

*Magic, Mutilation, and Murder: A Case for Granting Asylum to
Tanzanian Nationals with Albinism*

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Introduction

As a group, individuals with disabilities have historically been exposed to discrimination, neglect, abuse, and even death in many societies around the world and as such “have been deprived of such fundamental rights as liberty, education, privacy, family, and employment.”¹ This paper argues that the continuing cruel, inhuman, degrading, and discriminatory treatment of Tanzanian nationals with albinism (hereinafter “Persons with Albinism” or “PWAs”)² constitutes persecution under American asylum law and that these individuals who face or fear such treatment on account of their disability, albinism, should presumptively be entitled to eligibility for asylum in the United States (“U.S.”). The Immigration and Nationality Act (“INA”) of the U.S. affords protection to individuals who face persecution in their homelands. Specifically, INA § 101(a)(42) provides that the U.S. may grant asylum to:

any 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.

This paper argues that the language of the INA, its intent, current country conditions in United Republic of Tanzania (“Tanzania”), international treaties, and recent developments in case law defining the scope and coverage of the “particular social group” category support the

¹ Arlene Kanter & Kristin Dadey, *The Right to Asylum for People with Disabilities*, 73 TEMP. L. REV. 1117 (2000) (citing ARLENE KANTER, TOWARD EQUALITY: THE ADA’S ACCOMMODATION OF DIFFERENCES, IN DISABILITY DIVERSABILITY AND LEGAL CHANGE 228 (Melinda Jones & Lee Ann Basser Marks eds., 1999)).

² Ikponwosa Ero, Review of Magic, Mutilation, and Murder: A Case for Granting Asylum to Tanzanian Nationals with Albinism, Under the Same Sun [UTSS], Nov. 18, 2010 (stating that although the term “albino” continues to be in use today as a valid word, it is often a point of contention in the community of persons with albinism. “Some PWAs have argued that it is an offensive label as it characterizes a human with his condition instead of putting him first as one who is more than the condition.” UTSS advocates the use of “Persons with Albinism” (PWA) as a more respectful term; thus, this is the term that will be used throughout the paper); *see also*, Is Albino a Negative Term? NOAH AOC, THE ALBINISM ONLINE COMMUNITY, <http://community.albinism.org/forums/p/8494/39175.aspx> (last visited Jan. 9, 2011) (discussing the term “albino”).

right of PWAs to seek asylum because of the persecution they have suffered or fear on account of their disability. It should be noted that to date there are no reported cases of PWAs seeking asylum in the U.S. Current research has not revealed why PWAs have not yet sought asylum in the U.S. It may be speculated that PWAs are unaware of the asylum process, or that they lack the resources to leave Tanzania, or that they are uncertain about leaving their families and familiar surroundings. Nonetheless, the paper provides a framework for fulfilling the necessary requirements in applying for asylum should PWAs choose to seek it.

Part I discusses the current state of affairs in Tanzania regarding the treatment of PWAs and analyzes the first element of the refugee definition necessary for asylum adjudication purposes, “is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country.” Part II examines the second element of the refugee definition, “because of persecution or a well-founded fear of persecution.” The definition of the word “persecution” will also be discussed. Part III examines the third element of the refugee definition, “on account of race, religion, nationality, membership in a particular social group, or political opinion,” and argues that “PWAs” is a “particular social group.” Part IV concludes that PWAs ought to be eligible for protection under the immigration laws of the U.S.

I. Current State of Affairs in Tanzania

A. Unable or Unwilling to Return

To satisfy refugee definition requirements, the asylum applicant must establish that he³ is unable or unwilling to return to his country of past or feared persecution. Often the fact that the applicant has applied for asylum is evidence that the applicant is unwilling to return to that

³ The masculine pronouns “he” and “his” will be used throughout the paper to refer to both genders.

country.⁴ However, the inability or unwillingness of the PWA to return must be assessed in accordance with the risks involved in returning. PWAs who live in tropical climates, like Tanzania, have many physical and medical complications.⁵ It has been reported that one in 3000 Tanzanians have albinism.⁶ In sum, there are approximately 200,000 PWAs living in Tanzania, according to a 2009 report.⁷ While living with a genetic disability in a tropical climate in which the condition could be exacerbated would not deem an individual eligible for asylum, killings and mutilations of the human body, driven by superstitions that albino blood, hair, and body parts bring luck and riches, must. This has become a lucrative trade for some witchdoctors. In Tanzania, high prices are paid for PWA parts.⁸

B. Unable or Unwilling to Avail Self of the Protection

The fact that an individual has applied for asylum in the U.S. fulfills the requirement that he is *unwilling* to seek protection in the country from which he fled.⁹ Thus, the applicant is not required to prove that he is *unable* to avail himself of protection if he is *unwilling* to avail

⁴ IMMIGRATION OFFICER ACADEMY, ASYLUM OFFICER BASIC TRAINING COURSE, *Eligibility Part I: Definitions; Past Persecution* 13 (photo. reprint 2010) (2009) [hereinafter *Eligibility Part I*].

⁵ *Report: Scores of Albinos in Hiding after Attacks*, CNN.COM (Nov. 29, 2009), <http://edition.cnn.com/2009/WORLD/africa/11/29/tanzania.albinos/index.html?iref=allsearch> [hereinafter *Hiding*].

⁶ Jeffery Gettleman, *Albinos, Long Shunned, Face Threat in Tanzania*, N.Y. TIMES, (June 8, 2008), <http://www.nytimes.com/2008/06/08/world/africa/08albino.html?emc=eta1>; see also Esther Hong et al., *Albinism in Africa as a Public Health Issue*, 6 BMC PUBLIC HEALTH 1 (2006), <http://www.biomedcentral.com/content/pdf/1471-2458-6-212.pdf> (reporting that one in 1400 Tanzanians have albinism).

⁷ Faith Karimi, *Four Sentenced to Hang for Killing Albino in Tanzania*, CNN.COM (Nov. 6, 2009) <http://edition.cnn.com/2009/WORLD/africa/11/06/tanzania.albino.convictions/index.html?iref=allsearch>; see also *Tanzania Demographics Profile 2010*, INDEX MUNDI http://www.indexmundi.com/tanzania/demographics_profile.html (last visited Dec. 1, 2010) (noting the total population of Tanzania is estimated at about 41.8 million people).

⁸ Carlin Moore et. al, *International Legal Updates*, 16 HUM. RTS. BR. 36, 38 (2009).

