutorily barring Aguirre-Aguirre from eligibility to withholding of deportation); see also 8 U.S.C. § 1158(b)(2)(A)(iii).

While the meaning and application of virtually every component of the statutory definition of a refugee has been subject to judicial interpretation, with the most common thread being that these interpretations must be developed on a case-by-case basis, see *Cardoza-Fonseca*, 480 U.S. at 444, in recent years, the debate on asylum protection has focused on establishing the nexus or "on account of" basis. For a critique of the focus of the asylum law inquiry on establishing a "nexus" and the Court's decision in *Elias-Zacarias*, see generally DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* (3rd ed. 1999); Karen Musalo, *Irreconcilable Differences?: Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179 (1994).

²⁸ Before reaching a federal court, an asylum claim must first be adjudicated by the appropriate agency, which, in some instances, begins with the INS and then moves to the Immigration Court—the local branch of the Executive Office for Immigration Review (the "EOIR"). 8 C.F.R. § 208 (2001). The EOIR is not part of the INS but rather belongs to a separate and distinct agency. Both the INS and the EOIR fall under the jurisdiction of the Department of Justice and, hence, the Attorney General. In other cases, the process begins with a filing in the local immigration court directly. *Id.* From there, an appeal of a decision by an immigration judge (the "IJ"), whether a grant or a denial, must be reviewed by the Board,

political opinion,³⁰ and membership in a particular social group.³¹

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the "1996 IIRIRA")³² substantially altered the general framework for U.S. immigration law. Among the many changes, the amendments included provisions that spe-

the administrative reviewing body, established by regulation. 8 C.F.R. §§ 3.0, 3.1. The Board is also part of the EOIR. Only after all administrative levels have been exhausted will a request for asylum be subject to review in federal court. 8 U.S.C. § 1253(a)(1) (2000) (requiring that an order of removal must be final in order to seek judicial review); *id.* § 1252(a)(2)(B). By statute, an appeal of an asylum claim decision, whether brought by the applicant or the government, does not lodge in federal district court but must be filed directly with the circuit court of appeals in the appropriate jurisdiction as a Petition for Review. *Id.* § 1252(b)(2); *see also infra* note 34 and accompanying text (discussing the standard of review by the circuit court of appeals). For a detailed presentation of the administrative and judicial procedures for presenting and appealing a request for asylum, see ANKER, *supra* note 28, at 525-70.

²⁹ *See, e.g.,* Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985) (defining persecution as "oppression which is inflicted on groups or individuals because of a difference [between the persecutor's views or status and that of the victim] that the persecutor will not tolerate").

³⁰ *See, e.g.,* Carranza-Hernandez v. INS, 12 F.3d 4, 12-13 (2d Cir. 1993) (finding that warning by government official or arrest warrant issued against Carranza-Hernandez for membership in union and political organizations, coupled with harassment of other union leaders by the government, were sufficient to establish well-founded fear of persecution); *see also* Osorio v. INS, 18 F.3d 1017, 1029 (2d Cir. 1994) (holding that persecution arising out of union involvement is harm on account of political opinion and not merely a question of economics); Sotelo-Aquije v. Slatery, 17 F.3d 33, 36-37 (2d Cir. 1994) (holding that participation in a municipal governing body can constitute expression of political opinion).

³¹ *See, e.g.,* Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000) (holding that a " 'particular social group' is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it") (citations omitted). Hernandez-Montiel overturned *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986), insofar as *Sanchez-Trujillo* could have been interpreted to mean that a particular social group necessarily required a "voluntary associational relationship." 801 F.2d at 1576.

³² Pub. L. No. 104-208, div. C, 110 Stat. 3009 (1996) (codified in scattered sections of 8 and 18 U.S.C.). Many scholars and other commentators have been highly critical of the changes in immigration brought about by the 1996 IIRIRA. For some recent critiques of various provisions of the 1996 IIRIRA, *see generally* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963 (2000); Leti Volpp, *Court-Stripping and Class-Wide Relief: A Response to Judicial Review in Immigration Cases After AADC*, 14 GEO. IMMIGR. L.J. 385 (2000).

cifically delineated the standard and scope of judicial review of final orders of removal based on denial of relief. Under the 1996 IIRIRA, the standard for review now requires, *inter alia*, that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."³³ This standard, while subject to case-by-case application, seems especially harsh when viewed in light of the humanitarian purpose of asylum law to provide protection from harm or infringement of fundamental human rights, torture, or death to those individuals seeking refuge. Nevertheless, as with so much of immigration law, this provision does leave room for interpretation and has led to different results under not altogether dissimilar circumstances, depending on the facts of the case and the composition of the reviewing court.

In *Abankwah*, the Second Circuit reaffirmed the ability of appellate courts to review and reverse erroneous or misguided decisions by the Board. This authority of the circuit courts to reverse an administrative decision is critical, particularly in asylum law, where a denial of the claim could leave the applicant vulnerable to forced return to a country where she faces life-threatening danger, serious harm, or violations of her human rights. *Abankwah* is not the only Second Circuit decision to recognize this principle;³⁴ however, it is the only case to affirm this principle in the context of reversing the denial by the Board of an asylum claim raising gender-based persecution.

II. GENDER IN ASYLUM LAW

Over the last decade, issues related to gender-based persecution and human rights violations of women have gained increasing visibility.³⁵ First raised by community-based

³³ 8 U.S.C. § 242(b)(4)(B) (2000). As in the pre-1996 law, this standard has been construed to mean that the circuit court must examine the record to determine whether the conclusions reached by the agency are supported by substantial evidence. Of course, in matters of interpretation of the law, the circuit court may review the claim *de novo*.

³⁴ See, e.g., *Osorio*, 18 F.3d at 1022; *Sotelo-Aquije*, 17 F.3d at 35.

³⁵ For a discussion of the meaning of the terms "gender" and "gender-based" or "gender-related" harm, see Pamela Goldberg & Bernadette Passade Cisse, *Gender Issues in Asylum Law After Matter of R-A-*, IMMIGR. BRIEFINGS 1, 1-2 (Feb. 2000).

groups and other non-governmental organizations,³⁶ gender issues have become a central theme in refugee discourse among scholars³⁷ and governments.³⁸ This interest increased as the realization spread that many human rights violations faced by women had traditionally been discounted, if not outright ignored, by human rights law, humanitarian law, and the world in general.³⁹ The significance of gender in human rights law generally, and in refugee and asylum law in particular, continues to be discussed and debated.⁴⁰

³⁶ For a discussion of the events that occurred at the 1993 United Nations World Conference on Human Rights that first catapulted the issue of women and human rights into the public limelight, see generally Julie Mertus & Pamela Goldberg, *A Perspective on Women and International Human Rights After the Vienna Declaration: The Inside/Outside Construct*, 26 N.Y.U. J. INT'L L. & POL. 201 (Winter 1994). For a discussion of the impact of these changes on human rights and asylum law, see generally Pamela Goldberg, *Asylum Law and Gender-based Persecution Claims*, IMMIGR. BRIEFINGS (Sept. 1994).

³⁷ For example, many casebooks and treatises on immigration law and on asylum and refugee law include a section on gender-related persecution in the asylum context. See, e.g., THOMAS ALEXANDER ALIENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 1122-41 (4th ed. 1998); DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 252-66 (3d ed. 1999); RICHARD A. BOSWELL, IMMIGRATION AND NATIONALITY LAW CASES AND MATERIALS 314-66 (3d ed. 2000); GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 255-57, 359-65 (2d ed. 1996); STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 816-44 (2d ed. 1997); MUSALO ET AL., *supra* note 14, at 599-728.

³⁸ Gender-related concerns in the refugee and asylum law context were being raised by the Office of the United Nations High Commissioner for Refugees (the "UNHCR") as early as 1985 when it issued its first Executive Conclusion on refugee women. *Refugee Women and International Protection*, Conclusion No. 39 (XXXVI), U.N. High Commissioner for Refugees, 36th Sess., U.N. Doc. HRC/IP/2/Rev.1986 (1985). In that Conclusion, the UNHCR provided that states may recognize gender-based persecution claims of women seeking refugee status under the particular social group category. A similar resolution had been adopted by the European Parliament in 1984. The UNHCR is the United Nations body that oversees international refugee protection, with the exception of Palestinian refugees, whose protection oversight is under the rubric of the United Nations Relief and Works Agency.

³⁹ For example, it was only after great public outcry against the forced impregnation of women held in camps for that purpose in the former Yugoslavia that rape became recognized as a crime of war and against humanity. See, e.g., *infra* note 86; see also generally THEODOR MERON, WAR CRIMES LAW COMES OF AGE (1998). The fact that a catalyst for finally gaining recognition of the atrocious nature of the harm occurred when it was perpetrated against white, Eastern European women leaves room for comment and concern. Nevertheless, this marks a significant advancement in the recognition and protection of women in the context of international human rights and humanitarian law.

⁴⁰ For example, formulating the rules governing the International Criminal Court (which has yet to be established due in large part to resistance by the

A crucial turning point connecting women's rights with international human rights occurred at the 1993 United Nations World Conference on Human Rights (the "Vienna Conference"). Here, the gendered dimension of human rights violations committed against women first came into public view on an international scale.⁴¹ The Vienna Conference shed bright light on issues pertaining to women and human rights and the importance of employing a gendered lens in examining these concerns. A significant part of this discourse concerned making the links between human rights violations and women seeking asylum or refugee status.⁴²

Several years before the Vienna Conference launched women's human rights into the international discourse, the United Nations High Commissioner for Refugees (the "UNHCR") issued GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN (the "UNHCR GUIDELINES").⁴³ These guidelines largely address issues of concern to refugee women located in refugee camps; however, there is a short section on adjudicating claims for official refugee status. In that section, the UNHCR raises the notion that claims made by women asserting persecution for resistance to restrictive social norms can be assessed as persecution on account of membership in a particular social group.⁴⁴

United States), including gender and harms targeted at women, proved to be an arduous battle. See generally Jelena Pejic, *The International Criminal Court: An Appraisal of the Roma Package*, 34 INT'L L. 65 (Spring 2000).

⁴¹ See generally *Vienna Declaration and Programme of Action*, U.N. HCR, 44th Sess., U.N. Doc. A/CONF.157/24 (1993). For a full discussion of the Vienna Conference and its implications for women's human rights, see generally Mertus & Goldberg, *supra* note 37.

⁴² See generally Family Violence Prevention Fund, *Women on the Move: Proceedings of the Workshop On Human Rights Abuses Against Immigrant and Refugee Women* (Vienna, Austria June 18, 1993). This characterization is not entirely accurate. The Vienna World Conference on Human Rights was convened in June 1993. Canada promulgated the first guidelines for adjudicators of asylum claims brought by women in March 1993. See generally CANADIAN IMMIGRATION AND REFUGEE BOARD, GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION (1993), updated in CANADIAN IMMIGRATION AND REFUGEE BOARD, WOMEN REFUGEE CLAIMANTS FEAR GENDER-RELATED PERSECUTION: UPDATE (1996). The UNHCR promulgated guidelines in 1991. See *supra* note 39 and accompanying text; see also *infra* Part III.

⁴³ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN (1991).

⁴⁴ *Id.* at ¶¶ 54-61.

In the intervening years since the UNHCR issued its 1989 UNHCR GUIDELINES, the UNHCR, as well as other United Nations bodies, have issued a variety of documents that address the particular protection needs of refugee women.⁴⁵ In addition, a number of states have issued their own guidelines for adjudicating refugee or asylum claims raising gender-related issues.⁴⁶ The 1993 WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION guidelines (the "Canadian Guidelines")⁴⁷ were the first to be issued by a state. The Canadian Guidelines, still the most comprehensive issued on this subject, set the standard for countries concerned with fairly and appropriately adjudicating claims for protection brought by refugee women. The United States followed Canada in this trend by issuing its own *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* memorandum in 1995.⁴⁸

⁴⁵ See generally UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, SEXUAL VIOLENCE AGAINST WOMEN REFUGEES: GUIDELINES ON PREVENTION AND RESPONSE (1995); UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, REPORT OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES, MS. RADKHIKA COOMARASWAMY, SUBMITTED IN ACCORDANCE WITH COMMISSION ON HUMAN RIGHTS RESOLUTION 1997/44, U.N. Doc. E/CN.4/1998/54 (1998); U.N.D.A.W., *Report of the Expert Group Meeting on Gender-based Persecution*, Nov. 9-12, 1997, EGM/GBP/1997/Report.

⁴⁶ See, e.g., Memorandum from Phyllis Coven, Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women 2* (May 26, 1995) [hereinafter *U.S. Considerations*]; see generally AUSTRALIA DEP'T OF IMMIGR. & MULTICULTURAL AFFAIRS, REFUGEE AND HUMANITARIAN VISA APPLICANTS: GUIDELINES ON GENDER ISSUES FOR DECISION MAKERS (1996). For a compilation of some of the guidelines and some of the leading cases addressing gender issues from the United States, Canada, Australia, the United Kingdom, Ireland, and New Zealand, see generally GENDER ASYLUM LAW IN DIFFERENT COUNTRIES: DECISIONS AND GUIDELINES vol. 1 (Refugee Law Center, Inc. ed., 1st ed. 1999) [hereinafter REFUGEE LAW CENTER COMPILATION]. For an excellent website that contains a number of decisions, gender guidelines, and other information and links concerning gender issues in the asylum process, see University of California Hastings College of the Law Center for Gender and Refugee Studies, at <http://www.uchastings.law.edu/cgrs/> (last visited Feb. 16, 2001).

⁴⁷ CANADIAN IMMIGRATION AND REFUGEE BOARD, GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION (1993), updated in CANADIAN IMMIGRATION AND REFUGEE BOARD, WOMEN REFUGEE CLAIMANTS FEAR GENDER-RELATED PERSECUTION: UPDATE GUIDELINE 4 (1996). The Canadian Guidelines preceded the Vienna Conference by several months.

