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

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MAGIC, MUTILATION, AND MURDER: A CASE FOR GRANTING ASYLUM TO TANZANIAN NATIONALS WITH ALBINISM

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I. INTRODUCTION

As a group, individuals with disabilities have historically been exposed to discrimination, neglect, abuse, and even death. In many societies around the world, disabled individuals “have been deprived of such fundamental rights as liberty, education, privacy, family, and employment.”¹ This paper argues first 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. Albinism is the condition whereby a person congenitally lacks pigmentation in the skin, eyes, and hair.³ Second, the paper argues that PWAs 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 U.S. Immigration and Nationality Act (“INA”) 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

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”).
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of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.4

This paper argues that the language and intent of the INA; 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, all support the 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. Although 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, that they lack the resources to leave Tanzania, or that they are uncertain about leaving their families and familiar surroundings. Nonetheless, this 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: that the asylum seeker “is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, [his or her] country.”5 Part II examines the second element of the refugee definition: that the asylum seeker seeks asylum “because of persecution or a well-founded fear of persecution.”6 The definition of the word “persecution” will also be discussed. Part III examines the third element of the refugee definition: that the asylum seeker seeks asylum “on account of race, religion, nationality, membership in a particular social group, or political opinion”7 and argues that “PWAs” are a “particular social group.” Part IV concludes that PWAs ought

6 Id.
7 Id.
to be eligible for protection under the immigration laws of the U.S.

II. CURRENT STATE OF AFFAIRS IN TANZANIA

A. Unable or Unwilling to Return

To satisfy refugee definition requirements, the asylum applicant must establish that he is unable or unwilling to return to his country because 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 country. 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. It has been reported that one in 3000 Tanzanians have albinism. This amounts to approximately 200,000 PWAs living in Tanzania, according to a 2009 report. While living with a genetic disability in a tropi-
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A 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 albinism 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.\textsuperscript{14}

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.\textsuperscript{15} Thus, the applicant is not required to prove that he is unable to avail himself of protection if he is unwilling to avail 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 unable, as the protections Tanzania has put in place are arguably inadequate and insufficient. The protections in Tanzania are not proactive and appear to focus only on the social discrimination often faced by PWAs.\textsuperscript{16} Furthermore, it would be unreasonable for PWAs to internally relocate. The occult-based killings and mutilations of PWAs have continued in the region since 2007.\textsuperscript{17} In 2008, at least thirty-five PWAs, including children, were killed and mutilated;\textsuperscript{18} at least twenty-eight PWAs were killed

\textsuperscript{14} Carlin Moore et al., International Legal Updates, 16 HUM. RTS. BR. 36, 39 (2009).

\textsuperscript{15} Eligibility Part I, supra note 10, at 12 (noting that the refugee definition requires that the applicant be unable or unwilling to avail him or herself of the protection).

\textsuperscript{16} See infra notes 33-37 and accompanying text.


in 2009. The Tanzanian government’s response has been inadequate; hence, systemic violations of human rights persist.

1. Tanzanian Government Action

Tanzanian officials have taken some measures to protect PWAs. Police officers have gathered lists of PWAs to keep tabs on them and have begun 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. The government also began a campaign to provide PWAs with cell phones so that they may have a direct line to police in case of an attack. 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. Seven people have been sentenced to death for killings of PWAs in the past two years and more are awaiting trial.

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 are not enough police. Only 200 cell phones have been

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20 Id.
21 Id.; see also Moore, supra note 14, at 39 (noting police have been deployed to twenty-two provinces).
22 Moore, supra note 14, at 38.
23 Id.
25 Karimi, supra note 13; see also Hiding, supra note 11.
26 Karimi, supra note 13; see also Hiding, supra note 11.
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distributed to PWAs thus far. 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 upon the international community to oppose the discrimination and stigmatization of PWAs. Kwegyir also discussed the formation of her foundation, Good Hope Star Foundation, to raise global awareness of those with albinism. 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. 27 Moore, supra note 14, at 39.
30 Id. at 2.
31 Id.
32 Written Laws (Miscellaneous Amendments) Act of 2009, LAWS OF REP. OF TANZANIA (2009), http://www.parliament.go.tz/Polis/PAMS/Docs/3-2009.pdf; see also Moore, supra note 14, at 39; Simeon Mesaki, Witchcraft and the Law in Tanzania, 1(8) INT’L J. SOC. & ANTHROPOL. 132 (2009), http://www.academicjournals.org/ijsa/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
Witchcraft is, and has always been, a part of the social and traditional fiber of Tanzania. The government maintains that Tanzania does not believe in witchcraft and that anyone found guilty of witchcraft will be punished in accordance with the law. However, by continuing to have the Witchcraft Act on the books, even though some aspects have been outlawed by amendment, the government legitimizes the overall practice of witchcraft. Repealing the law in its entirety appears to provide a better solution.