⁹ *Eligibility Part I*, *supra* note 4, at 15 (noting that the refugee definition requires that the applicant be unable or unwilling to avail him or herself of the protection).

himself of that protection. PWAs, in theory, may be able to avail themselves of Tanzania's protection, but a strong case can be made that they are unwilling since the protections Tanzania has put in place are arguably inadequate and insufficient since they are not proactive and focus on the social discrimination often faced by PWAs. Furthermore, it would be unreasonable for PWAs to internally relocate. The occult-based killings and mutilations of PWAs, a practice which began in 2007, have continued in the region.¹⁰ In 2008 at least 35 PWAs, including children, were killed and mutilated;¹¹ at least 28 PWAs were killed in 2009.¹² The Tanzanian government's response has been inadequate; hence, systemic violations of human rights persist.¹³

1. Tanzanian Government Action

Tanzanian officials have taken some measures to protect PWAs.¹⁴ Police officers have gathered lists of PWAs to keep tabs on them, and police officers are escorting PWAs who are children to school. In the spring of 2009, President Jakaya Kikwete ordered all adults to fill out a form and name anyone who they suspected of having killed a PWA.¹⁵ The government also began a campaign to provide PWAs with cell phones so that they have a direct line to police in

¹⁰ *Danger Not Yet Over for the Great Lakes Albinos*, THE INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES, (May 21, 2010), <http://www.ifrc.org/docs/news/10/10052101/index.asp> [hereinafter *Great Lakes*].

¹¹ UNICEF Calls for a Crackdown on Albino Murders in Tanzania, U.N. NEWS CENTRE (Dec. 24, 2008), <http://www.un.org/apps/news/story.asp?NewsID=29409&Cr=albino&Cr1=>.

¹² *Human Rights in United Republic of Tanzania, Report 2009*, AMENSTY.ORG, <http://www.amnesty.org/en/region/tanzania/report-2009> (last visited Oct. 7, 2010) [hereinafter *Report 2009*].

¹³ *Id.*

¹⁴ *Id.*; see also, Carlin Moore, *supra* note 8, at 38 (noting police have been deployed to twenty-two provinces).

¹⁵ Carlin Moore, *supra* note 8, at 38.

case of an attack.¹⁶ Additionally, arrests have been made, and some of the guilty have been convicted. For example, a Kenyan national was arrested for striking a deal with undercover Tanzanian police to sell a PWA's body for \$250,000.¹⁷ Seven people have been sentenced to death for killings of PWAs in the past two years; more are awaiting trial.¹⁸

2. Inadequacy of Government Action

While the Tanzanian government publicly condemns the practice of killing and mutilating its PWAs, the measures it has put in place to protect the PWA population are inadequate and ineffective. Admittedly, the government says it has been hard to stop the killings since most occur in rural areas where there is not enough police.¹⁹ Only 200 cell phones have been distributed to PWAs thus far.²⁰ Providing only .001% of the PWA population with a cell phone is unacceptable. Further, one might question the cell phone reception in a rural area, as well as police response time, even if every PWA had access to a cell phone with a direct line to the police.

In addition to what the Tanzanian government would likely call increased law enforcement efforts, it has also attempted to make progress in the executive and legislative realms. First, President Kikwete appointed a PWA, Al Shaymaa J. Kwegyir, for a seat in Parliament. At the Durban Conference, Kwegyir discussed albinism as a disability and called

¹⁶ *Id.*

¹⁷ Will Ross, *Kenyan Arrested by Tanzania Police Over 'Albino Sale'*, BBC NEWS (Aug. 17, 2010, 9:25 ET), <http://www.bbc.co.uk/news/world-africa-11001791>.

¹⁸ Faith Karimi, *supra* note 7; *see also*, *Hiding*, *supra* note 4.

¹⁹ Faith Karimi, *supra* note 7; *see also*, *Hiding*, *supra* note 4.

²⁰ Carlin Moore, *supra* note 8, at 38.

upon the international community to oppose the discrimination and stigmatization of PWAs.²¹ Kwegyir also discussed the formation of her foundation, Good Hope Star Foundation, to raise global awareness of those with albinism.²² While certainly a noble act, the Foundation's purpose is to "advocate for the rights and interests of albinos...[so that they can become empowered to] contribute to national economic development, create employment opportunities and generate income through various activities." Empowerment may be helpful to the PWA community as a long-term goal, but the immediate, short-term goal should be the preservation of life and limbs.

Second, the Witchcraft Act was last amended in 2009.²³ Witchcraft is, and has always been, a part of the social and traditional fiber of Tanzania.²⁴ The government maintains that Tanzania does not believe in witchcraft, and anyone found guilty of witchcraft acts will be punished in accordance with the law.²⁵ However, continuing to have the Witchcraft Act on the books, even though some aspects have been outlawed by amendment, legitimizes the overall

²¹ Statement by Al Shaymaa J. Kwegyir at Durban Review Conference, Geneva (Apr. 20, 2009), <http://www.un.org/durbanreview2009/pdf/AI%20Shaymaa%20Kwegyir.pdf>.

²² *Id.* at 2.

²³ Written Laws (Miscellaneous Amendments) Act of 2009, LAWS OF REP. OF TANZANIA (2009), available at <http://www.parliament.go.tz/Polis/PAMS/Docs/3-2009.pdf>; see also, Carlin Moore, *supra* note 7, at 38-9; Simeon Mesaki, *Witchcraft and the Law in Tanzania*, 1(8) INT'L J. SOCIOLOG. & ANTHROPOLOG. 132 (2009), <http://www.academicjournals.org/ijasa/PDF/Pdf2009/Dec/Mesaki.pdf> (noting that witchdoctors are allowed to operate in the country but anyone who commits an action that would otherwise be a crime, even in the process of witchcrafting, will be punished for the offense); *Tanzania Human Rights Report 2006: Progress Through Human Rights*, LEGAL AND HUMAN RIGHTS CENTRE, 26-28 (Apr. 2007), http://www.humanrights.or.tz/wp-content/uploads/2010/09/human_rights_report_2006.pdf (discussing generally killings due to a belief in witchcraft and noting that the law provides for "incriminat[ing] any person, who intentionally causes death, disease, injury or misfortune to any community, person or animal or property [in the course of witchcraft activities]").

²⁴ Simeon Mesaki, *supra* note 23, at 133.

²⁵ TANZANIA: Human Rights Committee Consideres Report on Tanzania, THE FEMALE GENITAL CUTTING EDUCATION AND NETWORKING PROJECT, http://www.fgmnetwork.org/gonews.php?subaction=showfull&id=1248106410&archive=&start_from=&ucat=1 (last visited Oct. 9, 2010).

practice of witchcraft; therefore, the law should be repealed in its entirety. Then, even if the law is repealed, not all witchdoctors will discontinue their practices. After all, in January 2009, the government revoked all “traditional healers” licenses, but many have not complied.²⁶

Third, The Persons with Disabilities Act of 2010 (“PDA”) was signed by President Kikwete on May 20, 2010.²⁷ The purpose of the act, *inter alia*, is to “promot[e] [of] basic rights for the persons with disabilities.”²⁸ Arguably this act is not going to do enough to protect the lives and limbs of PWAs since its focus is primarily on social protections including access to education, employment, and public accommodations.²⁹ Section 6 of the PDA states that “The Government shall (b) prohibit all forms of discrimination on the basis of disability and *guarantee the persons with disabilities equal and effective legal protection against discrimination on all grounds*” (emphasis added), and (c) for purposes of promoting equality and elimination of all forms of discrimination, take all appropriate measures to ensure that reasonable changes are provided to persons with disabilities...”³⁰ The term, “reasonable changes” is defined in the act to mean “necessary, appropriate and adjustments offered in a manner that does not impose a

²⁶ Theunis Bates, *Deadly Skin Trade Preys on African Albinos*, AOLNEWS. (Nov. 23, 2009), <http://www.aolnews.com/article/deadly-skin-trade-preys-on-african-albinos/19262222> [hereinafter *Trade*].