⁴⁸ See generally *U.S. Considerations*, supra note 47.

Since the time gender was first recognized as a concern in asylum adjudication, there has been a range of decisions, both in the United States and abroad, examining the breadth, scope, and limits of such claims.⁴⁹ The Second Circuit has addressed claims involving gender-based persecution on only three occasions. The *Abankwah* case is the second of these, and it received wide-spread support and publicity.⁵⁰ To fully appreciate the decision in *Abankwah*, it is useful to place it in the context of the two other decisions.

III. SECOND CIRCUIT DECISIONS ON GENDER-BASED ASYLUM

*Gomez*⁵¹ represents the first Second Circuit decision where gender was explicitly surfaced as a central component of an asylum claim. Decided eight years before *Abankwah*, the *Gomez* decision was rendered when the notion that there might be particular concerns in assessing human rights violations or persecution against women was first recognized. Gender-based harm as a basis for seeking asylum, and, as such, presenting its own set of issues, had not yet been recognized in any meaningful way. By comparison, *Melgar*,⁵² the third decision in the Second Circuit trilogy, was rendered in 1999, shortly after the

⁴⁹ See, e.g., *Regina v. Immigr. Appeal Tribunal and another ex parte Shah; Islam v. Sec'y of State for the Home Dep't*, [1999] 2 All E.R. 545 (H.L.) (finding women subject to state-tolerated domestic violence to constitute a "particular social group"); Refugee Division, V95-02904 (Canada, Nov. 26, 1997) (granting refugee protection to a woman from the Ukraine on the basis of membership in a gender-based particular social group); Refugee Status Appeals Authority, Refugee Appeal No. 2039/93 (New Zealand, Feb. 12, 1996) (granting refugee protection to a woman from Iran and sustaining a decision by the Executive Committee of the UNHCR, which stated that "women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of the . . . Convention"). For a collection of decisions from several jurisdictions and summaries of other decisions raising gender issues, including the Canada and New Zealand decisions cited in this note, see generally REFUGEE LAW CENTER COMPILATION, *supra* note 47.

⁵⁰ *Abankwah* received some publicity because she was held in immigration detention for over two years. Several New York elected officials and other leaders spoke out on her behalf, including Representative Carolyn Malloney, Senator Charles Schumer, and Gloria Steinem. See, e.g., *Federal Court Update: Summaries of Recent Immigration Decisions: Asylum and Withholding of Deportation*, 76 INTERPRETER RELEASES 1328 (Sept. 3, 1999).

⁵¹ 947 F.2d 660 (2d Cir. 1991).

⁵² 191 F.3d 307.

Abankwah decision and long after gender had been identified as a crucial component in understanding and addressing human rights issues. Despite the vast changes in human rights and refugee discourse concerning gender-based harm internationally, and in U.S. asylum law, the Second Circuit's approach and analysis in *Melgar* seems to have more in common with the much earlier decision in *Gomez* than with the contextualized assessment in *Abankwah*.

To better understand the Second Circuit's later decision in *Melgar*, it is useful to first examine the court's 1991 *Gomez* decision. Unfortunately, the *Gomez* decision does not contain much useful language for an in-depth analysis; however, a look at the administrative record in the case below gives some insight into the Second Circuit's analysis of the claim.⁵³ The petitioner, Carmen Gomez, is a Salvadoran woman who fled El Salvador after having been repeatedly raped and beaten by the guerrilla forces.⁵⁴ The abuse continued over a two-year period, from the time Gomez was twelve until she reached fourteen years old.⁵⁵ Four years later, when she was eighteen years

⁵³ Significantly, there is no transcript of the testimony adduced from Ms. Gomez on direct examination when she presented the substance of her claim for asylum. Apparently there was a problem with the recording device and none of her testimony was recorded. The parties, through counsel, consented to have the IJ read his notes summarizing her testimony into the record. See Brief of the Immigration & Naturalization Service in Opposition to the Petition for Review at 4 n.*, *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991) (No. 91-4025) (on file with author).

⁵⁴ *Gomez*, 947 F.2d at 662.

⁵⁵ *Id.* This period, 1973-1975, marked the early stages of a civil war that raged in El Salvador with increasing intensity throughout the 1980s. Over the course of the war, it is estimated that upwards of 70,000 people, mostly unarmed civilians, were killed, and large numbers were arrested, detained, interrogated, tortured, and otherwise harmed. See *Temporary Suspension of Deportation for Nationals of Certain Countries: Hearings on H.R. 822 Before the Subcommittee on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 99th Cong. 7 (1985) (statement of Rep. Moakley). Some two million people from El Salvador are believed to have either crossed an international border seeking refuge or remained uprooted within El Salvador as internally displaced persons. *Id.* It has been widely documented that the vast majority of these human rights abuses were perpetrated by the Salvadoran military and paramilitary groups that operated with impunity in that country for years. See generally EL SALVADOR'S DECADE OF TERROR: HUMAN RIGHTS SINCE THE ASSASSINATION OF ARCHBISHOP ROMERO (1991); *Report of the United Nations Joint Group for the Investigation of Politically Motivated Illegal Armed Groups*, U.N. SCOR S/1994/989 (Oct. 22, 1994) [hereinafter U.N. Joint Group Report]; UNITED NATIONS, UNITED NATIONS TRUTH COMMISSION REPORT: FROM MADNESS TO HOPE: THE 12 YEAR WAR IN EL SALVADOR

old, she was finally able to flee El Salvador.⁵⁶ Based on her brutal treatment by the guerrillas in El Salvador, Gomez framed her claim for asylum as being "on account of" her membership in a particular social group. She defined her social group as "women who have been previously battered and raped by Salvadoran guerrillas."⁵⁷ The court examined a number of factors in reaching its conclusion that "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular social group."⁵⁸ Most significantly, the court found that Gomez "failed to produce evidence that women who have previously been abused by the guerrillas possess common characteristics . . . such that would-be persecutors could identify them as

(1993). For a compelling recounting of one of the worst massacres that occurred over the course of the war, and a critical examination of U.S. involvement in that war, see generally MARK DANNER, *THE MASSACRE AT EL MOZOTE* (1994). As discussed in *Gomez* and elsewhere, Peace Accords were signed in El Salvador in 1992 after protracted negotiations and with much controversy and discord. The rampant human rights abuses that had occurred during the height of the war years dissipated following the signing of the Accords, yet many human rights observers, including the United Nations itself, found continuing human rights violations on a fairly broad scale. See, e.g., *U.N. Joint Group Report, supra*.

⁵⁶ Although four years may seem a long time to remain in El Salvador, it is clear from the record that there were important reasons why she did not leave, and perhaps could not have left sooner. She was very young when the rapes and beatings occurred, she was an orphan, alone in the world without family, and she was living with a woman who had agreed to take her in exchange for housekeeping and other chores. See *Gomez*, 947 F.2d at 662; Brief for Petitioner Gomez in Support of Petition for Review to the Second Circuit Court of Appeals at 3, *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991) (No. 91-4025).

⁵⁷ *Gomez*, 947 F.2d at 663. This characterization of the social group closely resembles that used by the respondents in an earlier decision before the Ninth Circuit. In *Sanchez-Trujillo*, the court rejected as being over broad a social group defined as "young, urban, working class males of military age who have never served in the military or otherwise expressed support for the government." 801 F.2d 1571, 1576 (9th Cir. 1986). The ruling in this decision as to the criteria for establishing membership in a particular group was recently overturned by the Ninth Circuit. See *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (holding that membership in a particular social group does not require a voluntary associational relationship).

⁵⁸ *Gomez*, 947 F.2d at 664. These factors included, *inter alia*, the court's finding that the social group attributes were not recognizable or discrete. *Id.* Another problem with the definition of this social group is that it is somewhat circular, defining the social group by the fact of the harm suffered, i.e., people who face persecution because they have been subjected to rape and assault in the past. Defining the social group by the harm is problematic, though it certainly is possible that a group might exist that is defined by the fact that its members are harmed or have been harmed in the past and as such may be subject to future harm.

members of the purported group.”⁵⁹ The Court further stated, “Indeed, there is no indication that Gomez would be singled out for further brutalization on this basis.”⁶⁰ Here, as in *Abankwah*, the court based its decision squarely on the question of sufficiency of the evidence in the record. What differs is the court’s understanding and interpretation of the evidence, leading to its conclusion in *Gomez* that the Board’s decision denying the asylum claim was supported by substantial evidence, but in *Abankwah*, it was not.

Gomez was decided during a very tumultuous period in U.S. asylum law history. To gain greater insight into the significance of the circuit court’s decision affirming Gomez’ denial of asylum, it may prove helpful to examine the historical background of her case. While *Gomez* was pending, the INS settled a major class action lawsuit in which the plaintiffs asserted the existence of rampant prejudice and undue influence of foreign policy considerations in the asylum law adjudication process, at least regarding asylum claims brought by Salvadoran and Guatemalan nationals.⁶¹ The *American Baptist Churches* settlement (the “ABC settlement”) required, *inter alia*, the re-adjudication of all asylum claims of qualified Salvadorans and Guatemalans, even if their cases had already been through the entire administrative adjudication process.⁶² As the first major class action lawsuit challenging the fairness of the asylum adjudication process in the United States, this settlement had far-reaching ramifications.⁶³

⁵⁹ *Id.*

⁶⁰ *Id.* Here, the court relied on an erroneous articulation of the asylum standard—that an individual must demonstrate she would be “singled out” for persecution. This does not reflect the actual standard. Now codified in the regulations at 8 C.F.R. § 208.13(b)(2), it had already been made clear in 1987 by the Court in *Cardoza-Fonseca* that a well-founded fear does not require a showing that one would be singled out. 480 U.S. 421 (1987). Rather, a well-founded fear of persecution is sufficiently demonstrated if the prospect of future persecution is a “reasonable possibility” or a “one in ten chance.” *Id.* at 440. Alternatively, as the statute and the regulations make plain, past persecution alone could be sufficient to establish eligibility for asylum. 8 U.S.C. § 1101(a)(42) (2000); 8 C.F.R. § 208.13 (2000).

⁶¹ *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991). In reaching this settlement, the INS specifically did not concede the truth of any of these factual allegations. Nonetheless, the agency did agree to settle the case rather than proceed through a full trial on the merits of the claims.

⁶² *Id.* at 797-99.

⁶³ For a discussion of the ABC settlement, its provisions, and its significance in U.S. asylum law adjudication, see generally Robert M. Cannon, *A Reevaluation of*

Simultaneously with the ABC settlement, the Department of Justice published long-awaited final regulations governing the implementation of the 1980 Refugee Act, specifically the rules for adjudication of asylum claims.⁶⁴ Among the changes in the asylum adjudication process, these new regulations established an INS asylum officer corps of individuals who were to be specially trained in asylum law, human rights law, and assessment of country conditions and practices. This corps would serve as the sole body of INS officials to assess asylum claims raised affirmatively before the INS.⁶⁵

During this same time period, and also while the *Gomez* case was pending, Congress passed the Immigration Act of 1990, which included a new remedy—Temporary Protected Status (“TPS”)—for victims of civil strife, natural disaster, and other so-called temporary reasons for displacement or inability to return to their home country.⁶⁶ For an individual to be able to seek this remedy, which continues to be part of immigration law today, the Attorney General must first designate the country of origin as one whose nationals are eligible for TPS based on new or recent conditions in the country.⁶⁷

In addition to the general TPS, Congress passed a separate provision designating El Salvador as a country whose nationals should be allowed to apply for TPS. In this provision, Congress delineated similar, though somewhat more stringent, eligibility criteria for Salvadorans to be granted TPS.⁶⁸ This new remedy granted eligible Salvadorans permission to remain

the Relationship of the Administrative Procedure Act in Asylum Hearings: The Ramifications of the American Baptist Churches' Settlement, 5 ADMIN. L. J. 713 (Fall 1991).

⁶⁴ 55 Fed. Reg. 30674-88 (July 27, 1990) (codified at 8 C.F.R. § 208). For a discussion of the final regulations just prior to their official promulgation, see generally Arthur Helton, *Final Asylum Rules: Finally*, 67 INTERPRETER RELEASES 789 (July 23, 1990).

⁶⁵ For a discussion of the asylum officer corps and issues related to the then-new regulations, see generally Helton, *supra* note 65.

⁶⁶ Immigration Act of 1990, Pub. L. No. 101-649, Title III § 302(a), Title VI § 603(a)(24), 104 Stat. 5030, 5084 (Nov. 29, 1990). The provisions governing the general TPS are currently codified at 8 U.S.C. § 1254 (2000).

⁶⁷ 8 U.S.C. § 1254(b).

⁶⁸ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5036 (Nov. 29, 1990). This provision, which was not incorporated into the Immigration & Nationality Act, differed from, and was somewhat more restrictive than, the general TPS provisions in several respects. A comparison and discussion of the eligibility criteria and related matters is beyond the scope of this Article.

in the United States temporarily and to receive authorization to work during this period.⁶⁹

The new remedy of TPS, the landmark *ABC* settlement, and the final asylum regulations, heralded a new age for all asylum seekers in this country, especially for those from El Salvador. It is against this backdrop that Ms. Gomez, herself a Salvadoran, brought her claim before the Second Circuit.⁷⁰ These developments presented new complexities for many asylum claims pending at that time, yet, the *Gomez* court seemed unimpressed with their significance. The court did briefly address and reject Gomez' argument that because El Salvador was "in the midst of ongoing armed conflicts,"⁷¹ TPS "creates a presumption that all Salvadorans are refugees."⁷² The Second Circuit may have made a sound ruling in dismissing the argument that TPS should lessen the burden of proof on asylum applicants from El Salvador and be taken as an objective basis for the well-founded nature of their fear. This conclusion, nevertheless, did not obviate the need for the court to closely examine the implications of the recent changes re-

⁶⁹ Because the remedy was temporary and went into effect quickly, the terms of the *ABC* settlement allowing for re-adjudication of asylum claims for Salvadorans were held in abeyance for those Salvadorans who qualified and timely registered for TPS. The initial grant of TPS was for a period of eighteen months and then extended for an additional twelve months. See, e.g., 70 INTERPRETER RELEASES 1394 (October 18, 1993). The second extension also entailed changing the designation from TPS to Deferred Enforced Departure ("DED"). 58 Fed. Reg. 32157 (June 8, 1993). These remedies were subsequently subsumed into the *ABC* settlement. *American Baptist Churches*, 760 F. Supp. at 799.

