

**Written Statement for the Record
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**Hearing on:
“RENEWING AMERICA’S COMMITMENT TO THE REFUGEE
CONVENTION: THE REFUGEE PROTECTION ACT OF 2010”**

**Senate Committee on the Judiciary
May 19, 2010**

Introduction

Chairman Leahy and Members of the Committee, thank you for convening this hearing on the Refugee Protection Act of 2010, and for the opportunity to share the Tahirih Justice Center’s (“Tahirih”) perspectives on critical reforms needed to US asylum laws and policy. Tahirih deeply appreciates the Committee’s work to promote human rights and strongly supports the Refugee Protection Act of 2010; we look forward to further opportunities to assist the Committee as it considers this important legislation.

Tahirih is a national legal advocacy organization with offices in Falls Church, VA, Houston, TX, and Baltimore, MD, that provides free legal representation to women and girls fleeing human rights abuses such as domestic violence, rape, human trafficking, female genital mutilation, torture, “honor” crimes, and forced marriage. Since 1997, through direct services and referrals, Tahirih has assisted over 10,000 women and children. Rooted in our direct services experiences, Tahirih’s national advocacy initiatives seek systemic change to ensure the long-term protection of women and girls from violence.

As a student attorney I helped litigate the 1996 Board of Immigration Appeals (BIA) case, *Matter of Kasinga*, which set national legal precedent by granting asylum to a young woman from Togo fearing female genital mutilation. This compelling case and the overwhelming needs of women in similar circumstances inspired me to found Tahirih. Since its inception, Tahirih has worked to further articulate and assure the availability of asylum in the United States for vulnerable women and girls fleeing gender-based persecution. Tahirih’s efforts have intensified in recent years in response to a disturbing stagnation and even some regression in the United States’ treatment of gender-related claims. Tahirih’s report, *Precarious Protection: How Unsettled Policy and Current Laws Harm Women and Girls Fleeing Persecution* (October 2009; available at www.tahirih.org/2009/10/asylum-report) calls attention to how the chronic lack of clarity and coherence in the field of “gender-based asylum law,” together with harsh laws and policies of general application to all asylum seekers, can prevent women and girls from finding the protection they need and deserve in the United States.

Tahirih therefore welcomes the Refugee Protection Act of 2010 as a much-needed measure to set the United States back on track as a world leader in the protection of all

those who seek safe haven from persecution. We strongly support the bill as a whole, but for the purposes of this statement, we focus below on what the bill would do to address three of the most acute challenges that women asylum seekers face in the United States today:

- **The lack of a coherent definition as to what constitutes a “particular social group.”** In the absence of “gender” as one of the five grounds (race, religion, nationality, membership in a particular social group, and political opinion) expressly protected from persecution under US law,¹ cases involving gender-related persecution are often based on the “particular social group” ground. The classic, clear BIA definition of “particular social group” established in 1985 in *Matter of Acosta*² has been muddled in recent years with the BIA’s addition of further murky requirements that have, moreover, been inconsistently applied, resulting in adjudicators’ unjust denials of protection to women asylum seekers, among other groups.

Section 5, Subsection (a) of the Refugee Protection Act of 2010 codifies the BIA’s straightforward Acosta definition of “particular social group,” and rejects additional nebulous requirements.

- **The lack of clear guidance as to how the requisite “nexus” may be shown.** An asylum seeker must show that her well-founded fear of persecution is “on account of” one of the five protected grounds. However, it is unclear what kinds of evidence can demonstrate this nexus where the persecutor is a non-State actor, as is often the case where gender-related persecution is involved. Adjudicators’ uncertainty can result in unjust denials of women’s claims.

Section 5, Subsection (b), Paragraph 4 of the Refugee Protection Act of 2010 codifies draft regulations proposed by the Department of Justice in 2000, to make clear that evidence that the State, legal or social norms tolerate such persecution against persons like the applicant may establish the requisite nexus.

- **The steep procedural hurdle posed by the one-year filing deadline.** All asylum seekers must file an application within one year of their arrival in the United States, or they are barred from asylum.³ Exceptions (for “changed” or “extraordinary” circumstances) exist, but have proven unworkable, and many asylum seekers have been unjustly denied protection. For many reasons, the filing deadline has a particularly harsh impact on women and girls.