²⁷ The Persons with Disabilities Act of 2010, 9 LAWS OF REP. OF TANZANIA (2010), available at <http://www.parliament.go.tz/Polis/PAMS/Docs/9-2010.pdf> [hereinafter PDA].

²⁸ *Id.* (The purpose of the act also includes making provisions for the health care, social support, accessibility, rehabilitation, education and vocational training, communication, employment or work protection...for persons with disabilities).

²⁹ PDA of 2010 § 4 (Tanz.) (Section 4 of the act outlines its basic principles: (a) respect for human dignity, individual’s freedom to make own choices and independency of person with disabilities; (b) non discrimination; (c) full and effective participation and inclusion of persons with disabilities in all aspects in the society; (d) equality of opportunity; (e) accessibility; (f) equality between men and women with disabilities and recognition of their rights and needs; and (g) provide basic standard of living and societal protection).

³⁰ PDA of 2010 § 6 (Tanz.).

disproportionate burden, where needed in a particular case, to ensure persons with disabilities enjoy or exercise on an equal basis with other all human rights and fundamental freedoms.”³¹

Since the PDA was only signed into law a few months ago, perhaps it would be unfair to say that the government is not going to do what it has promised in the PDA. However, if past practice is indicative of the government’s future responses, the existence of the PDA will not safeguard the lives of PWAs. For example, in March 2009 the Tanzanian Albino Society³² (“TAS”) filed, along with the Legal and Human Rights Centre, a joint petition with the High Court of Tanzania, charging the Tanzanian government “with failure to protect the rights and dignity of its albino population.” Days after filing, TAS pulled out of the suit with some alleging governmental pressure to do so.³³ Overall, there has been a lack of prosecution for the assaults and murders of PWAs.³⁴ Where there has not been a lack, there has been a halt. Trials for some accused PWA killers were put on hold in 2009 because the courts ran out of money.³⁵

As mentioned above, the PDA requires “reasonable changes” be provided to promote the equality and elimination of discrimination of people with disabilities. The safe-houses that the government did set up would likely be examples of “reasonable changes” since safe-houses are presumably designed to allow a person with a disability to enjoy his human rights and

³¹ PDA of 2010 § 3 (Tanz.).

³² See Jeffery Gettleman, *supra* note 6 (TAS is a non-profit group that operates on less than \$15,000 a year. It provides sunscreen, hats and protective clothing to PWAs).

³³ Carlin Moore, *supra* note 8, at 39 (The petition charged the government with breaching the following articles of the Tanzanian Constitution: “Article 12, under which all human beings are recognized as free, equal, and entitled to dignity; Article 14, which guarantees the right to life and to protection of life by society; and Article 29(2), which guarantees equal protection under the law”).

³⁴ *Report 2009*, *supra* note 12; see also Press Release, Under the Same Sun, International Delegation Visits Tanzania to Investigate the Witchcraft Related Slaughter of People with Albinism (Jan. 28, 2009), available at <http://www.underthesamesun.com/press-release/PRESS-RELEASE-January-28-2009.pdf> [hereinafter Delegation].

³⁵ Kevin Kelley, *Dar Told: Resume Trials of Albino Killers*, *The East African* (Aug. 17, 2009), <http://www.theeastafrican.co.ke/news/-/2558/640210/-/r0mww0z/-/index.html>.

fundamental freedoms (i.e., one's right to life). Mariamu Staford Bandaba is a PWA who was living in one such safe-house after surviving an attack by a gang who tried, unsuccessfully, to kill her with a machete so that they could sell her remains to a witchdoctor; the gang was successful in chopping off one of her hands, and the other she had to have amputated.³⁶ After living in the safe-house for only about a year, Bandaba was evicted because the government said "the situation had improved" since there had not been any recent attacks in her village, which is located in the Kagera region.³⁷ The government's rationale for evicting Bandaba because of its belief that the killings had stopped after a year could prove problematic. For instance, in the Kibondo region there was a three-year span between PWA killings.³⁸

3. Unreasonableness of Internal Relocation

"Witchcraft transcends local and national culture and is part of daily life in all social settings and in all locations."³⁹ Plainly, internal relocation is not possible for PWAs. PWA killings have been reported in several cities⁴⁰ including Tabora, Arusha, Mara, Kagera, and Shilela. The killings have been particularly rife in the Kigoma and Mwanza regions on the shores of Lake Tanganyika and Lake Victoria.⁴¹ They also occur more frequently in the gold

³⁶ *Albino Victim Evicted from Safe House*, DAILY NEWS ONLINE EDITION (Oct. 23, 2009), <http://dailynews.co.tz/feature/?n=4667>; see also Ikponwosa Ero, *supra* note 2 (confirming the full name of the victim).

³⁷ *Id.*

³⁸ *Great Lakes*, *supra* note 10.

³⁹ Simeon Mesaki, *supra* note 23, at 132.

⁴⁰ *Report 2009*, *supra* note 12; see also UNICEF Calls for a Crackdown on Albino Murders in Tanzania, U.N. NEWS CENTRE (Dec. 24, 2008), <http://www.un.org/apps/news/story.asp?NewsID=29409&Cr=albino&Cr1=>.

⁴¹ *Great Lakes*, *supra* note 10; see also Tanzania, United Republic of, Funk & Wagnalls New World Encyclopedia (EBSCO) (last visited Dec. 22, 2010) (stating Tanzania is 364,879sq mi, which is a little less than half the size of the state of Alaska).

mine areas of Shinyanga.⁴² Some fishermen and miners believe that magical powers will provide a better harvest, so they take PWA body parts to witchdoctors who use them as talismans for potions. Killings have occurred in the neighboring countries of Kenya⁴³ and Swaziland.⁴⁴ Five PWAs were killed in Burundi between December 2008 and March 2009.⁴⁵ Witchcraft and beliefs that PWAs possess magical powers are present in Côte d'Ivoire, Democratic Republic of the Congo, Senegal and Zimbabwe.⁴⁶ Thus, neither internal relocation nor relocation within a neighboring African nation is a viable solution.

II. Past Persecution Or a Well-Founded Fear of Persecution

A. Past Persecution

To establish past persecution, an applicant must show that the harm experienced or feared is serious enough to rise to the level of persecution.⁴⁷ “Persecution” has been defined by the Ninth Circuit as “infliction of suffering or harm upon those who differ...in a way regarded as offensive” and “oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate.”⁴⁸ Moreover, the Seventh Circuit stated that “persecution” includes actions less severe than threats to life or freedom...” For PWAs, however, there *have*

⁴² *Id.*

⁴³ Jeffery Gettleman, *supra* note 6.

⁴⁴ See Sizwe Maziya, *Albino (11) Shot, Beheaded*, TIMES OF SWAZILAND (Aug. 20, 2010), <http://www.times.co.sz/index.php?news=19861>.