⁷⁰ Despite the efforts of Gomez' counsel, none of the arguments presented to the Second Circuit on these points prevailed. See generally Brief for Petitioner Carmen Gomez to the Second Circuit Court of Appeals in Support of Petition for Review, *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991) (No. 91-4025); Reply Brief for Petitioner Carmen Gomez, *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991) (No. 91-4025). Resolution of questions as to the eligibility of Gomez to either TPS or relief under the *ABC* settlement, which incorporated aspects of the new asylum regulations, is beyond the scope of this Article; however, given her criminal conviction, see *infra* note 76 and accompanying text, it is likely that she would not have been eligible for TPS, which was precluded for those with two or more misdemeanor convictions or any felony conviction. 8 U.S.C. § 1182(a)(2)(A) (2000). As to her eligibility for ABC, only a conviction for an aggravated felony would constitute a bar based on criminal grounds. There is some dispute in the record as to whether she was convicted of an aggravated felony. See *Gomez*, 947 F.2d at 665. Some of the implications of her criminal conviction are discussed *infra* at notes 75-77 and accompanying text.

⁷¹ *Gomez*, 947 F.2d at 664 (citations omitted).

⁷² *Id.*

garding Salvadorans in particular, and in asylum law generally, in assessing whether Gomez had established a viable asylum claim. The Second Circuit failed to do that; the court did not address her claim in the context of the harm she had endured, the country conditions at the time she sought asylum, and the recognition by Congress and the INS that Salvadorans deserved more generous treatment under U.S. asylum law than they had previously received.⁷³

There was a subset of issues in the *Gomez* case that detracted from the strength of Gomez' claim and perhaps made it easier for the court to uphold the denial of asylum by the Board. Apparently, a conviction for three counts of sale of cocaine⁷⁴ had been entered against her just prior to the commencement of the immigration proceedings.⁷⁵ Criminal con-

⁷³ There is the added factor of the need for an understanding of the gendered nature of rape, which had not yet been recognized in any significant way in the context of U.S. asylum law.

⁷⁴ Brief for Petitioner Carmen Gomez to the Second Circuit Court of Appeals in Support of Petition for Review at 4, *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991) (No. 91-4025). Among the crimes that carry the most severe penalties under the immigration laws are those relating to sale of controlled substances. See generally Morawetz, *supra* note 33.

⁷⁵ After years of living on her own in the United States, Gomez had fallen on hard times. According to the record, she was orphaned as a young child, worked as a live-in housekeeper for a woman in El Salvador from the age of five until the age of eighteen when the woman decided to leave for the United States and allowed Gomez to accompany her. See Brief for Petitioner Carmen Gomez to the Second Circuit Court of Appeals in Support of Petition for Review at 3-4, *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991) (No. 91-4025). Upon their arrival in the United States, the woman, identified in the record only as Tarcila, left Gomez to her own devices. *Id.* After surviving on her own for nine years, Gomez was without work and without money. *Id.* at 4. In a desperate move to stay housed and fed, she resorted to selling drugs. *Id.* In the span of three months, she was arrested three times and, in the end, pleaded guilty to three counts of sale of cocaine. *Id.* After serving one year of a three-year sentence, she was paroled. Brief for Petitioner Carmen Gomez to the Second Circuit Court of Appeals in Support of Petition for Review at 4, *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991) (No. 91-4025).

Changes in immigration law, starting in 1988 and expanded in 1994 and again in 1996, included adding penalties for convictions of certain statutorily defined crimes determined to be aggravated felonies. See Anti-Drug Abuse Act of 1988, Pub. L. 10-690, §§ 7341, 7344, 102 Stat. 4181, 4469-71 (Nov. 18, 1988); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, § 222, 108 Stat. 4305, 4320-22 (Oct. 25, 1994); Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.); IIRIRA, Pub. L. 104-208, div. C, 110 Stat. 3009-546 (1996). A full discussion of the meaning of this term, which has steadily expanded in the intervening years since 1988, is beyond the scope of this Article.

victions, especially those related to controlled substances, are treated very harshly under immigration law. Even where a conviction is not a bar to a requested immigration remedy, that conviction often generates substantial negativity towards an individual seeking immigration status.⁷⁶ It is impossible to know the extent to which Gomez' conviction may have adversely influenced the court's assessment of her appeal. It can be stated with some degree of certainty, however, that, at the time of the *Gomez* decision, the court had little exposure to asylum claims raising gender-based persecution. Unfortunately, it did not seize this opportunity to begin to grapple with the complexities of the issue. As a result, there is no attempt to discern the significance of the rapes that she endured, nor to examine them as a form of targeted persecution in the context of civil war.⁷⁷

In chronological terms, *Gomez* was rendered at the beginning of the second wave of circuit court decisions confronting gender issues in asylum law.⁷⁸ The first wave was comprised

It is important to note, however, that a determination that an individual has been convicted of an aggravated felony can be dispositive on a range of issues, including eligibility for a variety of immigration remedies, which today includes asylum. It can also be an important factor in determining whether an otherwise eligible applicant warrants a grant of asylum in the exercise of discretion. Under the current law, the definition of an aggravated felony contains over twenty-one paragraphs. 8 U.S.C. § 1101(a)(43) (2000). While there was never a clear determination as to whether Gomez was in fact convicted of an aggravated felony, it must be noted that the late 1980s and early 1990s mark the beginning of an increasing vigilance in this country against immigrants who have criminal convictions, whether before or after entering the country. For a discussion of the heightened impact of criminal convictions on immigration status over the last twelve years, see generally Morawetz, *supra* note 33.

⁷⁶ The asylum law provisions include statutory bars to eligibility based on criminal convictions. See 8 U.S.C. § 1158(b)(2). That list has grown substantially since 1990, and at the time of the *Gomez* decision, her convictions did not amount to a bar. However, given the severe negative implications of criminal convictions as well as the discretionary nature of a grant of asylum, it is important to recognize the potential impact Gomez' conviction might have had on the way her asylum claim was viewed. Under the law today, that conviction most likely would bar her from asylum eligibility. *Id.*

⁷⁷ This recognition did eventually come, first in the context of Bosnia and then Rwanda, with lesser success. See *infra* note 86.

⁷⁸ Other decisions rendered during this time, albeit after *Gomez* had been decided, include, among others, *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) (finding "that a group of women . . . who refuse to conform [to restrictive social mores for Iranian women] and whose opposition is so profound that would choose to suffer the severe consequences of noncompliance" may satisfy the eligibility re-

essentially of two circuit court decisions—both decided in 1987, both raised by Salvadorans, and both involving rape.⁷⁹ The *Gomez* case was first presented to the Immigration Judge (the "IJ") scarcely three years after those early decisions. As a practical matter, even in 1991 when the Second Circuit issued its decision in *Gomez*, international human rights and refugee law

quirements for asylum and finding that Safaie had failed to meet this standard); *Fatin v. INS*, 12 F.3d 1233, 1242 (3rd Cir. 1993) (ruling, *inter alia*, that feminism constitutes a political opinion); *Klawitter v. INS*, 970 F.2d 149, 151 (6th Cir. 1992) (finding that sexual harassment and assault, coercion, and threats in employment did not rise to the level of persecution on account of one of the five grounds but rather indicated sexual flirtation and interest). These decisions also raise interesting issues for comparison that are beyond the scope of this Article. For a discussion of some of these cases and their significance, see generally Pamela Goldberg, *U.S. Law and Women Asylum Seekers: Where Are They and Where are They Going?*, 73 INTERPRETER RELEASES 889 (July 8, 1996).

⁷⁹ See *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987) (finding that Campos-Guardado had not established eligibility for asylum); *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987) (finding that Lazo-Majano had established eligibility for asylum). Campos-Guardado, a Salvadoran woman, and her three cousins were brutally raped by two men. *Campos-Guardado*, 809 F.2d at 287. During the rapes, an older woman who had accompanied the men shouted political slogans. *Id.* Just before the women were raped they had been forced to watch while the attackers hacked the flesh from Campos-Guardado's uncle and a male cousin before shooting them to death. *Id.* Her uncle had been the chairman of a local agricultural cooperative in support of agrarian land reform, a crucial issue in the civil war in El Salvador. *Id.* The Fifth Circuit found that the Board did not err as a matter of law in denying her asylum claim. *Id.* at 286-87.

Lazo-Majano was decided less than two months later in the Ninth Circuit. There the court held that Lazo-Majano, also from El Salvador, had been persecuted on account of her political opinion by a sergeant in the army who "cynically" accused her of being a subversive and threatened to turn her in to the authorities unless she submitted to his demands for sex and did whatever household work he demanded of her. *Lazo-Majano*, 813 F.2d at 1435. These two cases represent the full complement of circuit court decisions where harm specific to women had been raised as the basis or pivotal factor for seeking asylum. The Board had not yet addressed this issue in a reported decision except once in a decision predating the 1980 Refugee Act. In *Matter of Pierre*, the Board denied withholding of deportation to a Haitian who feared her violently abusive husband, a deputy in the Haitian government. Significantly, the Board ruled that "persecution at the hands of individuals *not connected* with any government" could support a claim for this relief. 15 I & N Dec. 461, 462 (B.I.A. 1975) (emphasis added).

These early cases have been discussed in a number of articles on the subject of gender-based persecution. See generally Pamela Goldberg, *Any Place But Home: Asylum in the United States for Women Fleeing Domestic Violence*, 26 CORNELL INT'L L.J. 565 (1993); Nancy Kelly, *Gender-Related Persecution: Assessing Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625 (1993); David L. Neal, Note, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203 (1988).

discourse had not yet begun to recognize and incorporate gender as a fundamental concern.

Prior to 1993, human rights violations perpetrated against women were not commonly understood as human rights violations per se.⁸⁰ Rather, violations against women tended to be disregarded, even demeaned, and generally were viewed as less important than the harms faced by men.⁸¹ The INS mirrored these prevailing views in the arguments it made in *Gomez*.⁸²

Gomez testified that armed members of the opposition forces had attacked her—in her home—on five separate occasions. On each of those five occasions they assaulted her, and on several occasions, she was brutally raped.⁸³ However, in its brief to the Second Circuit, the INS argued that these five attacks, on five separate occasions, occurring over the course of two years, were nothing more than “isolated incidents of criminal behavior.”⁸⁴ Counsel for Gomez vigorously argued the absurdity of such conjecture but did not prevail. Rape as a form of coercion and control in the context of civil strife and war has since gained broad recognition as a politically motivated and specifically targeted human rights violation or persecution.⁸⁵

⁸⁰ See *supra* Part II.

⁸¹ See generally Mertus & Goldberg, *supra* note 37.

⁸² See generally Brief of the Immigration & Naturalization Service in Opposition to the Petition for Review, *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991) (No. 91-4025).

⁸³ The Board's decision, as contained in the Record of the case, indicates that she had been raped and beaten on five separate occasions. *Gomez* Joint Appendix at 4 & n.3, *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991) (No. 91-4025).

⁸⁴ Brief of the Immigration & Naturalization Service in Opposition to the Petition for Review at 16, *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991) (No. 91-4025). The INS also asserted that Gomez was not eligible for asylum because she was not “singled out” for persecution. *Id.* at 15. Notwithstanding that an individual need not establish that she would be “singled out” for persecution to demonstrate eligibility for asylum, see *supra* note 61, the record clearly established that in fact she was singled out, on five separate occasions, at her place of residence, and while she was still a child between the ages of twelve and fourteen. *Gomez*, 947 F.2d at 662. It is not clear from the record why the issue of past persecution was not more fully addressed.

⁸⁵ This perspective on rape occurred due to a constellation of factors, including the Vienna Human Rights Conference, the Asylum and Refugee Guidelines raising gender concerns, and, certainly of central impact, the tragic use of rape on a horrendously large scale in Bosnia and Rwanda. In this context, rape is considered to be targeted at women as a means of asserting control over the larger community through the actual harm and injury rape causes as well as through its impact in

The Board itself has since recognized that rape can constitute a form of politically motivated persecution.⁸⁶

There is no way of knowing whether *Gomez* might have been argued or decided differently if the understanding of rape as a form of gender-based harm had been more developed at that time.⁸⁷ Indeed, the court places two important qualifiers on its ruling. The court states that it neither "discount[s] the physical and emotional pain that has been wantonly inflicted on *these* Salvadoran women,"⁸⁸ nor "suggest[s] that women who have been repeatedly and systematically brutalized by particular attackers cannot assert a well-founded fear of persecution."⁸⁹ This language is significant. In the context of the

terrorizing the community, both by making women feel especially vulnerable and by the shame, humiliation, and degradation it can bring to the community as a whole. See generally Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97 (Jan. 1999); Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 HOFSTRA L. & POL'Y SYMP. 87 (1999); see also *supra* note 40.

⁸⁶ *In re D-V*, Interim Decision 3252 (BIA 1993). Some scholars and commentators have written specifically about rape in the asylum law context. See, e.g., Deborah Anker, *Rape in the Community as a Basis for Asylum: The Treatment of Women Refugees' Claims to Protection in Canada and the United States (Parts I & II)*, 2 BENDER'S IMMIGRATION BULLETIN 476 (July 15, 1997) (Part I) and 2 BENDER'S IMMIGRATION BULLETIN 608 (August 1, 1997) (Part II).