Section 3 of the Refugee Protection Act of 2010 eliminates this arbitrary time limit and returns adjudicators’ focus to the actual merits of the application for protection.

Below we expand upon the reasons that these reforms proposed in the Refugee Protection Act of 2010 are so vitally necessary, and the ways in which women and girls are harmed by the *status quo*.

The Pervasive Lack of Coherence and Clarity in “Gender-Based Asylum Law” Denies Women and Girls Protection from Persecution

The first two challenges outlined above are directly attributable to the United States’ failure, in the nearly 15 years since the BIA decided *Matter of Kasinga*,⁴ to resolve key questions raised by gender-related claims through clear and authoritative guidance. Without a proper analytical framework to apply to such claims, immigration judges, government attorneys, and advocates have been left to navigate unfamiliar terrain on their own, with vastly divergent—and often unjust—results around the country.

The BIA's own rulings have been inconsistent. Despite granting asylum based on female genital mutilation in 1996, the BIA rejected other gender-related claims in 1999: one based on a fear of "honor" killing;⁵ the other, in a case known as *Matter of R-A*,⁶ based on severe domestic violence. These decisions called into question the scope of protection under US asylum law for women fleeing gender-based persecution.

Past attempts to bring coherence to this field of law through the judicial or regulatory channels have proven fruitless. In fact, in the years that followed the BIA's 1999 decision in *Matter of R-A*, we have witnessed seemingly endless rounds of procedural ping-pong in gender-based asylum cases—appeals up through the BIA, Circuit Courts, and even the Supreme Court, followed by remands all the way back to the trial court, and sporadic interventions by the Attorney General—without definitive resolution. Draft regulations, first proposed by the Department of Justice (DOJ) in 2000, remain unfinished. Only this past December—14 years after she first went before an immigration judge—did the applicant in *Matter of R-A* finally win asylum. However, because the decision was made at the trial court level, it does not bind other adjudicators. We still have no new precedent-setting decisions from the BIA indicating how far its holding in *Matter of Kasinga* extends to protect women fleeing gender-based persecution.

At present, in fact, all we have are agency half-measures, followed inconsistently by the agency itself. In both *Matter of R-A* in 2004,⁷ and in a different domestic violence-based asylum case, *Matter of L-R*, in 2009,⁸ the Department of Homeland Security (DHS) filed legal briefs setting forth a framework in which women fleeing domestic violence, depending on the facts of the case, may qualify for asylum under the "particular social group" ground. Yet despite these apparently official positions, and despite the fact that DHS did not contest the recent grant of asylum in *Matter of R-A*, Tahirih and other advocates continue to meet opposition by DHS attorneys to domestic violence-based asylum cases. Some DHS attorneys have even challenged advocates' introduction of DHS's own brief from *Matter of L-R*, and characterized the legal framework DHS advances therein as inapplicable to other cases.

In addition, over the years that *Matter of R-A* was pending at the BIA, appeals presenting similar issues were likewise placed on hold, including a number of Tahirih cases. The BIA has recently begun remanding these cases back to immigration court for further fact development and legal briefing—but without any further guidance for advocates or adjudicators as to what standards they should apply. Frustrated immigration judges are encouraging applicants to appeal their decisions in the hope of obtaining clarifying guidance. Women fleeing domestic violence and other forms of gender-based persecution continue to encounter a legal environment that is unclear and unstable.

Because so many gender-based asylum claims hinge on the applicant's "membership in a particular social group" or whether she can demonstrate "nexus" where a non-State actor is her persecutor, the related amendments in the Refugee Protection Act of 2010 would provide critical clarity to this field of law.

Demonstrating "Membership in a Particular Social Group"

In its 1985 decision *Matter of Acosta*,⁹ the BIA held that particular social groups are comprised of individuals who share a common characteristic that members of the group either cannot change, or should not be required to change, because it is fundamental to their individual identities or consciences.¹⁰ The BIA arrived at this definition by interpreting particular social group in line with the other protected grounds—race,

religion, nationality, and political opinion—all of which concern characteristics that are either immutable or fundamental to an individual’s identity, and as such, warrant protection from persecution.