⁴⁵ Ban Commends Burundi for Strides in Carrying out Peace Pact, U.N. NEWS CENTRE, (June 2, 2009), <http://www.un.org/apps/news/story.asp?NewsID=30996&Cr=burundi&Cr1=>.

⁴⁶ Paul Redfern, *Rising Number of Children Accused of ‘Crime of Witchcraft,’* ALLAFRICA.COM (July 26, 2010), <http://allafrica.com/stories/201007261355.html>.

⁴⁷ *Eligibility Part I*, *supra* note 4, at 15.

⁴⁸ *Id.* at 17 (citing *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985)).

been threats to their lives and freedom. The UNHCR Handbook explains that if these threats to lives or freedom have been on account of any of the protected grounds, then this would *always* (emphasis added) constitute persecution.⁴⁹

Perhaps most importantly is that certain violations of fundamental human rights, as prohibited by customary international law, will constitute persecution when connected to a protected ground. Torture and other cruel, inhuman, or degrading treatment are examples of such human rights violations in the cases of PWAs. The suffering does not get any more severe than mutilating someone's body parts or threatening to do so. *Matter of Kasinga* can be used as guidance here. In *Kasinga*, a girl who was a member of the Tchamba-Kunsuntu Tribe of northern Togo was granted asylum because she fit the "particular social group" of "young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice."⁵⁰ As will be explained in Part III, "Tanzanian nationals with albinism" (PWAs) fit the category of particular social group.

B. A Well-Founded Fear of Persecution

If an applicant has established past persecution on account of a protected characteristic, the applicant is not required to separately establish that his fear of future persecution based on the original persecution is well-founded,⁵¹ and he meets the statutory definition of refugee.

PWAs should be able to establish past persecution, but if not, then they must establish that their

⁴⁹ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, at para. 51, HCR/IP/4/Eng/REV.1 (revised 1992), <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf> [hereinafter UNCHR].

⁵⁰ *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

⁵¹ 8 C.F.R. § 208.13(b)(1).

fear of persecution has a valid basis.⁵² A Canadian court has clarified the test for well-foundedness and may prove to be of assistance here. In *Ponniah*, the court declared that “‘good grounds’ or ‘reasonable chance’ is defined [] as occupying the field between upper and lower limits; it is less than a 50 percent chance, but more than a minimal or mere possibility. There is no intermediate ground: what falls between the two limits is good grounds.”⁵³

PWAs have “good grounds” for believing they will be persecuted. Those in the PWA community feel like they are being hunted.⁵⁴ For example, Yusuph Malogo, a PWA, “carries a loud, silver whistle” to blow in case he needs to summon for help.⁵⁵ Mr. Mluge, also a PWA who has five children with albinism as well as a wife who is a PWA, bars his windows to keep out the predators.⁵⁶ Mr. Mluge and his family never go outside at night for fear of being attacked.⁵⁷ Moreover, group persecution has been declared as sufficient in itself to establish eligibility for asylum in certain circumstances.⁵⁸ The need to show a well-founded fear lessens

⁵² See *Lai, Kai Ming v. M.E.I.* (F.C.A., no. A-792-88), Marceau, Stone, Desjardins, Sept. 18, 1989. Reported: *Lai v. Canada* (minister of Employment and Immigration) (1989), 8 Imm. L.R. (2d) 245 (F.C.A.).

⁵³ *Ponniah, Manoharan v. M.E.I.* (F.C.A., no. A-345-89), Heald, Hugessen, Desjardins, May 16, 1991. Reported: *Ponniah v. Canada* (Minister of Employment and Immigration) (1991), 13 Imm. L.R. (2d) 241 (F.C.A.), at 245; see also *Albino African Seeks Spain Asylum*, BBC NEWS (Apr. 9, 2009, 13:22), <http://news.bbc.co.uk/2/hi/europe/7991789.stm> (discussing Spain’s consideration of an asylum request in 2009 from a Tanzanian albino. The Spanish Commission for Refugee Aid said his fear was reasonable); see also *Spain Takes in First Albino Refugee*, CAPE TIMES, (Dec. 22, 2009), <http://www.capetimes.co.za/?fSectionId=&fArticleId=nw20091222125805306C903374>.

⁵⁴ Delegation, *supra* note 34. See also Mugisho N. Theophile, *Albino Killings Cause Fear and Anxiety*, BROOWAHA (July 23, 2010), <http://www.broowaha.com/articles/7004/albino-killings-cause-fear-and-anxiety> (discussing fear among the albino population in Tanzania and Burundi).

⁵⁵ Jeffery Gettleman, *supra* note 6.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Kotasz v. INS*, 31 F.3d 847, 852 (9th Cir. 1994).

when an applicant can demonstrate that a systematic pattern or practice of persecution exists even if the applicant has not [yet] been singled out or targeted.⁵⁹

C. Defining Persecution

1. Motivation of the Persecutor

To establish that he is a refugee within the meaning of INA § 101(a)(42), the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or would be at least one central reason for the persecutor's motivation.⁶⁰ Here, "membership in a particular social group" is arguably the *only* reason for the persecutor's motivation. No other groups are being targeted for their body parts. However, the result is that the persecutors are also making money. On the black market, witchdoctors will pay between \$500 (USD) and \$2000 (USD) for the limb of a PWA.⁶¹ Since per capita income in Tanzania is about \$450 (USD) a year,⁶² a limb is a financial incentive. Witchdoctors are profiting by "marketing albino skin, bones and hair as ingredients in potions that are promised to make people rich."⁶³ It could be argued that this is a mixed motive case since the targeting of PWAs is based in some part on economic concerns, but this argument would likely fail since depriving an individual of the right to life would outweigh any economic motive of the persecutor;

⁵⁹ *Id.*

⁶⁰ INA § 208(b)(1)(B)(i), as amended by Section 101(a) of the Real ID Act, as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, P.L. 109-13 (the Real ID Act added the words "at least one central reason" to describe the extent to which persecution must be on account of a protected ground); *see also* Matter of S.P., 21 I&N Dec. 486 (BIA 1996) (interpreting the "at least one central reason" requirement by reviewing the Real ID Act's legislative intent that the protected characteristic cannot be tangential or incidental to the persecutor's motivation).

⁶¹ Juju Chang, *Journey to Tanzania: Reporter Exposes Epidemic of Albino Killings*, ABC News, (Oct. 2, 2009), <http://abcnews.go.com/2020/journey-tanzania-reporter-exposes-albino-killings/story?id=8712754>.