⁸⁷ For a groundbreaking work on rape as a form of violence, domination, and control, see generally SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975).

⁸⁸ *Gomez*, 947 F.2d at 664 (emphasis added). Emphasis is placed on "these" women to underscore the fact that the court is, on some level, recognizing that there are others who fit the social group description, not just *Gomez*. Thus, it is conceivable that the Court could find a social group here if, perhaps, the definition had been more refined or there had been stronger evidence demonstrating that young women had been targeted by the opposition.

⁸⁹ *Id.* The court then states that it "cannot, however, find that *Gomez* has demonstrated that she is more likely to be persecuted than any other young woman." *Id.* The court seems to be requiring that *Gomez* show that she would be singled out for persecution, which, as discussed at *supra* note 85, is not an accurate statement of the standard. Further, the court seems to be applying the standard for withholding of deportation to the asylum request. The standard for the mandatory relief of withholding of deportation, applicable at the time of the *Gomez* decision, called for a showing that one's "life or freedom would be in danger." 8 U.S.C. § 1253(h) (2000). In *INS v. Stevic*, the Court interpreted this to require a showing of clear probability of danger or that such harm would be "more likely than not" to occur. 467 U.S. 407, 429-30 (1984). This is a higher standard than a showing of a "reasonable possibility" of harm required for the protection of asylum, as interpreted by the Court in *Cardoza-Fonseca*. See *supra* note 26 and accompanying text.

decision as a whole, the court's statement leaves open the possibility that gender could form the basis of a particular social group if the other concerns expressed by the court are met.⁹⁰ The two principle concerns the court raises are that gender must be established as a cognizable attribute and that credible evidence must support the fact that it serves as a basis for persecuting at least some members of the population.⁹¹ Although this sounds promising, to some extent these concerns had already been addressed in existing case law. Certainly, the Board had already established gender, i.e., sex, as a *prototype* for a cognizable social group.⁹² Moreover, it had also been established, by the time of the *Gomez* decision, that an asylum applicant's uncorroborated testimony can be sufficient to establish eligibility for asylum where that testimony is credible.⁹³ Still, the dicta in *Gomez* gave reason to be optimistic about the possibility of more expansive treatment of rape or

⁹⁰ Significantly, in *Gomez*, the legal theory on which the asylum claim was based became the heart of the issue on appeal to the Second Circuit. The question was whether Gomez was a member of a cognizable social group, and if so, whether she suffered in the past or had a well-founded fear of future persecution "on account of" that social group membership. *Gomez*, 947 F.2d at 664. The Circuit Court ruled that Gomez failed to define a particular social group and therefore she could not have been persecuted or fear future persecution on account of membership in that social group. *Id.*

⁹¹ *Id.*

⁹² Although there is no published decision that has upheld an asylum claim raising gender as the sole defining characteristic of a particular social group, by the time *Gomez* was decided, the Board had already established the possibility of such a social group in a landmark decision. See *In re Acosta*, 19 I & N Dec. 211 (BIA 1985). In *Acosta*, the Board defined a social group as being either an immutable characteristic or one so fundamental to a person's conscience or identity that she either cannot change it or should not be compelled to change it. *Id.* at 233. The Board ruled, *inter alia*, that "sex" constitutes an immutable characteristic. *Id.* Notwithstanding that there are distinctions between "sex" and "gender," see *supra* note 36, these terms have been used interchangeably in the asylum case law. The *Acosta* ruling on the meaning of a particular social group has been cited favorably by U.S. circuit courts and by a number of foreign jurisdictions. See, e.g., *Lwin v. INS*, 144 F.3d 505 (7th Cir. 1998); *Regina v. Immigr. Appeal Tribunal and another ex parte Shah*; *Islam v. Sec'y of State for the Home Dep't*, [1999] 2 All E.R. 545 (H.L.) (finding women subject to state-tolerated domestic violence to constitute a "particular social group"); *Canada (Attorney General) v. Ward*, 2 S.C.R. 689 (Canada 1993) (agreeing with and elaborating on *Acosta's* social group definition); Refugee Appeal No. 1312/93 (New Zealand Refugee Status Appeals Authority, Aug. 30, 1995), reprinted in GENDER ASYLUM LAW IN DIFFERENT COUNTRIES 547 (granting refugee protection to a man from Iran based on his membership in the banned Tudeh Party and his sexual orientation).

⁹³ See 8 C.F.R. § 208.13(a) (2000).

other gender-based harm in future asylum law decisions by the Second Circuit. When the court was finally presented with an opportunity to fulfill this promising approach, it reached mixed results.⁹⁴

Although the Second Circuit issued several important decisions concerning asylum eligibility after *Gomez*, for almost a decade, none of the cases explicitly raised the issue of gender or the issue of determining what might constitute a particular social group.⁹⁵ The court then rendered two decisions in rapid succession in 1999. The second of these, *Melgar de Torres*,⁹⁶ though distinguishable from *Gomez*, provides an opportunity to examine the court's treatment of essentially similar claims over an eight-year time span. The richness of the comparison makes it useful to discuss *Melgar* before reaching the first gender decision in 1999, *Abankwah*.⁹⁷

The facts of the claim in *Gomez* occurred during the early phase of what became a long and brutal civil war,⁹⁸ whereas the facts of the claim in *Melgar* arose in the last stages of that war, during the violent aftermath of the signing of the January 1992 Peace Accords.⁹⁹ Both women were raped, but unlike *Gomez*, who identified her attackers as guerrillas, *Melgar* believed her perpetrators to be members of the government's armed forces.¹⁰⁰ And, unlike *Gomez*, *Melgar* did not base her claim specifically on the rape. The essence of *Gomez*' claim concerned the repeated rapes she endured, in her own home,¹⁰¹

⁹⁴ See generally *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999); *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999).

⁹⁵ For a brief reference to some of the significant asylum decisions rendered by the Second Circuit during this period, see *supra* note 31 and accompanying text. Asylum claims that raise gender as an essential component, like any other asylum claim, can be based on any of the five enumerated statutory grounds. Membership in a particular social group is frequently used in this context.

⁹⁶ *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999).

⁹⁷ 185 F.3d 18 (2d Cir. 1999). *Abankwah* was decided on July 9, 1999, and *Melgar* on August 19, 1999.

⁹⁸ *Gomez*, 947 F.2d at 662; see also *supra* note 56.

⁹⁹ *Melgar*, 191 F.3d at 309.

¹⁰⁰ *Id.* at 309, 312.

¹⁰¹ Actually, the home was that of the woman who had taken her in when she was a young orphan. She was raised by this woman, identified in the record only as Tarcila, not as her adopted child but more as a live-in housekeeper. See Brief for Petitioner *Gomez* in Support of Petition for Review to the Second Circuit Court of Appeals at 3, *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991) (No. 91-4025). Nonetheless, the record establishes that she lived in the home with Tarcila for some

which she framed as persecution on account of her membership in a particular social group. Melgar, who endured rape on one occasion,¹⁰² presented her claim very differently.

One critical difference between these two cases is that Melgar demonstrated two bases for asylum eligibility.¹⁰³ The facts of her claim reveal both an actual, and most certainly, an imputed political opinion as one basis. In addition, she presented what is considered by many courts to be the prototype of membership in a particular social group—family relationship.¹⁰⁴ Melgar married in 1985 at the age of eighteen; however, her husband left El Salvador some eight months later, seeking safe haven in the United States.¹⁰⁵ With his departure in 1986, she went to live with her uncle in a different village. She did not remain in the village where she and her husband had lived because it was controlled by the military and, since her husband had fled rather than serve in the military, she believed she would be suspected and targeted as either a member or supporter of the opposition.¹⁰⁶

The town in which her uncle lived was one the guerrillas traveled through frequently, and, as the court noted, although her uncle "was not an FMLN guerrilla, he helped the guerril-

eleven years before the two fled El Salvador together. *Id.* The record indicates that it was Tarcila who made the decision to flee and "allowed" Carmen Gomez to accompany her if she so chose. *Id.*; see also *supra* note 57 and accompanying text.

¹⁰² The Record indicates that she was raped twice, but there is no explanation about the second rape. See Melgar Joint Appendix at 197, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124) (stating in Melgar's application, "I was raped twice by a soldier from the Salvadoran military, I cannot say why it happened"). One plausible interpretation is that she was raped twice on the same occasion when the soldiers raided her home. It is also possible that she was referring to the incidents that led to the birth of her children. About that she states that her children were "fathered by a military man who took advantage of me in my husband's absence." *Id.* at 226.

¹⁰³ See generally Petitioner's Brief to the Court of Appeals for the Second Circuit in Support of Petition for Review and Petitioner's Reply Brief, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124).

¹⁰⁴ See, e.g., *Iliev v. INS*, 127 F.3d 638, 642 (7th Cir. 1997); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993); *Sanchez-Trujillo*, 801 F.2d at 1576, *overruled on other grounds by Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000); *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

¹⁰⁵ Melgar's husband feared forcible recruitment and possible death at the hands of the military, a fate his own brother had in fact suffered some three years earlier. Melgar Joint Appendix at 98, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124).

¹⁰⁶ *Melgar*, 191 F.3d at 309.

las by giving them food and allowing them to sleep in his house."¹⁰⁷ The court agreed that Melgar "assisted her uncle in those endeavors" during the time that she lived with him.¹⁰⁸ In November 1992, eleven months after the signing of the 1992 Peace Accords, Melgar's uncle went on a short trip. She never saw her uncle again. He had been murdered, and his body, which was found seven days later, was in such a condition that he was buried immediately.¹⁰⁹ Although the killers were never identified, Melgar and others believed he was assassinated by the military because he had aided the armed opposition.¹¹⁰

Melgar remained in the village with her two young children, her aunt, and her aunt's two daughters. Scarcely a month after her uncle's murder, military soldiers stormed their home and raped Melgar and the other women.¹¹¹ Apparently, Melgar was unable to substantiate to the satisfaction of the court that this attack was deliberate against her and her family members because of their support of the guerrillas and because of their family connection to her recently murdered uncle.¹¹² It is difficult to imagine how that causal connection

¹⁰⁷ *Id.* FMLN is the acronym for the armed opposition, the Frente Farabundo Marti Liberacion Nacional or Farabundo Marti National Liberation Front. *See id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Melgar*, 191 F.3d at 310.

¹¹¹ *Id.* In Melgar's brief to the Second Circuit, she states that she was raped and the other women were abused by soldiers. *See* Petitioner's Brief to the Court of Appeals for the Second Circuit in Support of Petition for Review at 9, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124). The Board's decision refers to the rapes of Melgar, her cousins, and her aunt. *Melgar Joint Appendix at 2*, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124). The Circuit Court also states that "soldiers came to her uncle's home—where Melgar continued to live with her aunt and cousins—and raped the women, including Melgar." *Melgar*, 191 F.3d at 309. In this Article, the rapes will be referred to as having been committed against Melgar, her aunt, and her cousins.

¹¹² A review of the record reveals the apparent difficulty Melgar had in testifying. Her entire direct testimony is barely ten pages long. *See Melgar Joint Appendix at 8-18*, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124). One concern that is always present when testimony must be translated from one language to another is the adequacy of the translation. This includes not only the level of precision of the interpreter, but also, and in some ways even more importantly, the intonations, hesitations, and delivery of the interpreter. The manner in which an interpreter "testifies" can affect witness credibility as well as diminish the overall impact of the witness' testimony. *See generally* Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 CLINICAL L. REV. 347 (2000); Franklyn P. Salimbene, *Court Interpreters: Standards of Practice and Standards for Training*, 6 CORNELL

could *not* have been made, given the timing of the two incidents, the country conditions, and the activities of Melgar and her uncle.¹¹³

One troublesome aspect of the presentation of the claim is that Melgar's testimony was very brief. Moreover, she did not provide any details of the rape.¹¹⁴ More information, such as how long the attackers remained on the premises, how they were dressed, what if anything they said, and other details surrounding the rapes and assaults would very likely have helped to establish the persecutory nature of the rapes;¹¹⁵ such information might have also lent further credibility to her testimony.¹¹⁶ At the same time, it must be underscored that

J.L. & PUB. POL'Y 645 (1997). In immigration proceedings, although the entire testimony is recorded in the native language spoken by the witness and the subsequent English interpretation, the record only contains the English interpretation. The exact content and presentation of the testimony of any non-English speaking witness is lost the moment the tape is transcribed. See 8 C.F.R. §§ 3.3(c), 3.28, 3.36, 240.9 (2001).

¹¹³ It is interesting to note that counsel for Melgar did not argue that the rape was past persecution or perpetrated on account of any of the five enumerated grounds. Moreover, an examination of the record reveals that Melgar testified only that she had been raped, without providing anything further about the attack. See Melgar Joint Appendix at 60, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124). She was not questioned about the rape on cross examination. On re-cross examination, she was asked only whether she was contending she had been raped by soldiers, and, when it happened, whether the father of her children was present at that time, and whether she had any documentary evidence corroborating the rape. *Id.* at 93-94. Her responses to these questions were, respectively, yes, she had been raped by soldiers about a month after her uncle was killed; no, the children's father was not present; and no, she did not have any corroborating evidence of the rape. *Id.* The IJ asked no questions about the rape. See Brief of Petitioner Melgar de Torres to the Second Circuit Court of Appeals at 9 n.6, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124) ("Both the Immigration Judge and the Board commented on the lack of details about the rape. It is difficult to imagine what details about the rape would add to the record while the anguish and embarrassment such recounting would cause the petitioner is obvious. She was not asked for details on direct or cross or by the Judge.").