For 20 years, the BIA adhered to this clear and straightforward standard. But beginning in 2006, the BIA and some federal circuit courts began to layer an additional murky requirement referred to as “social visibility” on that core *Acosta* standard.¹¹ The BIA’s imposition of “social visibility” is burdensome in all particular social group cases but seems particularly at odds with cases involving gender-based persecution such as domestic violence. Oftentimes, the nature of the harm and even the victim herself may be purposely shielded by the persecutor from the public eye—in fact, forcing her to be invisible. The very form of persecution she suffers may restrict her public movement and hide her social identity.¹² Even in cases not involving domestic violence, requiring a particular social group to be socially visible is problematic because, “if you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to *avoid* being social visible.”¹³

Moreover, it is often difficult to discern just what the BIA intends by the term “social visibility.” A frustrated judge on the Seventh Circuit Court of Appeals recently lamented that the BIA has been wildly inconsistent, recognizing some particular social groups without reference to social visibility, but also “refusing to classify socially invisible groups as particular social groups [] without repudiating the other line of cases.”¹⁴ In 1996, for example, in *Matter of Kasinga*, the BIA recognized a social group consisting of “young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation], as practiced by that tribe, and who oppose the practice”;¹⁵ yet in 2007, in a case called *Matter of A-T-*, the BIA rejected a group based on its supposed lack of “social visibility” consisting of “young Bambara women who oppose arranged marriage.”¹⁶

By restoring the straightforward Acosta definition as the standard to establish a “particular social group,” without additional requirements, the Refugee Protection Act of 2010 would rescue this area of asylum law from confusion. The amendment also ensures that particular social group claims, including gender-based claims, receive the same consideration as claims arising under the other protected grounds (race, religion, nationality, and political opinion).

Showing the “on account of” connection, or “nexus,” between the persecution and a protected ground

Varying widely, adjudicators have, at times, taken an overly narrow approach to analyzing whether this “nexus” element is met. This can lead to an unfair denial of gender-related claims in particular: the types of harms women suffer may be perceived as reflecting purely “personal” motives (especially where the persecutor is a family member); chalked up as purely criminal acts; or ascribed to culture or tradition.

The BIA’s narrow analysis of nexus was a key factor in its 1999 denial of asylum to the applicant in *Matter of R-A-*, who based her claim on more than a decade of brutal domestic violence and her government’s failure to protect her.¹⁷ In its 2000 draft regulations, DOJ clarified that nexus could be established by either “direct or circumstantial evidence.”¹⁸ In a statement released with those regulations, DOJ criticized the BIA’s mischaracterization of domestic violence in *Matter of R-A-* as “private acts of violence.”¹⁹ Importantly, DOJ acknowledged:

“that certain forms of domestic violence may constitute persecution, despite the fact that they occur within familial or intimate relationships . . . The proposed rule recognizes that such patterns of violence are not private matters, but rather should be addressed when they are supported by a legal system or social norms that condone or perpetuate domestic violence.”²⁰

The legal system and social norms often act as co-conspirators in furthering the persecution faced by Tahirih's clients. The refusal by the State and society to intervene where violence against women is at issue demonstrates that a woman is persecuted "on account of" her gender. When a woman is sold into marriage by her family and is forcibly returned by police after she runs away; when police arrest and beat her for refusing to stay with her abusive husband; when the authorities refuse to get involved when a woman is threatened with death by her male relatives in the name of family "honor"; when police decline to investigate or prosecute "honor" killings of women and girls; when a girl's family subjects her to female genital mutilation and then forces her to marry a man who beats and rapes her daily; or when the police call the abuse "normal" behavior for a husband and a woman cannot leave because divorce in her country is illegal—then the State and society are complicit in the persecution. Asylum adjudicators should be legally bound to consider such vitally relevant contextual evidence, but under current law, they are not.

By codifying the draft regulations proposed by DOJ in 2000, the Refugee Protection Act of 2010 clarifies that the requisite nexus may be established through either "direct or circumstantial evidence," such as evidence that legal or social norms tolerate the persecution at issue. This amendment would enable claims brought by women facing gender-based persecution to be evaluated on par with claims brought by political activists, religious dissidents, or ethnic minorities who face persecution from which they likewise cannot find protection in their own countries.

The One-Year Filing Deadline Denies Protection to Women and Girls Fleeing Persecution

Congress enacted a filing deadline in 1996 that bars individuals from seeking asylum unless they file within one year of arrival in the United States.²¹ The bar was intended to prevent fraudulent asylum applications made to delay deportation, and was never intended to deny safe haven to legitimate asylum seekers.