⁶² *Id.*

⁶³ Jeffery Gettleman, *supra* note 6.

furthermore, the overall motivation of the persecutor in these cases is to overcome the characteristic of being a PWA.⁶⁴

To determine whether the applicant's protected characteristic or perceived protected characteristic is central to the persecutor's motivation to target the applicant, all relevant direct or circumstantial evidence regarding the persecutor's motivation should be considered.⁶⁵ Warning the applicant would qualify as direct evidence of motive.⁶⁶ In Tanzania, the persecutors have more than announced their motives. For instance, in 2008, Vumilia Makoye, a PWA, was having dinner with her family in their hut when two men showed up with long knives. Vumilia's mother tried to barricade the door, but the men overpowered her, entered the hut, and sawed off Vumilia's legs above the knee and left with the stumps; Vumilia died.⁶⁷ Circumstantial evidence of motive can include evidence that the persecutor seeks to act out against other people who share the applicant's protected characteristic, thereby supporting the claim that the applicant was targeted on account of a protected characteristic.⁶⁸ Mr. Mluge, mentioned above, says that when he is walking down the street, he hears people saying, "It's a deal. Let's get him and make some

⁶⁴ See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. G.A.O.R., Dec. 16, 1966 [hereinafter ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. G.A.O.R., Dec. 10, 1948 [hereinafter UDHR] (recognizing fundamental human rights violations as grounds for persecution); Matter of Kasinga, *supra* note 50 (noting the motive in the practice of FGM was to make the tribal members comply with the rules of the tribe); INS v. Cardozo-Fonseca, 480 U.S. 421 (1986) (holding that a well-founded fear of persecution may be established upon a lesser showing than the clear probability of persecution); Matter of Chen, 20 I. & N. Dec. 16 (BIA 1989) (allowing past persecution as a qualifying act without a showing of a well-founded fear if the applicant's return would offend humanitarian concerns).

⁶⁵ INS v. Elias-Zacarias, 502 U.S. 478 (1992).

⁶⁶ IMMIGRATION OFFICER ACADEMY, ASYLUM OFFICER BASIC TRAINING COURSE, *Eligibility Part III: Nexus 12* (photo. reprint 2010) (2009) [hereinafter *Nexus*].

⁶⁷ Jeffery Gettleman, *supra* note 6.

⁶⁸ *Nexus*, *supra* note 66, at 12.

money.”⁶⁹ Again, while there is clearly economic motive, it is outweighed by the severity of harm to the PWA.

The determinative factor in establishing nexus between the harm or feared harm and a protected ground is that the persecutor must perceive the applicant to possess a protected characteristic.⁷⁰ The applicant must also establish “facts on which a reasonable person would fear that the danger arises on account of” one of the five protected grounds, in this case membership in a particular social group.⁷¹ No punitive or malignant intent is required for harm to constitute persecution.⁷² The relevant inquiry regarding motivation is whether the persecutor has committed an intentional act, or intends to commit an act that is seriously harmful to the applicant, because of a characteristic (or perceived characteristic) of the victim, regardless of whether the persecutor intends the victim to experience harm as harm.⁷³

Persecutors of PWAs have been publicly vocal about their motives. Tanzania’s new member of Parliament, Al-Shaymaa J. Kwegyir, a PWA, reported that people think PWAs are lucky and that is why they are being killed.⁷⁴ There is a superstition that PWAs vanish when they get older and do not die.⁷⁵ Anthropological studies have reported this trade of body parts as a phenomenon directly related to globalization, the arrival of capitalism and the market,

⁶⁹ Jeffery Gettleman, *supra* note 6.

⁷⁰ *Nexus*, *supra* note 66, at 7.

⁷¹ *Id.*

⁷² *Matter of Kasinga*, *supra* note 50.

⁷³ *Nexus*, *supra* note 66, at 11.

⁷⁴ Jeffery Gettleman, *supra* note 6.

⁷⁵ *Id.*

production, and consumerism.⁷⁶ UNICEF has suggested that trade of body parts and the “sacrifice” of PWAs is a new tradition and is not reflective of ancient African tradition.⁷⁷

2. Evaluation of Whether the Harm is Persecution

The BIA’s decision in *Matter of Acosta* defined persecution as harm or suffering inflicted upon an individual in order to punish the individual for possessing a belief or characteristic the entity inflicting the harm or suffering seeks to overcome.⁷⁸ The BIA modified this definition in *Matter of Kasinga*⁷⁹ and explicitly recognized, as stated above, that a punitive or malignant intent is *not* required for harm to constitute persecution, although there must be intent to overcome a protected ground. Persecution can consist of objectively serious harm or suffering that is inflicted because of a characteristic (or perceived characteristic) of the victim, regardless of whether the persecutor intends the victim to experience the harm as harm.

Should the BIA have difficulty in evaluating whether the harm experienced by PWAs actually amounts to persecution, it can look to several sources. First, there has been U.S. Legislation⁸⁰ on the matter. Congressman Gerald Connolly (D-Vir.) authored a resolution, calling for an end to the attacks and killings, and it was passed by the House in March 2010.⁸¹

⁷⁶ Paul Redfern, *supra* note 46. *See also Trade, supra* note 26 (noting that the mining and fishing boom may have been attributed to the fact that some business people had previously purchased “good luck” albino charms from witchdoctors).

⁷⁷Paul Redfern, *supra* note 46.

⁷⁸ *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

⁷⁹ *Kasinga, supra* note 50; *see Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1996) (holding that INA § 101(a)(42)(A) did not require proof that the persecutor had a subjective intent to harm or punish the applicant where the Russian militia and psychiatric institutions’ intent was to “cure” the applicant of her homosexuality through means of electric shock. The relevant factor was the victim’s characteristic, such as a religious or political belief, not the persecutor’s).

⁸⁰ H.R. 1088, 111th Cong. (2010).

⁸¹ *See Ben Pershing, Connolly Featured in 20/20 Report on Albinism*, CONGRESSMEN GERALD E. CONNOLLY (Aug. 27, 2010), <http://connolly.house.gov/index.cfm?sectionid=44§iontree=6,44&itemid=398>. (The legislation was prompted by Connolly’s meeting with Mariamu Staford Bandaba, the PWA referenced on page 10 of this paper. She was 5-months pregnant at the time of the attack and lost her unborn baby. Bandaba survived the heinous attack

Second, the BIA can seek guidance from the federal courts. The Ninth Circuit has defined “persecution” as “infliction of suffering or harm upon those who differ...in a way regarded as offensive” and “oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate.”⁸² The Eighth Circuit has held that persecution “involves the infliction or threat of death, torture, or injury to one’s person or freedom on account of a statutory ground.”⁸³ There is no requirement that an individual suffer “serious injuries” to be found to have suffered persecution. Serious threats made against an applicant may constitute persecution even if the applicant was never physically harmed.⁸⁴ A threat may be sufficient to establish a well-founded fear of persecution, depending on all the circumstances of the case.⁸⁵ Emotional or psychological harm resulting from the threats could also constitute persecution.⁸⁶

and was sponsored by American parents of children with albinism to come to the U.S. where she was fitted with prosthetic arms donated by the Orthotic Prosthetic Center in Fairfax, Virginia). The resolution:

(1) recognizes the plight of people with albinism in East Africa, condemning their murder and mutilation, and advocating remedies to bring an end to this heinous and misguided behavior; (2) urges [] the governments of Tanzania and Burundi, to take immediate action to prevent further violence against persons with albinism and to bring to swift justice those who have engaged in such reprehensible practices; (3) calls upon governments in East Africa, along with international organizations and other donors, including the United States, to actively support the education of people with albinism about the prevention of skin cancer and provide appropriate levels of assistance toward that end; and urges the United States to work with the governments of East Africa, and international organizations and other donors, to eliminate violence against people with albinism.