¹¹⁴ Melgar's entire direct testimony encompasses less than ten pages in the record. See Melgar Joint Appendix at 54-56, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124).

¹¹⁵ The IJ states in her decision that, through counsel, Melgar "conceded that her rape by a Salvadoran soldier does not constitute past persecution because there is no evidence that his motive was to punish or persecute her on account of one of the five grounds." Decision of the Immigration Judge at 11, Melgar Joint Appendix at 27, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124) (citations and footnote omitted).

¹¹⁶ Both the IJ and the Board found her to be credible. See *Melgar de Torres*,

it is quite conceivable that testifying about the details of the rape might well have caused Melgar great anguish, psychological trauma, and perhaps even shame.¹¹⁷ Melgar did not, however, base her claim on the rape itself. Rather, she argued that she had established eligibility for asylum based on the totality of the circumstances. These circumstances included on-going human rights abuses in El Salvador—the persecution by the military of people, like Melgar and her uncle, who were believed to have assisted the armed opposition; the murder of her uncle by men believed to be in the military; and the subsequent rapes of Melgar and her family members, also believed to have been perpetrated by military men.¹¹⁸ Melgar further argued that, as a close family member who lived with her uncle for many years, his brutal murder was targeted not only against him, but also against her. The pain and suffering she experienced as a result of his murder, combined with the anxiety of realizing that she could be murdered next, was so severe and traumatic that it constituted persecution against her as well.¹¹⁹

Central to Melgar's claim were two correlative arguments. First, she argued that the conditions that existed in El Salvador when she fled were such that a reasonable person in her circumstances would have feared persecution.¹²⁰ Second, she argued that, notwithstanding the signing of the 1992 Peace Accords, her claim for asylum remained viable.¹²¹ This latter argument consisted of two components: First, the harm that

191 F.3d at 312.

¹¹⁷ See generally LINDA FOREST, *FORCIBLE RAPE: MEDICAL AND LEGAL INFORMATION* (1977); THE RAPE VICTIM (Deanna R. Nass ed., 1977).

¹¹⁸ See generally Brief of Petitioner Melgar de Torres to the Second Circuit Court of Appeals, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124).

¹¹⁹ *Id.* at 18-19. In her Reply Brief, Melgar argues more fully the standard, articulated in 8 C.F.R. § 208.13(b)(2) (2000), that an individual may establish eligibility for asylum if she can show a "pattern or practice of persecuting similarly situated individuals on account of [one of the five enumerated grounds]" without having to establish that the asylum seeker herself had been, or would be, singled out for persecution. See Reply Brief of Petitioner Melgar de Torres to the Second Circuit Court of Appeals at 1-5, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124).

¹²⁰ Brief of Petitioner Melgar de Torres to the Second Circuit Court of Appeals at 14-15, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124).

¹²¹ *Id.* at 16-17.

Melgar already had endured occurred after the signing of the Peace Accords, when there continued to be much instability and targeted violence by former military personnel against actual or perceived supporters or members of the armed opposition. Second, her fear of continued persecution continued to be well-founded because the general instability and targeted violence persisted, albeit on a smaller scale, for a number of years, including the period when she first presented her asylum claim. To support her argument, Melgar submitted substantial documentary evidence which, although it did not directly corroborate the specific facts of her claim, clearly demonstrated that her uncle's murder was most likely politically motivated and not a random act of criminal violence.¹²² Moreover, the evidence established that persons similarly situated to Melgar had been, and continued to be, targeted for persecution.¹²³ Constructing the claim in this manner, the rape Melgar endured is not a central component of her claim but is, rather, a substantial contributing factor to the totality of her circumstances. The rape, in conjunction with the other factors, further supports the argument that Melgar experienced past persecution¹²⁴ and continued to have a well-founded fear of

¹²² The evidence submitted included, *inter alia*, excerpts from *U.N. Joint Group Report*, *supra* note 56, and a twenty-page expert Declaration from Stanford University Professor of Latin American Studies Terry Karl detailing on-going human rights violations in El Salvador in the year following the Peace Accords signing. For a complete index of the documentary evidence, see Melgar Joint Appendix at i-iii, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124).

¹²³ Being "similarly situated" to others who have been targeted for persecution is an alternative basis to support a claim in circumstances where the individual has not established that she has been, or would be, "singled out" for persecution. 8 C.F.R. § 208.13. It seems clear that Melgar established that, in fact, she had been "singled out" for persecution and that she was "similarly situated" to others who had been targeted for persecution. This combination should have served to strengthen her claim.

¹²⁴ There can be more than one possible motivation for the feared or past harm, so long as at least one of the reasons is connected to a statutory ground. *See, e.g.*, *Angoucheva v. INS*, 106 F.3d 781, 790 (7th Cir. 1997); *Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir. 1994). Melgar's past persecution argument was based on the fact that the killing of her uncle, a close family member, constituted persecution to her. *See* Brief of Petitioner Melgar de Torres to the Second Circuit Court of Appeals at 18-19, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124). In addition, Melgar's husband, who had received asylum several years earlier, was involved in a controversial project to bring potable water to the village where they had lived together during their marriage. He testified at her asylum hearing that he believed he would be targeted by the government and elected

persecution on account of her membership in the particular social group of her family¹²⁵ and because of her actual or imputed support for the armed opposition.¹²⁶

Despite the range of facts supporting Melgar's claim, the Second Circuit ruled that the Board's finding¹²⁷ that Melgar "failed to demonstrate an objective basis for her belief that she will be persecuted on account of a protected ground [because] neither her uncle's death nor her own rape supports such a belief" was supported by substantial evidence.¹²⁸ Perhaps the greatest discrepancy between this ruling and the record Melgar

officials in the area because of his involvement in that project. Melgar Joint Appendix at 102-105, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124). He also testified that he would be targeted because he originally fled to avoid forcible conscription in the armed forces. His brother, who had attempted to avoid conscription in the Salvadoran army, had been killed. *Id.* at 98. As a result, Melgar argued, she would be targeted based on her relationship to her husband. See Brief of Petitioner Melgar de Torres to the Second Circuit Court of Appeals at 18-19, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124). This argument, though strenuously made, was mitigated by the fact that she had lived in the town with her husband for only eight months some ten years prior to making her asylum claim and that whatever family identification she had centered around her relationship with her uncle and his family, with whom she had lived for seven years after her husband departed for the United States and up until the time she prepared to leave to come to the United States herself. See *Melgar de Torres*, 191 F.3d at 312. Although Melgar and her husband were out of communication for much of the time after he fled to the United States, and she had two children by another man during that time period, he helped her flee to the United States when he heard what had happened to her and her uncle. He also testified in support of her claim at her hearing. See Melgar Joint Appendix at 97-114, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124). It is not clear from the record whether her children were the result of a consensual relationship or a coercive one. The father of the children is not identified and, according to her testimony, was not present at the time of the rape and assault on her and her aunt and cousins in 1992. *Id.* at 86-87.

¹²⁵ See *In re Acosta*, 19 I. & N. Dec. at 233 (BIA 1985) (ruling that "kinship" is a prototype of a particular social group).

¹²⁶ See, e.g., *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (finding that even if imputed "cynically," a person may face persecution because of a political opinion that is imputed to her, regardless of whether she actually holds that opinion).

¹²⁷ The decision of the Board was not unanimous. In a scathing dissent, Board Member Rosenberg eloquently details what she perceives as a history of misapplication and misinterpretation of asylum law by the Board. Decision of the BIA, reproduced in Melgar Joint Appendix at 6-14, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124). The majority opinion is found at Melgar Joint Appendix at 2-5, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124).

¹²⁸ *Melgar de Torres*, 191 F.3d at 313 (citations omitted).

created is the court's statement that the Board's decision was supported by substantial evidence "especially in light of the changed country conditions in El Salvador."¹²⁹ This finding makes it clear that the court did not take into account the substantial documentary evidence submitted, which demonstrated that human rights violations continued to occur well after the 1992 Peace Accords were signed.¹³⁰ Moreover, the purported changed country conditions did not affect the reality of the past experience that Melgar, her uncle, and her close family members had already suffered. Furthermore, like the Board and the IJ, the Second Circuit gave inappropriately little weight to the numerous reports that specified that targeted violence continued to occur against individuals perceived to have been members or supporters of the armed opposition.¹³¹

Finally, and most dramatically, the court utterly discounted the rapes of Melgar, her aunt, and her cousins. Indeed, even though the rapes were not presented as a central factor, when viewed in the totality of her circumstances, Melgar's claim seems even stronger than the one presented in *Gomez*. The Second Circuit's finding in *Gomez* that five different rapes and assaults, occurring at the applicant's place of residence and over the span of two years, were nothing more than coincidental acts of random criminal violence is highly suspect, even for 1991. However, in light of the advances in the understanding of gender-based persecution in asylum law, and, particularly, rape in asylum law, the *Melgar* court strains credulity when it characterizes the multiple rapes and violence, occurring just after a murder that is viewed as a politically motivated assas-

¹²⁹ *Id.* (footnote omitted).

¹³⁰ See *supra* note 123 and accompanying text.

¹³¹ In a footnote, the court quotes the Board's decision where it acknowledges that Melgar did submit documentary evidence that human rights violations continued in El Salvador after the signing of the Peace Accords. *Melgar de Torres*, 191 F.3d at 314 n.3. The Board continued, "Nonetheless, [Melgar] has not shown that she would be at particular risk of government persecution." *Melgar Joint Appendix at 4, Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124). This misstates the standard. There is no requirement to show a "particular risk." Further, the harm need not be from the "government." It is well-established that the persecutor can be the government or a force that the government either cannot or will not control; paramilitary groups and former members of the armed forces could constitute such a force. See, e.g., *Arteaga v. INS*, 836 F.2d 1227, 1231 (9th Cir. 1988); *Matter of McMullen*, 17 I. & N. Dec. 542, 544-45 (BIA 1980). For a discussion of the politicized nature of rape in war, see *supra* notes 40 and 86.

sination, as mere coincidental criminal conduct. This finding ignores the use of rape as a political tool and as a devastating form of gender-based violence, which, eight years after *Gomez*, had become widely understood.¹³²

In a dissenting opinion, Judge Kearse succinctly and vividly captures the salient facts of the case and displays keen insight into the appropriate application of the law to those facts.¹³³ After reiterating the standard for establishing a well-founded fear of persecution, Judge Kearse summarizes the relevant facts and articulates her analysis as follows:

[T]he IJ found that Melgar, her uncle, and her uncle's immediate family constituted a cognizable social group. . . . [T]he IJ, apparently accepting Melgar's belief as to responsibility for this killing, described it as "her uncle's murder by the authorities." In December 1992, Melgar, her uncle's wife, and her cousins (i.e., all of the surviving adults in the social group) were raped by members of the Salvadoran military. . . .

The IJ, despite finding that Melgar had a legitimate subjective fear based on her past experiences, recommended¹³⁴ against asylum, concluding that Melgar had not demonstrated that the authorities "have taken or are inclined to take action harmful to her on the basis" of her membership in her uncle's family. . . .

More importantly, the Board itself, in accepting the IJ's recommendation to deny asylum, stated that Melgar "has not shown that she would be at particular risk of government persecution."

As made clear in *Cardoza-Fonseca*, however, neither more-likely-than-not nor "would be" is the proper test; and it is not clear to me from either the IJ's decision or the Board's decision that the correct legal standard was applied.¹³⁵

In these few paragraphs, Judge Kearse identified the essential facts, articulated the appropriate standard, and pinpointed where in the decisions below the standard was misstated or misapplied. The dissent acknowledges the importance of the rapes endured by Melgar and her aunt and cousins. Moreover, Judge Kearse puts that experience in the broader context of the claim and the country conditions at the time it

¹³² See, e.g., *supra* notes 8, 40, & 86.

¹³³ *Melgar de Torres*, 191 F.3d at 314-16 (Kearse, J., dissenting).

¹³⁴ *Id.* at 315. In fact, the IJ does not simply recommend. The IJ's decision granting or denying asylum is legally binding unless it is timely appealed to the Board. In the absence of such an appeal, the decision becomes dispositive. 8 C.F.R. § 3.39 (2001).

¹³⁵ *Melgar de Torres*, 191 F.3d at 315-16 (citations omitted).

arose. With incisive eloquence, Judge Kearse places the rapes in proper perspective as central to Melgar's asylum claim and treats them as violent persecutory conduct that requires full consideration in assessing whether the denial of the asylum claim was warranted. The dissent exemplifies the highest level of integration of gender in an analytical framework. The dissent also contextualizes the claim and, with neither special treatment nor defensive justification, performs a nuanced analysis that recognizes the gendered dimension and assesses it accordingly.¹³⁶ Notwithstanding the dissent in *Melgar*, the Second Circuit seems to still be a long way from this approach. The next best alternative to complete and fluid integration of gender in the analytical framework is to deliberately surface gender and specifically analyze the gendered dimension of the harm. The Second Circuit used such an approach in reaching its decision in *Abankwah*.¹³⁷

The Second Circuit characterized the *Abankwah* case strictly as an evidentiary question, specifically, whether the decision by the Board was supported by substantial evidence.¹³⁸ An examination of the sufficiency of the evidence however, requires an examination of the facts themselves to determine whether the conclusions reached below were supported by substantial evidence. The *Abankwah* court examined the evidence contextually, considering the gendered nature of the harm, the treatment of women in the country of origin, and the social and cultural climate *Abankwah* fled.

The facts of *Abankwah* can be synthesized as follows. *Abankwah*'s mother had fulfilled a spiritual leadership role as Queen Mother for her tribe, the Nkumssa, in Central Ghana.¹³⁹ When her mother died unexpectedly, *Abankwah* was next in line to replace her mother as Queen Mother and assume the duties her mother had performed. To do so,

¹³⁶ For a well-written discussion of the need to incorporate gender issues into the asylum adjudicatory process without creating any special category or analysis, see *In re Fauziya Kasinga*, Int. Dec. 3278 at 15-20 (BIA 1996) (Rosenberg, Bd. Mem., concurring).