Fourteen years later, it is clear that the imposition of a filing deadline has a dramatic negative impact. The deadline has created terrible inefficiencies in a system that is already notoriously overloaded, as cases that would have been granted by asylum officers at an initial interview, but-for filing deadline issues, are being needlessly referred to immigration judges for further proceedings. According to a 2008 GAO report, in fact, in a seven-year period asylum officers referred about 64,000 cases based in part on the filing deadline.²² The sheer time it takes adjudicators to investigate compliance with this technicality or determine eligibility for an exception (perhaps 20 minutes' worth of a one-hour asylum interview) also burdens the system.

Most importantly, the filing deadline has resulted in unjust denials of asylum to bona fide applicants with compelling claims. While Congress, clearly recognizing there could be many justifiable reasons that an individual might not file within a year of arrival, enacted a non-exhaustive list of exceptions, adjudicators have narrowly construed the filing deadline and restrictively applied the exceptions. Since these are discretionary judgment calls, there are few "checks" in the system to catch and reverse grave injustices.

The cases below expose how the filing deadline can force dramatically different results for two women despite their nearly identical experiences of sustained and brutal persecution. Both cases present a compelling case for the US' protection and compassion, but only one of these women truly received justice.

***"Aida."** Aida's mother beat her, and her mother's boyfriend sexually assaulted her. When she was 13, Aida was effectively given to her abusive husband Juan, who was twenty-seven years her senior and a high ranking army officer in her home country, in return for financial support that he provided to her family. Juan raped her*

frequently and inflicted on her a wide range of abuse, much of it learned in the military, including: throwing boiling water on her, gouging her with fence wire, burning her with a branding iron, and rubbing salt in open wounds. When she was 15, Juan discovered she was pregnant and he beat her belly until she aborted twins; later, he tried to have her killed. In 2002, after nearly 11 years of abuse, Aida fled to the United States.

Aida did not file for asylum until 2007. Despite waiting nearly six years to file, Aida was granted asylum. Her attorneys successfully argued that she had established “extraordinary circumstances” for not filing within one year, in the form of “serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past.” Aida’s application for asylum included a lengthy psychological evaluation performed by a psychologist who is a domestic violence expert, diagnosing Aida with severe Post-Traumatic Stress Disorder (PTSD). In time, Aida can apply for permanent residency and eventually, citizenship.

“Lina.” Lina’s mother beat her, took her out of school in the third grade and threw her out of the house while Lina was still a child, leaving her homeless. She moved around many times, giving birth to two children by age 17. She met Oswaldo, a soldier in the military, who later became a policeman. The abuse began immediately after they moved in together and included: violent rapes, banging her head into cinder blocks, whipping her with cables and wires, dragging her through the streets by her hair, and military torture techniques. Lina tried to escape with another man she hoped would protect her. Oswaldo tracked them down, beat them and took Lina back with him. When she gave birth to the other man’s child, Oswaldo took the baby from her and gave it away. In 2000, after 11 years of abuse, Lina fled to the United States. When she sent for her children, Oswaldo came with them and tried to kill Lina.

Lina did not file for asylum until 2007. Because she did not file within one year of her arrival, and the Immigration Judge did not find that she had established “extraordinary circumstances,” Lina was granted only “withholding of removal,” not asylum. As in the case of Aida, Lina’s attorneys argued that her failure to file within one year was due to the psychological effects of her past persecution. The psychologist in her case found that Lina suffered from depression, nightmares, that she avoided thinking and talking about her past trauma, and that she showed suicidal tendencies. But the Immigration Judge concluded that because Lina was capable of arranging for her children to escape from their home country, she was likewise capable of timely applying for asylum. Because Lina was granted withholding of removal, her children did not receive legal status and face the possibility of deportation, and Lina can never become a permanent resident or citizen.

Women asylum seekers fleeing gender-based persecution such as domestic violence, female genital mutilation, forced marriage, and “honor” crimes often have particular complications that delay their applications and place them at greater risk of being denied asylum due to the one-year bar,²³ including:

- Women may not have a support network here that can advise and assist them in seeking asylum, especially when the persecution the woman fears is a harmful traditional practice inflicted and sanctioned by her own family or community. The very fact that she has defied the practice and is seeking refuge in the United States may put her at risk for community retribution.
- Women may also understandably hesitate to take the drastic step of applying for asylum—since in gender-based cases this often means not only severing ties with one’s country, but also with one’s family and community—until it is absolutely clear that the danger they face (e.g., the threat of a forced marriage or female genital mutilation) will not pass and they have no other choice.