⁸² See e.g., *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985).

⁸³ *Makatengkeng v. Gonzales*, 495 F.3d 876, 882 (8th Cir. 2006) (citing *Woldemichael v. Ashcroft*, 448 F.3d at 1003 (8th Cir. 2006)).

⁸⁴ See *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074 (9th Cir. 2002) (holding that multiple death threats, harm to family, and murders of counterparts constituted past persecution), *amended by* 290 F.3d 964 (9th Cir. 2002).

⁸⁵ See *Matter of Villalta*, 20 I&N Dec. 142 (BIA 1990); *Kaiser v. Ashcroft*, 390 F.3d 653, 658 (9th Cir. 2004); *Arteaga v. INS*, 836 F.2d 1227 (9th Cir. 1988); *Sotelo-Aquije v. Slattery*, 17 F.3d 33 (2d Cir. 1994); *Cordero-Trejo v. INS*, 40 F.3d 482 (1st Cir. 1994) (cautioning against inferring that an applicant is unlikely to be persecuted because he was not killed during attempts to terrorize him as this would lead to the absurd result of denying asylum to those who were fortunate enough to survive).

⁸⁶ See *Matter of A-K*, 24 I&N Dec. 275 (BIA 2007) (recognizing that an emotional persecution case could be recognized “where a person persecutes someone close to an applicant, such as a spouse, parent, child or other

If no domestic law addresses a specific legal issue, international human rights law may provide guidance in determining whether the harm is persecution. The UNHCR Handbook states that a threat to life or freedom, or other serious violation of human rights on account of any of the protected grounds constitutes persecution.⁸⁷ Moreover, certain violations of core⁸⁸ or fundamental human rights, as prohibited by customary international law, may constitute harm amounting to persecution, but the harm must be connected to one of the five grounds for the applicant to be eligible for asylum. Such fundamental human rights include one's right to life, right to freedom from persecution, and the right to bodily integrity. Several international instruments also provide protection for fundamental human rights.⁸⁹

The Convention on the Rights of Persons with Disabilities ("CRPD")⁹⁰ is one such treaty that applies to PWAs.⁹¹ Although the U.S. has not ratified the treaty, it is a signatory; Tanzania is a party to the treaty.⁹² Article 3 of the CRPD outlines the general principles as follows:⁹³

relative, with the intended purpose of causing emotional harm to the applicant, but does not directly harm the applicant himself").

⁸⁷ UNHCR, *supra* note 49, at 14.

⁸⁸ See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* SECOND ED. 68-69 (1998); JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 109 (1992) (describing "core" rights as rights that a government cannot violate even in time of a national emergency).

⁸⁹ See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT], 1465 U.N.T.S. 85 (Dec. 10, 1984). Article 1 defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for...any reason based on discrimination of any kind." CAT seems to require state action or at least approval of these bad acts; however, indifference or inability on the part of the state to prevent this harm could arguably amount to the state's acquiescence).

⁹⁰ Convention on the Rights of Persons with Disabilities, U.N. G.A. Res. 61/106 (Dec. 13, 2006) [hereinafter CRPD].

⁹¹ Shantha Rau Barriga, *Voices to Be Heard, in Harmony*, THE HUFFINGTON POST (May 3, 2010), available at <http://www.hrw.org/en/news/2010/05/03/voices-be-heard-harmony>.

⁹² CRPD, *supra* note 90 (Tanzania ratified CRPD in November 2009); see also Optional Protocol on Convention on the Rights of Persons with Disabilities, U.N. G.A. Res. 61/106 (Dec. 13, 2006) (States Parties to the Protocol agree to submit to jurisdiction of the Committee on the Rights of Persons with Disabilities if violations are brought to its attention. Tanzania is a party to the Protocol).

(a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choice, and independence of persons; (b) Non-discrimination; (c) Full and effective participation and inclusion in society; (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; (e) Equality of opportunity; (f) Accessibility; (g) Equality between men and women; (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

It is clear that Tanzania has not been able to fulfill these general principles. Thus, the U.S. must combat the discrimination of PWAs when, as here, the adverse practice or treatment increases in severity to the extent that it leads to consequences of a substantially prejudicial nature.⁹⁴

In Tanzania, much of the social discrimination of PWAs seems to stem from lack of education.⁹⁵ While Tanzania has enacted the PDA, it may be sometime before the effects of that law are actually realized. Therefore, a U.S. asylum officer can defer to the following relevant factors in determining whether discrimination amounts to persecution:⁹⁶ (a) serious restrictions on the right to earn a livelihood; (b) serious restrictions on the access to normally available educational facilities; (c) arbitrary interference with privacy; and (d) enforced social or civil inactivity.

In Tanzania, PWAs have a history of stigmatization. Many do not go to school, which leads to an inability to secure gainful employment.⁹⁷ If they go to school, they are more likely to drop out due to stigmatization.⁹⁸ However, more recently, an estimated 10,000 PWAs have gone

⁹³ CRPD, *supra* note 90.

⁹⁴ *Ivanishvili v. USDOJ*, 433 F.3d 332, 342 (2d Cir. 2006) (stating that “violent conduct generally goes beyond the mere annoyance and distress that characterize harassment”).

⁹⁵ Esther Hong, *supra* note 6, at 4. (What is most interesting is that those who are witchdoctors or purchase potions from witchdoctors believe that albinos possess special powers which can be gleaned from their body parts, but the general population seems to believe they cannot participate as full members of society).

⁹⁶ *Eligibility Part I*, *supra* note 4, at 26.

⁹⁷ Faith Karimi, *supra* note 7.

⁹⁸ Esther Hong, *supra* note 6, at 4.

into hiding because of the fear that they too will be attacked or killed.⁹⁹ Even absent the recent killings, PWAs are discriminated against and face segregation most of their lives.¹⁰⁰ In fact, even prior to the rash of attacks and killings, many PWAs have had difficulty obtaining and maintaining social relationships and are even shunned by their own families.¹⁰¹ PWAs have also been criticized publicly. In 2008 a Parliamentary candidate said that his opponent, a PWA, would not be suitable for the position because PWAs suffer from memory loss as a result of lack of Vitamin C.¹⁰² Such a statement indicates that there is a limited understanding of the causes, and effects, of albinism.

As a result of this lack of understanding, many Tanzanians focus on myths to explain the condition.¹⁰³ For example, one myth holds that PWAs are born to black women who have slept with a white man.¹⁰⁴ Albinism is believed by some to be a contagious disease; consequently, many employers avoid hiring PWAs due to fears that their customers and staff will "catch" the condition, or that food would be contaminated if touched by a PWA.¹⁰⁵ Albinism is erroneously

⁹⁹ *Hiding*, *supra* note 5 (Many PWAs are hiding in schools for the disabled or in emergency shelters).