¹³⁷ 185 F.3d 18 (2d Cir. 1999). A recent BIA decision that exemplifies this contextual approach to gender-based asylum claims in a well-developed analysis can be found in *In re Fauziya Kasinga*, Int. Dec. 3278 (BIA 1996).

¹³⁸ *Abankwah*, 185 F.3d at 21, 22-23.

¹³⁹ *Id.* at 20-21.

Abankwah had to satisfy a two-prong test: she had to establish that she was a virgin at the time of her "enstoolment" and, after the enstoolment ceremony, she had to be wed to a man of the tribe elders' choosing.¹⁴⁰ Abankwah had, as a young woman, abandoned her tribal religion and converted to Catholicism. She had also become sexually involved with a young man whom she did not marry.¹⁴¹ She believed that her tribe would discover she was no longer a virgin, either at the time she was enstooled, or, most certainly, at the time she was married following her enstoolment.¹⁴² She further believed that once the tribe realized she was not a virgin, and was unable to assume the role of Queen Mother, she would be punished by being forced to undergo FGM.¹⁴³ She framed her asylum claim as fear of the infliction of FGM on account of her religious beliefs and on account of her membership in a particular social group.¹⁴⁴

The IJ found that although Abankwah subjectively had "an intense fear," it was not reasonable because the government of Ghana "[was] taking steps to eliminate the practice of FGM throughout the country."¹⁴⁵ Thus, the IJ found that Abankwah would be able to "seek protection from the government of Ghana in the form of criminal complaints against any parties who may practice FGM upon her" and that she would be able to obtain the assistance of non-governmental organizations in Ghana that have established shelters for those seeking to avoid FGM.¹⁴⁶ The IJ also found that Abankwah did not establish any religious-based persecution.¹⁴⁷ The IJ next con-

¹⁴⁰ *Id.* at 20. The enstoolment ceremony entails several rituals, some of which are designed to ascertain whether the in-coming Queen Mother is a virgin. *Id.*

¹⁴¹ *Id.*

¹⁴² *Abankwah*, 185 F.3d at 20-21.

¹⁴³ *Id.*

¹⁴⁴ *Id.* She raised several other bases for her claim, including that the tribe might kill her for fleeing or for attempting to circumvent her obligation to become Queen Mother. *Id.* at 25.

¹⁴⁵ Decision of the Immigration Judge at 10, 12; *Abankwah* Joint Appendix at 71, 73, *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304).

¹⁴⁶ Decision of the Immigration Judge at 11; *Abankwah* Joint Appendix at 72, *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304).

¹⁴⁷ *Abankwah* Joint Appendix at 73-74, *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304). The IJ found that while Abankwah "does face a challenge in reconciling her Christian beliefs with her obligations as others see it to be the queen mother in her village . . . [the IJ must] find that the motive of the village

sidered whether Abankwah could have found protection in another part of the country, the "internal flight alternative," and found no such alternative available to her.¹⁴⁸ The IJ then addressed the question of whether Abankwah had established a "nexus" between her fear of FGM and her membership in a particular social group. For this analysis, the IJ discussed whether Abankwah was, in fact, a member of a particular social group and if so, whether the feared harm would be inflicted on account of that membership.¹⁴⁹ On this point, the IJ found that the social group, "comprised of candidates for the queen mother position who are unable or unwilling to accept that position," is "too narrowly drawn to be cognizable."¹⁵⁰ Rather, the IJ determined that:

[T]he applicant is faced with something that's properly characterized as an *individual predicament*. She has a problem which is more kin [sic] to a personal problem than a problem relating to social groups or other organizations. I feel that the applicant fears retribution over what must be classified as personal matters, and accordingly, there is not a cognizable nexus to one of the protected grounds.¹⁵¹

leaders is to punish her on account of her religion." *Id.*

¹⁴⁸ *Id.* at 74-75.

¹⁴⁹ This is a bit odd since the IJ has already found that even if it is true that she would be subject to FGM, she would be able to obtain protection from the State as well as from non-governmental organizations, as discussed above. *Id.* at 73-74.

¹⁵⁰ *Id.* at 75. This is the IJ's characterization of the social group. A review of the record indicates that counsel for Abankwah never articulated a clear definition of the social group. For example, in a colloquy at the close of the hearing before the IJ, counsel for Abankwah presented the social group as "[Abankwah] being female. And also, for the refusal to become a queen mother." Abankwah Joint Appendix at 226, *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304). Shortly thereafter, counsel identified the social group as "[Abankwah] being a woman, of her not being a virgin." *Id.* at 229.

¹⁵¹ *Id.* at 75-76 (emphasis added). The IJ concludes this portion of his decision by finding that "it appears that the practice of FGM is basically abolished in the applicant's area, and as mentioned above, would be imposed as a matter of individual punishment rather than a matter of a general practice imposed upon a particular social group." *Id.* at 76. Here, the IJ is implicitly acknowledging that FGM would be imposed as a form of punishment, thereby confirming an essential component of her claim: that FGM is performed by her tribe as punishment for not remaining a virgin until marriage. This should not be confused with an erroneous assumption that the persecutor must have a punitive intent for the harm to constitute persecution. As the Board and at least some circuit courts have made clear, no punitive intent is required for establishing asylum eligibility. *See, e.g., Pitcherskaia v. INS*, 118 F.3d 641, 648 (9th Cir. 1997) (holding that the "requirement that an alien prove that her persecutor's subjective intent was punitive is

As a result of his belief that Abankwah's problems were "personal" in nature and not related to any of the five eligibility grounds for asylum, the IJ determined that, despite finding her credible and genuinely fearful, Abankwah did not establish eligibility for asylum.¹⁵² On appeal to the Board, Abankwah refined her social group, defining it as being comprised of "women from the Nkumssa tribe who lost virginity prior to marriage."¹⁵³ In an unpublished decision, the Board ruled that Abankwah did not establish past persecution, did not establish a well-founded fear of future persecution based on religion, did not provide any support for her claim that there would be any negative consequences to her refusal to serve as Queen Mother of her tribe, and did not establish that her "failure to remain a virgin would result in punishment amounting to persecution."¹⁵⁴ Contrary to the rulings of the IJ, the Board discounted the evidence Abankwah submitted, finding it "insufficient to support her claims of persecution."¹⁵⁵ However, the Board found that Abankwah did establish membership in a particular social group.¹⁵⁶

The Board then discussed the evidence, beginning with the declaration of Kwabena Danso Otumfuor, a friend and confidant of Abankwah's in Ghana. He stated that when Abankwah told him about her situation, he advised her to flee the country. He further stated that he believed there would be no place

unwarranted"); *In re Fauziya Kasinga*, Int. Dec. at 12 (BIA 1996) (finding that a "subjective," "punitive," or "malignant" intent is not required for harm to constitute persecution").

¹⁵² Abankwah Joint Appendix at 76, *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304).

¹⁵³ Applicant's Brief Appealing Decision of Immigration Judge, *Abankwah Joint Appendix* at 29, *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304).

¹⁵⁴ *Abankwah Joint Appendix* at 4, *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304). The Board also found that she "offered no evidence that the punishment for refusing to become the Queen Mother is death" and dismissed that portion of her claim as "unbelievable." *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ In fact, the Board implicitly seems to accept both her characterization of the social group and her membership in it. The Board found that the "evidence [submitted] is insufficient to support her claims of persecution based upon her membership in a social group, specifically, 'women of the Nkumssa tribe who did not remain virgins until marriage.'" *Id.* (quoting Applicant's Brief Appealing Decision of Immigration Judge, *Abankwah Joint Appendix* at 29, *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304).

in Ghana where she could safely remain and that, if she were ever sent back to Ghana, her tribe would continue to search for her until they found her.¹⁵⁷ The Board dismissed this affidavit as being based solely on what Abankwah told Kwabena Otumfuor and not on any direct personal knowledge or particular expertise in the matters he addressed.¹⁵⁸

The Board also dismissed the affidavit and testimony of another supporting witness, Victoria Otumfuor. Victoria Otumfuor stated in her affidavit that she is a naturalized U.S. citizen, born and raised in Ghana, and a Pentecostal Minister.¹⁵⁹ She stated that she is "familiar with the practice known as female genital mutilation," knows that FGM is practiced in Ghana, and personally witnessed it being performed on young girls. She further stated that she "heard and read about it later in life" and that in many tribes, "it is inflicted as punishment for losing virginity before marriage."¹⁶⁰ She stated that while she did not "know a great deal about [Abankwah's] tribe, Nkumssa, [Abankwah's] account is consistent with [Victoria Otumfuor's] knowledge of the situation."¹⁶¹ She also asserted that she is familiar with the position of Queen Mother and that "while it is possible for ordinary girls to keep their sexual history a secret, . . . it is virtually impossible for someone who is to become a Queen Mother."¹⁶² Finally, she presented her belief that if Abankwah is in fact not a virgin, "she will be forced to undergo FGM as a form of punishment."¹⁶³

¹⁵⁷ Statutory Declaration by Kwabena Danso Otumfuor (Sept. 8, 1997), Abankwah Joint Appendix at 244-45, Abankwah v. INS, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304).

¹⁵⁸ Abankwah Joint Appendix at 4-5, Abankwah v. INS, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304).

¹⁵⁹ Affidavit of Victoria Otumfuor (Aug. 30, 1997), Abankwah Joint Appendix at 248, Abankwah v. INS, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 248. In her oral testimony, Otumfuor essentially elaborates on the statements contained in her affidavit, providing some of the bases of her knowledge. For example, she discusses how years ago, prior even to her own birth, her father had to flee his village because he refused to become king in his village and that the punishment for such refusal would be equivalent in degree to that of refusing to become a village queen mother. Abankwah Joint Appendix at 205-06, Abankwah v. INS, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304). Ms. Otumfuor also stated that she met Abankwah in Ghana and later learned of her efforts to seek asylum in the United States through her son, Kwabena Danso Otumfuor, who

The Board was not persuaded by Victoria Otumfuor's affidavit or her testimony, focusing on her statement that she did "not know a great deal about [Abankwah's] tribe."¹⁶⁴ The Board was also concerned that Victoria Otumfuor could not state unequivocally that she knew whether Abankwah's tribe practiced FGM as a form of punishment.¹⁶⁵

Finally, the Board gave two reasons for why it did not find Abankwah's documentary evidence persuasive. First, it found that none of the documentation specifically named Abankwah's tribe as one that practices FGM. Second, the Board found no indication "that FGM is used as punishment or in retaliation for failure to maintain chastity prior to marriage."¹⁶⁶ The Board reiterated some of the reasons for imposing FGM listed in the documentary evidence: "pre-condition for marriage; *test for virginity*; check against infidelity."¹⁶⁷ Ironically, the Board does not seem to recognize the relationship of these cited reasons to Abankwah's own claim that she would be forced to undergo FGM precisely for having violated taboos of her own community's culture and social mores.

The Second Circuit framed its analysis as a simple matter of the sufficiency of the evidence. Nevertheless, the court focused on the nature of the harm inflicted by FGM and the egregious and potentially life-threatening consequences of undergoing that practice.¹⁶⁸ The court characterized the ruling by the IJ as twofold. First, the IJ was not convinced that "[Abankwah's] fear of FGM as punishment for her lack of vir-

provided the declaration discussed *supra* at note 158 and accompanying text. Abankwah Joint Appendix at 199, *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304).

The record refers to her son as "Corvina" but this clearly seems to be an error in the transcription from the tape recording of the hearing as his name is spelled out Kwabena and there are no other individuals referred to in the record with the last name of Otumfuor. *See generally id.*

¹⁶⁴ Abankwah Joint Appendix at 5, *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304) (citations to the record omitted).

¹⁶⁵ *Id.* The Board quotes her as saying, "No, really, I can't say I know it specifically." *Id.* (citations to record omitted).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* (citations omitted).

¹⁶⁸ This approach follows that of Abankwah's counsel in his circuit court brief. *See generally* Brief for Petitioner Abankwah in Support of Petition to Review to the Second Circuit Court of Appeals, *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304).

ginity was objectively reasonable." Second, the IJ found that Abankwah "failed to demonstrate that she feared any harm that would be imposed on account of a statutorily protected ground" determining instead that her fear was based on a "personal problem."¹⁶⁹ The court further found that the Board did not dismiss Abankwah's claim for failure to establish a nexus between her fear of persecution and one of the five statutory grounds or show that her fear was objectively reasonable. Rather, according to the court, the Board ruled that Abankwah failed to establish "past persecution, and that the 'evidence [was] insufficient to support her claims of persecution based upon her membership in a social group.'"¹⁷⁰ The Second Circuit reversed the Board, holding that "Abankwah did present sufficient evidence to support her claims and the record *compels a finding* that Abankwah's fear of persecution is objectively reasonable."¹⁷¹

The *Abankwah* court stated that the "substantial evidence" test is one that "accords 'substantial deference' to the [Board's] findings of fact" and that the "scope of review is 'exceedingly narrow,' " allowing findings to be overturned "only if 'no reasonable fact finder could fail to find the requisite fear of persecution.'"¹⁷² The Court unequivocally concluded that "[u]nder this standard, the [Board's] decision denying Abankwah asylum cannot be sustained."¹⁷³

Clearly, the Second Circuit was moved by the evidence that detailed the potentially devastating consequences of FGM. Relying on the evidence, the court briefly described the practice of FGM and referred to the 1996 Board decision granting asylum to a young woman from Togo who had fled forcible imposition of FGM.¹⁷⁴ The court discussed the international recognition of the practice of FGM as a "violation of women's and female children's rights,"¹⁷⁵ and mentioned that this practice "has also been criminalized under [U.S.] federal

¹⁶⁹ *Abankwah*, 185 F.3d at 21.