- Women do not know that asylum offers protection to victims of gender-based persecution. If they are aware of “asylum” at all, women often think of it as a form of protection reserved for victims of political persecution or religious or ethnic oppression, and may not realize that the kinds of harm they suffered could make them eligible for asylum.

By eliminating the arbitrary one-year filing deadline for asylum claims, the Refugee Protection Act of 2010 restores adjudicators’ focus to the actual merits of the applicant’s claim for protection, and removes one of the major barriers that women asylum seekers currently face to obtaining justice and safety in the United States.

We are grateful for this opportunity to share Tahirih’s perspectives and experiences with the Committee. Many of the observations above are elaborated more fully in Tahirih’s *Precarious Protection* report (available at www.tahirih.org/2009/10/asylum-report), which also examines how detention policies and conditions and the expedited removal process harshly impact women asylum seekers. For additional questions about other challenges that women and girls face in the US asylum system, or about how reforms in the Refugee Protection Act of 2010 would ensure that they are given safe haven rather than returned to face persecution, please do not hesitate to contact Tahirih. Thank you.

¹ Immigration and Nationality Act [hereinafter “INA”] §101(a)(42), 8 USC §1101 (a)(42).

² *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985).

³ INA § 208(a)(2)(B).

⁴ *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).

⁵ See *Matter of A-* [number withheld] (BIA August 20, 1999), cited in Stephen M. Knight, *Seeking Asylum from Gender Persecution: Progress amid Uncertainty*, 79 Interpreter Releases 689 (May 13, 2002), at 694.

⁶ *Matter of R-A-*, 22 I. & N. Dec. 906, 922 (BIA 1999; Att’y Gen. 2001; BIA 2005; BIA 2008)

⁷ Department of Homeland Security’s Position on Respondent’s Eligibility for Relief (Feb. 19, 2004), submitted in *Matter of R-A-*, 22 I&N Dec. 906 (A.G. 2008, BIA 2005, A.G. 2001, BIA 1999), available at http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf.

⁸ Department of Homeland Security’s Supplemental Brief, submitted to the BIA in *Matter of L-R-*, (Apr. 13, 2009), available at <http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-brief.pdf>. This case has since been remanded to immigration court.

⁹ *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985).

¹⁰ *Id.* at 233.

¹¹ See Lisa Frydman Covers Recent Developments in Domestic Violence-Based Asylum Claims, 2009 Emerging Issues 4075 (Lexis-Nexis: July 27, 2009)

¹² See Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 Yale L. & Pol’y Rev. 47, 94-98 (Fall 2008).

¹³ *Gatimi v. Holder*, No. 08-3197 (7th Cir. August 20, 2009) (Posner, J.), at 7 (emphasis added).

¹⁴ *Id.*, at 8.

¹⁵ *Matter of Kasinga*, 21 I. & N. Dec. 357, 358 (BIA 1996).

¹⁶ See *Matter of A-T-*, 24 I. & N. Dec. 296, 303 (BIA 2007).

¹⁷ See *Matter of R-A-*, 22 I. & N. 906, 916 (BIA 1999; Att’y Gen. 2001),

¹⁸ US Dep’t of Justice, Immigration and Naturalization Services, 65 Fed. Reg. 76588-98, (proposed December 7, 2000), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=00-30602-filed.pdf.

¹⁹ See 22 I. & N. at 922.

²⁰ US Dep’t of Justice, INS, *Questions and Answers on the R-A- Rule* (December 7, 2000), at 4, available at http://www.uscis.gov/files/pressrelease/R-A-Rule_120700.pdf.

²¹ INA § 208(a)(2)(B).

²² US Government Accountability Office, *US Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judges*, GAO-08-940 (September 2008), at 58, available at <http://www.gao.gov/new.items/d08940.pdf>.

²³ A Canadian court that recently reviewed US and Canadian case law and anecdotal evidence from advocates concluded that the one-year filing deadline can have a particularly serious impact on refugee women with gender-based claims, and that exceptions under the deadline may not assist women fleeing domestic violence and other forms of gender-based persecution. See *Canadian Council for Refugees v. Canada* (2007 FC 1262) IMM-7818-05, 29 November 2007, at 69.