¹⁰⁰ *Id.*

¹⁰¹ Esther Hong, *supra* note 6, at 5; *see, e.g.*, Kenan Miruka, *Woman Kills Albino Child to Avoid Bad Omen*, THE STANDARD (Aug 25, 2010), <http://www.standardmedia.co.ke/InsidePage.php?id=2000016790&cid=4&ttl=Woman%20kills%20albino%20child%20to%20avoid%20bad%20omen> (A mother killed her baby, a PWA, because she felt having a child who was a PWA was a disgrace to the family and that the baby was a bad omen. Note, however, that this crime occurred in Kenya, not Tanzania).

¹⁰² Said Hamdani, *CCM Candidate Praises Lipumba, Disqualifies CUF Albino Candidate*, IPP MEDIA (Sept. 26, 2010), <http://www.ippmedia.com/frontend/index.php?l=21400>.

¹⁰³ Esther Hong, *supra* note 6, at 4.

¹⁰⁴ UNDER THE SAME SUN, <http://www.underthesamesun.com/home.php> (last visited Oct. 9, 2010) [hereinafter UTSS]; *see also* *What is Albinism?*, NATIONAL ORGANIZATION FOR ALBINISM AND HYPOPIGMENTATION, http://www.albinism.org/publications/what_is_albinism.html (last visited Oct. 10, 2010) [hereinafter NOAH].

¹⁰⁵ UTSS, *supra* note 104.

linked with conception during menstruation (which is culturally unacceptable).¹⁰⁶ Others believe albinism represents a punishment from the gods for an ancestor's wrongdoing.¹⁰⁷ One U.S. court found that merely being a victim of social discrimination was not enough to show past persecution, and the court also found that the petitioner, a PWA, could not show a well-founded fear of persecution because the name-calling he experienced as a result of his appearance did not "involve a serious threat to his life or freedom."¹⁰⁸ Here, however, the myths serve to demonstrate evidence of the causes of systemic adverse treatment of PWAs. More importantly, however, than Article 3 is Article 10 of the CRPD. Article 10's "Right to Life" provision states "that every human being has the inherent right to life and [States Parties] shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others."¹⁰⁹ The examples noted above prove that PWAs are in danger for their lives. In addition, PWAs are not safe even in death. A body of a PWA was actually exhumed and dismembered by hunters who took her limbs most likely to sell them.¹¹⁰

In addition to the CRPD, the International Covenant on Civil and Political Rights ("ICCPR")¹¹¹ also applies here. Article 4 of the ICCPR designates as non-derogable particular

¹⁰⁶ Esther Hong, *supra* note 6, at 4.

¹⁰⁷ *Id.*

¹⁰⁸ Makatengkeng, *supra* note 83, at 880. (Petitioner was a native and citizen of Indonesia who suffered from albinism and blurry vision. The Eighth Circuit found that his inability to find employment coupled with teasing, name-calling, and rock-throwing were not enough to constitute persecution).

¹⁰⁹ CRPD, *supra* note 90, art. 10.

¹¹⁰ Meddy Mulisa, *Body of Albino Woman Exhumed*, DAILY NEWS ONLINE EDITION (June 12, 2010), <http://www.dailynews.co.tz/home/?n=10742&cat=home>.

¹¹¹ ICCPR, *supra* note 64; *see also* U.S. Treaty Reports, U.S. DEPARTMENT OF STATE, <http://www.state.gov/g/drl/hr/treaties/index.htm> (last visited Nov. 5, 2010) (The U.S. has been a state party to the ICCPR since 1992); United Nations Treaty Series, http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en (last visited Nov. 5, 2010) (Tanzania acceded to the ICCPR in June 1976).

internationally-accepted human rights, including (a) the right to life; (b) freedom from torture, or cruel, inhuman or degrading treatment or punishment; (c) recognition as a person before the law.¹¹² First, the right to life is self-explanatory. Second, torture can include severe physical pain such as beating or kicking, or pain inflicted with the help of objects—canes, knives, cigarettes, or metal objects. In May 2008 a PWA was hacked to death—“her eyes, tongue and breast gouged out.”¹¹³ A five year old PWA had her throat slashed with a machete by attackers who then drank her blood and took her body away.¹¹⁴ Torture can include deliberate infliction of mental as well as physical harm; the suffering must be severe.¹¹⁵ The threats PWAs receive, living in fear of attack, and awareness of how severe the attacks could be, even leading to death, create mental trauma for PWAs and thus amount to torture. Third, PWAs are not considered human beings (at least not by the witchdoctors or the buyers of their potions).¹¹⁶

Although not binding on the U.S., the Universal Declaration of Human Rights (“UDHR”)¹¹⁷ also supports the argument that PWAs should be granted asylum in the U.S. Several Articles of the UDHR reiterate the provisions already discussed above in relation to the

¹¹² ICCPR, *supra* note 64, art. 4 (These rights are enumerated in Articles 6, 7, and 16).

¹¹³ Jeffery Gettleman, *supra* note 6.

¹¹⁴ Under The Same Sun: Peter Ash speaking at the United Nations Human Rights Council in Geneva, YouTube (Sept. 30, 2009), <http://www.youtube.com/watch?v=iKhoBbbjNxA>.

¹¹⁵ See J. HERMAN BURGERS & HANS DANIELIUS, A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 117-118 (1988).

¹¹⁶ Faith Karimi, *supra* note 7.

¹¹⁷ UDHR, *supra* note 64; see also Human Rights Reports, U.S. DEPARTMENT OF STATE, <http://www.state.gov/g/drl/rls/hrrpt/> (last visited Nov. 5, 2010) (noting that the U.S. human rights reports cover internationally recognized individual, civil, political, and worker rights, as set forth in the Universal Declaration of Human Rights).

CRPD and the ICCPR.¹¹⁸ However, Article 8 of the UDHR provides that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” As noted above in Part I, Tanzania has been unable to adequately provide this remedy to PWAs. Therefore, PWAs should be able to invoke Article 14 of the UDHR which provides for the right to seek asylum from persecution. Since states, not the international community, have the primary responsibility to provide protection to refugees present on their soil, the U.S. must grant PWAs asylum.