¹⁷⁰ *Id.* (emphasis added) (citation omitted).

¹⁷¹ *Id.* (emphasis added).

¹⁷² *Id.* at 22-23 (citations omitted).

¹⁷³ *Id.* at 23.

¹⁷⁴ *Abankwah*, 185 F.3d at 23 (citing *In re Fauziya Kasinga*, Int. Dec. 3278 (BIA June 13, 1996) (additional citations omitted)).

¹⁷⁵ *Id.* (citations omitted).

law.”¹⁷⁶ The Second Circuit reaffirmed what both the IJ and the Board acknowledged: Abankwah’s fear was subjectively genuine. Regarding the objective basis of Abankwah’s fear, the court found that “[t]he [Board] was too exacting both in the quantity and quality of evidence that it required.”¹⁷⁷

The Second Circuit summarized Abankwah’s testimony, which both the IJ and the Board deemed credible, and made several important findings based on those facts. First, the court found that FGM is used as a punishment for women of Abankwah’s tribe who break the taboo of pre-marital sex. Second, the court found that as the next Queen Mother of her tribe, it was especially important that Abankwah observed all the tribal laws and customs. Next, the court noted that if Abankwah had engaged in pre-marital sex, that fact would be revealed during her enstoolment as Queen Mother. Finally, the court concluded that the Ghanaian government neither could, nor would, prevent Abankwah’s tribe from subjecting her to FGM.¹⁷⁸ Based on this rendition of Abankwah’s testimony, the court not only found her testimony credible and convincing, but it also found that she had amply supported it with both documentary and testimonial evidence.¹⁷⁹ Although the court did not seem to give much weight to the declaration of Kwabena Danso Otumfuor, it did discuss at some length the testimony of Victoria Otumfuor.

The Second Circuit seemed particularly persuaded by the evidence concerning the practice of FGM and its potentially devastating consequences. The Court referred to a 1997 U.S. Department of State Report on FGM in Ghana, specifically noting the report’s estimate that “between 15 and 30 percent of all women and girls in Ghana had been subjected to FGM.” Relying on this figure, as well as other documentary evidence concerning the practice of FGM in Ghana, the court determined that “Abankwah’s position is particularly compelling in

¹⁷⁶ *Id.* (citing 18 U.S.C. § 116 (Supp. 1996)).

¹⁷⁷ *Id.* at 24.

¹⁷⁸ *Id.*

¹⁷⁹ Though it did not rely on it, the Court referred to the legal standard that an asylum applicant’s uncorroborated testimony could be sufficient to sustain her burden where that testimony is credible, consistent and specific. *Abankwah*, 185 F.3d at 24 (citing 8 C.F.R. §§ 208.13(a), 208.16(b) (1999); *Melendez v. U.S. Dep’t of Justice*, 926 F.2d 211, 215 (2d Cir. 1991)).

light of the general conditions present in Ghana."¹⁸⁰

In finding Abankwah's fear "sufficiently 'grounded in reality' to satisfy the objective element of the test for well-founded fear of persecution,"¹⁸¹ the Second Circuit made an insightful, if somewhat understated, observation about the proper approach to assessing the reasonableness of an asylum applicant's fear.¹⁸² The court found that such assessment "may be tempered by individual considerations such as . . . the experiential, educational, and cultural factors particular to the individual respondent."¹⁸³ This contextualized approach captures important gender dimensions to assessing credibility and to conceptualizing persecution. Moreover, it reaffirms that evidentiary assessments in asylum claims must be made in the context in which the claim arose. By employing this approach, the *Abankwah* court demonstrated a willingness to reach beyond narrow conceptions of harm and to interpret the degree of proof necessary to substantiate an asylum claim when the feared harm falls outside traditional asylum law notions of persecution using a contextualized framework.¹⁸⁴ The Second

¹⁸⁰ *Abankwah*, 185 F.3d at 24.

¹⁸¹ *Id.*

¹⁸² *Id.* at 25 n.3.

¹⁸³ *Id.* (citing *In re Y-B-*, Int. Dec. 337 (BIA Feb. 19, 1998). This is much the same approach taken by the Board in *Kasinga*, Int. Dec. 3278 (BIA 1996). Following this approach, the circuit court criticized the INS for seeming "to suggest that in order to demonstrate an objectively reasonable fear, Abankwah had to make some formulaic statement that she knew she would be subjected to FGM because someone, (in this case her grandmother), told her that it is the Nkumssa custom to mutilate women who engage in sex before marriage." *Id.* Similarly, credibility issues were raised in *Kasinga* because she was uncertain as to whether she had married the man who would force her to undergo FGM since the ceremony had not been completed, and because she was uncertain who precisely would perform FGM on her. *Kasinga*, Int. Dec. 3278 at 2. The INS argued that these were discrepancies that made her appear not credible. *Id.* The Board rejected this argument, finding that these were explainable gaps in her knowledge or understanding of the situation given her age, her upbringing, and the incomplete marriage ceremony, and found that her credibility was not undermined by these statements. *Id.* at 3. For a detailed analysis of the *Kasinga* decision, see generally Karen Musalo, *In Re Kasinga: A Big Step Forward for Gender-Based Asylum Claims*, 73 INTERPRETER RELEASES 853 (July 1, 1996).

¹⁸⁴ This was, conceivably, influenced by the manner in which the Board wrote its decision as well as the manner in which Abankwah's counsel presented the arguments to the circuit court. See generally Brief for Petitioner Abankwah in Support of Petition to Review, *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304). In the brief, counsel sets forth the argument as a question of sufficiency of the evidence. *Id.* at 2. He then immediately addresses the harmful, often debili-

Circuit assessed Abankwah's claim by seeking to understand it based on the totality of her circumstances as a woman from a culture and community that is highly gender-stratified. The court then evaluated the harm she feared and the evidence she submitted in support of her fear, both its quantity and quality, in light of that complex context. This approach is quite different from that taken in *Gomez* eight years earlier. Unfortunately, it is also vastly different from the approach taken by the court only a few weeks later in *Melgar*. In both *Gomez* and *Melgar*, the gendered harm—rape—was treated dismissively, with the Second Circuit affirming the denial of each asylum claim. Contrasting *Abankwah* with *Gomez* and *Melgar* surfaces important issues relating to culture and gender. Thus, a concluding comparative exploration of the three cases may be useful for the development of gender issues in U.S. asylum law.

IV. A COMPARATIVE ANALYSIS OF *GOMEZ*, *ABANKWAH*, AND *MELGAR*

Further exploration of the Second Circuit decisions in *Gomez*, *Abankwah*, and *Melgar* reveals significant similarities and differences. These comparisons arise in two basic arenas: the factual basis of the claim and the application of the law to those facts. Within the basic framework, there are a number of variables, such as the country of origin and its social, political, and cultural climate, the nature of the harm and the persecutor, and the evidence supporting the claim. *Gomez* and *Melgar* were similar with regard to the nature of the harm they experienced and the country conditions surrounding the infliction of that harm. On the other hand, the evidence submitted in support of the claims in *Melgar* and *Abankwah* was very similar. In *Abankwah* and *Gomez*, the past or future persecutors were non-state actors. Significantly, in *Abankwah*, the facts, the surrounding country conditions, and the court's analytical

tating and shocking nature of FGM. *Id.* at 3. Without defending the practice of FGM, this approach has been criticized as allowing for too strenuous an indictment of other cultures without conferring respect on the culture and context which shape practices and rites. See, e.g., Isabelle R. Gunning, *Women and Traditional Practices: Female Genital Surgery*, in KELLY D. ASKIN & DOREAN M. KOENIG EDS., *WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW* vol. 1 at 651 (1999).

approach in assessing the claim were markedly different from both *Gomez* and *Melgar*.

The claims in both *Gomez* and *Melgar* were situated in the context of the civil war in El Salvador, at opposite ends of the time line. In *Melgar*, the persecution occurred in the aftermath of the signing of the 1992 Peace Accords; in *Gomez*, the claim arose in the early years of the conflict. Although it was officially denied throughout the war, it is now widely accepted that the United States played a significant role in the conflict in El Salvador by providing funding and training to the military dictatorship and even to death squad members.¹⁸⁵ It is also commonly believed that, for many years, U.S. foreign policy considerations interfered with a fair and impartial adjudicatory process for asylum claims, particularly those claims brought by people from El Salvador.¹⁸⁶ In light of this history and controversy, it is not difficult to imagine that an asylum seeker from El Salvador might be treated with some hesitation, if not suspicion.¹⁸⁷ Thus, the fact that both *Gomez* and *Melgar* were from El Salvador might well have had some bearing on the outcome of those cases.¹⁸⁸ In addition to the simi-

¹⁸⁵ See generally DANNER, *supra* note 56

¹⁸⁶ See *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991); see also *supra* note 62 and accompanying text and *infra* note 189.

¹⁸⁷ See, e.g., *infra* note 189.

¹⁸⁸ Aside from the potential foreign policy issue, there is also the geographical issue. Central America in general and El Salvador in particular are in close proximity to the U.S. border. Throughout the 1980s, when the greatest number of Salvadorans and other Central Americans fled to the United States seeking asylum, many of them made virtually the entire journey on foot. This proximity does not necessarily detract from the "otherness" or "alienness" dimension of the manner in which the United States has viewed Salvadorans. I use this terminology to underscore the fact that U.S. immigration law has a highly racialized context that is built, from its inception, on the notion that there is an "us" who will be welcomed in and a "them" who may be welcomed in when labor demands call for it but who are otherwise viewed as separate and apart from who "we" as a country are or should be made up of. This includes a long history of discriminatory treatment of many different groups of immigrants from the 1852 Chinese Exclusion Act to the Mexican Bracero Program to the internment of Japanese Americans during World War II up to the recent treatment of interdicting boats carrying Haitian refugees fleeing the repressive Duvalier regime. For a discussion of the impact of race and racial prejudice on U.S. immigration law, see generally Kevin R. Johnson, *Race, The Immigration Law, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness*, 73 IND. L.J. 1111 (Fall 1998). For an interesting view of the historical discriminatory treatment of different immigrant groups in this country, see generally Gabriel Chin, *Is There a Plenary Power Doctrine? A Tentative*

larity of place and context, in at least one significant respect, Gomez and Melgar suffered similar harm.

The claims in both *Gomez* and *Melgar* involved multiple rapes.¹⁸⁹ Thus, a full assessment of each of their claims required an understanding of the rapes as a gendered form of harm and as a crucial dimension to the claims. However, the court did not demonstrate any in-depth comprehension of the rapes in either case nor did it recognize their persecutory and politicized nature.¹⁹⁰ The *Gomez* court examined important questions of statutory interpretation where gender-based harm was presented as the basis of the asylum claim.¹⁹¹ In this early decision, rendered before an international human rights and refugee law foundation had been established to examine these issues, the court concluded that Gomez did not demon-

Apology and Prediction for Our Strange But Unexceptional Constitutional Immigration Law, 14 GEO. IMMIGR. L.J. 257 (Winter 2000).

The perception of "otherness" and proximity, the U.S. support of the military regime in El Salvador, and the numbers of Salvadoran refugees crossing the border from Mexico into the United States all worked together to create the prevailing view that if one Salvadoran is granted asylum, many more—too many more—will make the journey. In turn, it will become increasingly difficult to deny them the same protection. In fact, during the height of the war in El Salvador, according to one estimate, some 500,000 Salvadorans entered the United States, largely through the southwestern border with Mexico in Texas, Arizona, and California. See *Temporary Suspension of Deportation for Nationals of Certain Countries: Hearings on H.R. 822 Before the Subcommittee on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 99th Cong. 1st Sess. 7 (1985) (statement of Rep. Moakley). Of that number, some three percent were granted asylum protection between the years of 1987 and 1993. See 136 CONG. REC. S17,108 (daily ed. Oct. 26, 1990) (statistic cited by Sen. DeConcini). As for the dilemma of justifying providing protection to some and not others, over the years there have been a variety of short-term remedies designed to allow Salvadorans to remain in the United States, culminating with the 1996 Nicaraguan and Cuban Adjustment Relief Act (the "NACARA"). For further discussion on the treatment of Salvadorans in the U.S. asylum law process, see generally *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (D.C. Cal. 1988), *aff'd* 919 F.2d 549 (9th Cir. 1990); Ari Weitzhandler, *Temporary Protected Status: The Congressional Response to the Plight of Salvadoran Aliens*, 64 U. COLO. L. REV. 249 (1993).

¹⁸⁹ As discussed above, in *Melgar* the rape was treated almost as a subsidiary to her claim while in *Gomez* the repeated rapes over a two-year period formed the substance of her claim. It is also true that Gomez' attackers were members of the armed opposition while Melgar's were members of the Salvadoran armed forces. This difference would not necessarily materially affect the potential prejudice against granting asylum to Salvadorans.

¹⁹⁰ The clear exception to this charge is Judge Kearse's dissent in *Melgar*. See *supra* notes 134-135 and accompanying text.

¹⁹¹ See *supra* notes 88-95 and accompanying text.

strate that she was a member of a particular social group based on her gender and, therefore, that she did not suffer persecution based on any group membership.