III. Membership in a Particular Social Group

The third element of the refugee definition stipulates, “on account of race, religion, nationality, membership in a particular social group, or political opinion.” “Tanzanian nationals with albinism” (PWAs) represents a “particular social group.” Individuals with disabilities have previously been granted asylum because of their membership in a particular social group. For example, Russian children with serious disabilities that are long-lasting or permanent in nature constituted a particular social group.¹¹⁹ Asylum has been granted to persons with disabilities in cases where the applicant showed he was persecuted in the past or would be persecuted in the future on account of his membership in a particular social group defined as individuals who

¹¹⁸ See e.g., UDHR, *supra* note 64, art. 1 providing that “[a]ll human beings are born free and equal in dignity and rights”; UDHR, art. 2 providing that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status* (emphasis added); UDHR, art. 3 providing that “[e]veryone has the right to life, liberty and security of person”; UDHR, art. 5 stating that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”; UDHR, art. 6 acknowledging that “[e]veryone has the right to recognition everywhere as a person before the law”; UDHR, art. 7 stating that all people are “equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

¹¹⁹ Tchoukhrova v. Gonzales, 404 F.3d 1181, 1189-90 (9th Cir. 2005) *reh’g and reh’g en banc denied*, 430 F.3d 1222 (9th Cir. 2005), *vacated*, 127 S.Ct. 57 (U.S. 2006) (holding that these disabilities constituted a specific and identifiable group, as evidenced by their “permanent and stigmatizing labeling, lifetime institutionalization, denial of education and medical care, and constant, serious, and often violent harassment”).

shared those disabilities.¹²⁰ U.S. asylum officers are supposed to construe protected characteristics broadly.¹²¹ Further, the analysis of whether the harm the applicant experienced or feared is on account of membership in a particular social group must include three parts.¹²²

The first part of the analysis requires the identification of a group that constitutes a particular social group within the meaning of INA § 101(a)(42). A three prong test has been established by the BIA to determine if a group meets the definition.¹²³ To begin with, the group must comprise individuals who share a common, immutable characteristic—such as sex, color, kinship ties, or past experience—that members cannot change or a characteristic that is so fundamental to the member’s identity or conscience that he should not be required to change it.¹²⁴ In evaluating the subjective element to determine whether a characteristic is fundamental to an applicant’s identity or conscience, officers should consider how the applicant experiences the characteristic as part of his identity or conscience.¹²⁵ Everyday issues for PWAs include physical challenges such as staying out of the sun and wearing hats and sunscreen and social challenges such as combating discrimination in school or at work. In evaluating the objective element in determining whether a characteristic is fundamental, an asylum officer should

¹²⁰ *Nexus*, *supra* note 66, at 53 (noting, however, that the two-prong test of immutability and social distinctiveness must be satisfied).

¹²¹ *Nexus*, *supra* note 66, at 15.

¹²² *Id.* at 21.

¹²³ *Matter of C.A.*, 23 I&N Dec. 591 (BIA 2006). In *C.A.*, the BIA supplemented the Acosta test with a third prong—social visibility and particularity. *Cf. Gatimi v. Holder*, 578 F.3d 611 (4th Cir. 2007) (questioning the two requirements of social visibility and particularity where applicant defected from a tribal group). *See also* Letter from Thomas Albrecht, Deputy Regional Representative, UNHCR, to Eric Holder, Attorney General of the United States (Mar. 18, 2009), http://www.immigrantlawcentermn.org/documents/unhcr_support_letter_certification_seg.pdf (Holder has sought review on these criteria as a result of *Matter of S.E.G.*, 24 I&N Dec. 579 (BIA 2008) perhaps with the support of UNHCR’s position that the two criteria are inconsistent with the object and purpose of the 1951 Convention).

¹²⁴ *Acosta*, *supra* note 78.

¹²⁵ *Nexus*, *supra* note 66, at 24.

consider basic human rights norms.¹²⁶ Here, a person cannot change skin color. Albinism is a rare genetic condition which results in a lack of pigmentation in the hair, skin and eyes. In almost all cases a significant visual impairment is also involved; most PWAs are legally blind.¹²⁷ Next, the group must be recognizable and distinct in society.¹²⁸ A distinctive shared trait is an indicator of a social distinction or visibility.¹²⁹ PWAs cannot hide their identity. Additionally, particularity is required by the BIA—“the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized in the society in question as a discreet class of persons.”¹³⁰ Since most people in Tanzania are very dark-skinned, a PWA literally stands out. Thus, both prongs are satisfied here. Further, the court in Makatengkeng stated that “Albinism is an immutable characteristic that [] is incapable of changing. It clearly identifies him on sight.”¹³¹

The second part of the analysis requires a determination of whether the applicant is a member, or perceived to be a member, of that group; and a determination of whether an applicant has been persecuted or has a well-founded fear of persecution “on account of” his/her membership in a particular social group, the asylum officer must elicit and consider all evidence, direct and circumstantial, providing information about the motivation of the persecutor,¹³² and at

¹²⁶ *Id.*

¹²⁷ UTSS, *supra* note 104; NOAH, *supra* note 104.

¹²⁸ C.A., *supra* note 123 (discussing “social visibility” as evidence that a group is recognizable).

¹²⁹ *Nexus*, *supra* note 66, at 26 (citing Memorandum from Lynden D. Melmed, USCIS Chief Counsel, to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations, *Guidance on Matter of C.A.*, (Washington, D.C.: Jan. 12, 2007).

¹³⁰ *Id.* at 28 (citing *Matter of A.M.E. & J.G.U.*, 24 I&N Dec. 69, 76 (BIA 2007); *See also*, Arteaga, *supra* note 85, at 945 (finding that a tattooed gang member failed as a particular social group for lack of particularity).

¹³¹ Makatengkeng, *supra* note 83, at 880.

¹³² *Nexus*, *supra* note 66, at 32 (citing *Elias-Zacarias*, *supra* note 65).

least one reason the persecutor harmed or seeks to harm the applicant must be because the applicant possesses or is perceived to possess a group-defining characteristic.¹³³ The third part of the analysis requires a determination of whether the persecutor or feared persecutor is motivated to harm the applicant on account of his/her membership (or perceived membership) in the particular social group. U.S. law requires specific evidence, either direct or circumstantial, that the persecutor is motivated by a protected characteristic that only the applicant possesses or is perceived to possess and that the persecutor seeks to overcome.¹³⁴ Both the second and third parts of the analysis have been satisfied per this paper's discussion in Part II.

IV. Conclusion

“Tanzanian nationals with albinism” (PWAs) constitute a particular social group under American asylum law and as such should presumptively be granted refugee status. The continuing cruel, inhuman, degrading, and discriminatory treatment of PWAs at the hands of hunters who maim and kill them in order to sell their body parts violates PWAs' core fundamental human rights. Although the Tanzanian government does not condone such conduct, it has been unable to protect PWAs because of the inadequacy and ineffectiveness of its laws and practices. Witchcraft remains an embedded part of the social and cultural structure of Tanzania and is unlikely to cease even with the legal penalties the Tanzanian government has imposed.¹³⁵ While the government has enacted the PDA to protect PWAs, and others with disabilities, until the government devises a stronger legal strategy to provide immediate protection for PWAs, the killings are going to continue. Lack of education about albinism is one of the reasons social

¹³³ See *supra* note 60; *Nexus*, *supra* note 66, at 32 (citing Elias-Zacarias, *supra* note 65).

¹³⁴ *Nexus*, *supra* note 66, at 32.

¹³⁵ See Simeon Mesaki, *supra* note 23.

discrimination of PWAs still exists. Traditional reliance on witchcraft as an explanation for good fortune needs to be further addressed. Therefore, in addition to a short-term legal strategy to protect PWAs, Tanzania also needs to educate its citizens about the fallacy and misperceptions of witchcraft as well as the causes of albinism. Education, however, will be a process that could take generations. In the meantime, the international community, including the U.S., has a responsibility to humanity to protect this very vulnerable population.