By the time *Melgar* was decided, gender-based harm had achieved international recognition under human rights law and was recognized as persecution in the context of refugee and asylum law. Unlike the *Gomez* court, the *Melgar* court had the opportunity to apply the most recent developments that led to a recognition of rape, in particular, as a violation of human rights and humanitarian law. The heart of the legal issue in *Melgar*, however, was not interpretation of the meaning of persecution, social group, or political opinion, as it had been in *Gomez*. Rather, the *Melgar* court very explicitly identified as the core issue the question of whether the Board's decision was supported by substantial evidence.¹⁹² In considering this legal question, the *Melgar* court also had the benefit of the reasoning in *Abankwah*, rendered only weeks before, which focused quite specifically on the sufficiency of the evidence as the basis of its ruling. Notwithstanding these significant developments, the *Melgar* court held that the Board's decision denying the claim was supported by substantial evidence, without seeming to take into account any of the recent developments that arguably could have had a profound impact on the court's approach, if not its ultimate conclusion.¹⁹³

By contrast, the *Abankwah* court found that the Board's decision denying the request for asylum was not supported by substantial evidence.¹⁹⁴ Interestingly, a comparison of the records in *Abankwah* and *Melgar* reveal a number of similarities regarding the quantum of the evidence submitted.

¹⁹² It was only the dissent that called into question the interpretation and application by both the Board and the IJ of the well-founded fear standard.

¹⁹³ *Melgar*, 191 F.3d at 313-24. The court ruled that the evidence supported the findings below that neither the murder of her uncle nor the rape she and other family members endured demonstrated "an objective basis that she will be persecuted on account of a protected ground." *Id.* at 313. The court also ruled that even assuming her uncle had been killed by the military for his support of the guerrillas, "Melgar fails to offer any evidence upon which a reasonable person could rest a well-founded fear of persecution due to her uncle's acts." *Id.* This finding fails to recognize the link between the familial relationship between Melgar and her uncle and the harm that could come to pass as a result of that close family tie. It also completely disregards the persecution she did in fact endure just weeks after her uncle's murder. *Id.*

¹⁹⁴ *Abankwah*, 185 F.3d at 23.

In support of her request for asylum, Abankwah submitted one affidavit and one declaration. Although both documents addressed her claim in particular, neither document was without problem. The declaration came from a personal friend who seemed to do little more than repeat what Abankwah had told him about her story.¹⁹⁵ The affidavit came from a Ghanaian woman, Victoria Otumfuor, who had lived for the past twenty years in the United States and traveled regularly to Ghana.¹⁹⁶ This expert did have some independent knowledge about practices and customs in Ghana, but she also stated unequivocally that she had no knowledge about the Nkumssa tribe or about the practice of FGM in that tribe. Thus, while Victoria Otumfuor did display some knowledge about Ghanaian cultural practices, her main credentials seem to be that she grew up in Ghana and maintained contact with the country.¹⁹⁷ In contrast, Melgar provided an expert affidavit on human rights and country conditions in El Salvador following the signing of the 1992 Peace Accords. Although it was not prepared specifically for Melgar's case, the affidavit did provide a comprehensive description of conditions in El Salvador at the time Melgar's claim arose, including detailed information concerning significant and on-going human rights violations in the aftermath of the 1992 Peace Accords.¹⁹⁸ Arguably, the affidavit submitted in *Melgar* was at least as credible and provided as much support to her claim as the affidavit submitted in *Abankwah*.¹⁹⁹ Certainly, the supporting oral and written tes-

¹⁹⁵ Declaration of Kwabena Danso Otumfuor, Abankwah Joint Appendix at 244-46, *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304).

¹⁹⁶ Affidavit of Victoria Otumfuor, Abankwah Joint Appendix at 247-49, *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304). Victoria Otumfuor also testified at the hearing, essentially restating the content of her affidavit. See Abankwah Joint Appendix at 199-221, *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304).

¹⁹⁷ She might very well have further qualifications for her expertise but this is not apparent from the record. Even the more anecdotal basis of her knowledge was not fully developed in the record. See *id.*

¹⁹⁸ For a discussion of some of the other documentary evidence submitted, see *supra* note 123.

¹⁹⁹ See Affidavit of Terry Karl, Melgar Joint Appendix at 155-74, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124). It has not escaped this author's notice that the "expert" in Abankwah is an African woman without what many in the West would view as traditional credentials for her expertise. Melgar's expert, on the other hand, is in fact college educated with numerous publications and other credentials detailed in her affidavit, including Senior Fellow for the

timony in *Abankwah* deserved to be assessed and relied on appropriately. But it does not appear that the evidence was more compelling than the similar type offered in *Melgar*.

Like *Abankwah*, *Melgar* also had a witness testify in support of her claim. Unlike the witness for *Abankwah*, however, *Melgar* did not try to establish her witness as an expert. In fact, it was her husband who was able to corroborate certain aspects of her claim and who had himself received asylum protection in the United States some years earlier.²⁰⁰ Whereas *Abankwah*'s witness testified about country conditions to support her claim, *Melgar*'s witness gave testimony as to his personal knowledge of the basis of her claim.

In each of these cases, the Second Circuit looked to the documentary evidence in addition to the testimony and written support of witnesses and experts.²⁰¹ In *Abankwah*, the documentary evidence that addressed the practice of FGM seemed to have a particular impact on the court. Indeed, the court relied on this evidence, even though there was little support for *Abankwah*'s claim that FGM was practiced by her tribe as punishment for failure to comply with social taboos and restrictions imposed on the tribe's women.²⁰²

In contrast, *Melgar* did not include any evidence that specifically detailed the use of rape as a political or repressive tool in El Salvador. Yet the documentary evidence, as well as the expert affidavit, clearly provided a solid basis to support a finding that the murder of her uncle and the subsequent rapes of *Melgar* and her family members were politically motivated. The failure of the *Melgar* court to find links between the political activities of *Melgar* and her uncle, her uncle's murder, and

Institute for International Studies at Stanford University. See *id.* at 155. Certainly there are cultural biases in how an individual's expertise is measured and valued. It also bears repeating that in this particular comparison, it was *Abankwah* whose witness the Court seemed to find compelling while in *Melgar* the expert affidavit was scarcely even mentioned.

²⁰⁰ Specifically, he was able to discuss his involvement in the water project that he believed would subject her to persecution if she were forced to return. *Melgar* Joint Appendix at 102-05, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999) (No. 98-4124). He also corroborated her testimony about the woman who supposedly was going to help her obtain a visa to depart El Salvador and instead threatened to turn her over to the military authorities. *Id.* at 100-01.

²⁰¹ The documentary evidence submitted in *Melgar* and *Abankwah* is discussed in detail in *supra* Part IV.

²⁰² *Abankwah*, 185 F.3d at 26.

the subsequent rape and assault against Melgar, reveals the court's profound lack of awareness of the gendered and political nature of rape. The *Melgar* court, with the clear exception of the Kearsse dissent, seemed disturbingly unable to frame Melgar's asylum claim in a broader, more gender-aware, context.

It may be that a sense of "otherness" of the two women and their circumstances played a role in shaping the Second Circuit's approach to these cases. The notion of woman as "other" and, as a result, not having a place in the mainstream, is common in many critiques of traditional law and analysis.²⁰³ These critiques address the ways in which women's concerns have been dismissed because they are not valued the same as those faced or experienced by men.

Applying this critical approach to the decision in *Melgar* provides insight into what might have led the court to be so dismissive of the egregious and politicized nature of the rapes that Melgar and her family members experienced. At the same time, rape is such a common occurrence in the United States and throughout the world that the urge to keep it removed from human rights and persecution analysis, though not acceptable, could be considered predictable. The court's unwillingness to find both the political and persecutory nature of the treatment of Melgar and her family members is thus not surprising, but is deeply disappointing. A similar argument, though perhaps less compelling in light of the time at which the decision was rendered, could be made about the *Gomez* court's approach.

Unlike both *Melgar* and *Gomez*, however, *Abankwah* presented a different kind of "otherness."²⁰⁴ *Abankwah* fled

²⁰³ See generally WINNIE HAZOU, *THE SOCIAL AND LEGAL STATUS OF WOMEN: A GLOBAL PERSPECTIVE* (1990); *WOMEN AND CULTURE* (Caroline Sweetman ed., 1995).

²⁰⁴ This factor did not favorably influence the Board or the IJ, both of which denied her claim. Both found a basis for distinguishing this claim from the claim in *Kasinga*, in which the Board ruled that FGM constitutes a form of persecution; that those seeking to carry out the FGM need not have a punitive intent for it to constitute persecution; and that in this particular case, *Kasinga* had established her membership in a particular social group of young women in the Kunsuntu Tschamba tribe of Togo who had not undergone FGM and who were subject to it and that she would face persecution on account of this group membership. *In re Fauziya Kasinga*, Int. Dec. 3278 (BIA 1996). This decision was rendered following much publicity and a long period of detention for *Kasinga*. The INS did not seek

strange and exotic customs and practices in faraway Ghana. Perhaps, on some level, these factors contributed to the Second Circuit's conclusion in *Abankwah* that, based on the evidence submitted, no reasonable fact-finder could have found Abankwah ineligible for asylum. Unlike rape, FGM is perceived as a cultural practice performed in distant countries and is often viewed with contempt and even outrage by many in the United States.²⁰⁵ It has been widely condemned as being a most egregious violation of the fundamental right to bodily integrity.²⁰⁶ The "exotic" and shocking nature of the practice of FGM may have allowed the *Abankwah* court to look at the claim more holistically and to recognize FGM as gender-based persecution.²⁰⁷ Examining the facts in that framework, in turn, allowed the court to conclude that the claim was supported by substantial evidence and that the Board erred as a matter of law in denying asylum to Abankwah. The essential analytical determinant in reaching this outcome is found here in the *Abankwah* court's broad, contextual approach to the claim.

review in the circuit court of the Board's final decision, which was rendered *en banc* and, though not unanimous, contained only a single line dissent by one Board Member. *Id.* at 20.

²⁰⁵ In fact, this concern that FGM was being practiced in the United States led to the passage of the Anti-Female Genital Mutilation Legislation, 18 U.S.C. § 116 (Supp. 1996).

²⁰⁶ While the practice of FGM may raise deep questions pertaining to cultural relativism and universalism in human rights discourse, it is beyond the scope of this article to closely examine these important issues. For purposes here, it suffices to say that, again, while it is impossible to have any degree of certainty regarding the degree of influence this aspect of the case may have had, it is also difficult to discount the possibility that it did play some role in the outcome of the case. Others have written about how the practice of FGM has been viewed in this country. For one of the first, and most eloquent articles grappling with this issue in the legal context, see generally Isabelle Gunning, *Arrogant Perception, World-Traveling and Multicultural Feminism: The Case of Female Genital Surgeries* 23 COLUM. HUM. RTS. L. REV. 189 (1991). See generally Phoebe A. Haddon, *All the Difference in the World: Listening and Hearing the Voices of Women* 8 TEMP. POL. & CIV. RTS. L. REV. 377 (1999).

²⁰⁷ See generally CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); BELL HOOKS, *KILLING RAGE: ENDING RACISM* (1995); PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* 1989 U. CHI. LEGAL F. 139. For an insightful discussion of racism and affirmative action from the point of view of a white scholar raising an African-American daughter, see generally Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1 (1999).

It is the court's application of this analytical framework that most distinguishes *Abankwah* from *Melgar* and *Gomez*.²⁰⁸

Abankwah presents yet another key distinction—race. Certainly, there is the significance of “other” in race. In the United States, where racism permeates many social, cultural, and political institutions, there is often a strong social bias in favor of appearing “white” or Caucasian.²⁰⁹ Ironically, that bias seems to be working inversely in *Abankwah*. The fact that *Abankwah* is black-skinned becomes part of her more exotic “otherness.” Her race redounds negatively not so much against her, but against where she comes from and what she fears. In this context, the race of the people she feared harm from may have helped support her claim rather than weaken it.

CONCLUSION

Great advances have been made in international human rights law in the recognition of violence perpetrated against women as human rights violations. Rape has achieved recognition as a crime of war and a tool of repression. A variety of courts, including the Second Circuit, are taking a more nuanced approach to claims that raise gender-based persecution.

²⁰⁸ The discussion of the factors that might have negatively influenced the outcome of these three decisions is not meant to suggest that the Second Circuit Court of Appeals renders its decisions in asylum claims based on foreign policy considerations, proximity of the country of flight, racial stereotypes, or any other inappropriate factor. At the same time, asylum claims require, by their nature, examining such factors as race, country conditions and, at times, relations with other countries, the nature and type of harm feared, and other factors that, viewed in isolation or to an extreme, might easily slide into misconceptions at best. In the context of evaluating an asylum claim, any or all of these factors may be relevant to attaining a clear understanding of the issues and analyzing them completely in all their complexity. It is the kind of examination provided, and the depth of acknowledgment and understanding in addressing the issues, that is being questioned here.

²⁰⁹ A full exploration of race and racism in this country is far beyond the scope of this article. The implications of racism, sexism, and other biases and prejudices intertwine in very different ways in the context of examining a claim for asylum. There is no basis to conclude that one claim was granted based solely on the applicant's race or the nature of the harm feared or that another claim was denied for these same reasons. At the same time, an asylum applicant's gender, race, and nature of the harm feared or experienced are all factors that generally come into play in making and assessing an asylum claim. The potential of any or all of these factors in any given asylum decision, thus, cannot be discounted. See *supra* note 209.

The *Gomez* decision reflects a long out-dated view of these issues. The *Melgar* decision reveals the best and the worst of the Second Circuit's ability and willingness to adequately and appropriately assess gender issues in the human rights and asylum law context. Judge Kearse's dissent in *Melgar* reflects a sophisticated and elegant contextual analysis—one that fully and inherently integrates issues of culture, gender, and society, and represents the high-water mark of analysis of gender-based persecution by the Second Circuit. The court may not yet be prepared to incorporate this approach on a broad scale in its assessment of asylum claims. The *Abankwah* decision offers an important alternative to the Kearse dissent in *Melgar*. In *Abankwah*, the court consciously surfaced gender and applied a contextualized framework of analysis. A thoughtful and consistent application of this analytical approach is necessary for the Second Circuit to render fair and just decisions on asylum claims raising gender issues, and perhaps to one day set the standard for providing an inherently gendered and contextualized analysis of all asylum claims.