Third, The Persons with Disabilities Act of 2010 (“PDA”) was signed by President Kikwete on May 20, 2010. The purpose of the act, inter alia, is to “promot[e] basic rights for [] persons with disabilities.” Arguably, this act is not going to do enough to protect the lives and limbs of PWAs, as its focus is primarily on social protections, including access to education, employment, and public accommodations. Section 6 of the
PDA states that

The Government shall (b) prohibit all forms of discrimination on the basis of disability and guarantee [ ] persons with disabilities equal and effective legal protection against discrimination on all grounds (c) for purposes of promoting equality and elimination of all forms of discrimination, [and] take all appropriate measures to ensure that reasonable changes are provided to persons with disabilities . . . “

The term, “reasonable changes” is defined in the act to mean “necessary, appropriate . . . adjustments offered in a manner that does not impose a 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.”

Since the PDA was only signed into law less than a year 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 Society (“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. Overall, there has been a lack of prosecution for the as-
saults and murders of PWAs. 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.

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,” as safe-houses are presumably designed to allow a person with a disability to enjoy his human rights and 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 to kill her with a machete so that they could sell her remains to a witchdoctor. The gang was only successful in chopping off one of her hands while she had to have the other amputated following the attack. After living in the safe-house for approximately 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. 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.

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”).


49 Great Lakes, supra note 17.
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.” 51 Plainly, internal relocation is not possible for PWAs. PWA killings have been reported in several cities, including Tabora, Arusha, Mara, Kagera, and Shilela. 52 The killings have been particularly rife in the Kigoma and Mwanza regions on the shores of Lake Tanganyika and Lake Victoria. 53 They also occur more frequently in the gold mine areas of Shinyanga. 54 Some fishermen and miners believe that magical powers will yield a successful harvest, so they take PWA body parts to witchdoctors, who use them as amulets for potions. 55 Killings have occurred in the neighboring countries of Kenya 56 and Swaziland. 57 Five PWAs were killed in Burundi between December 2008 and March 2009. 58 Witchcraft and beliefs that PWAs possess magical powers are present in Côte d’Ivoire, Democratic Republic of the Congo, Senegal, and Zimbabwe. 59 Relocation, whether it be internal or to a neighboring African nation, is therefore not viable solution.

51 Mesaki, supra note 32 at 132.
52 Report 2009, supra note 19; see also UNICEF, supra note 17.
53 Great Lakes, supra note 17; see also United Republic of Tanzania, FUNK & WAGNALLS NEW WORLD ENCYCLOPEDIA (stating Tanzania’s total land area is 364,879 square miles, which is a little less than half the size of the state of Alaska).
54 Great Lakes, supra note 17.
55 Id.
56 Gettleman, supra note 12.
59 Paul Redfern, Rising Number of Children Accused of 'Crime of Witchcraft,' THE EAST AFRICAN (July 26, 2010), http://www.theeastafrican.co.ke/-news/-/2558/964398/-/pc3tmoz/-/index.html.
III. 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.60 “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.”61 Moreover, the Seventh Circuit stated that “persecution” includes actions less severe than threats to life or freedom . . . .” For PWAs, however, there have been threats to their lives and freedom.62 The UNHCR Handbook explains that if threats to lives or freedom are on account of any of the protected grounds, then they will always constitute persecution.63

Perhaps most importantly is that certain violations of fundamental human rights, as prohibited by customary international law,64 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. 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.65 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 of the Tchamba-Kunsuntu Tribe who have not been subjected to female genital

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60 Eligibility Part I, supra note 10, at 15.
61 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)).
62 See supra notes 10-13, 16-26, 41-58 and accompanying text.
64 See infra notes 80 and 110-111.
mutilation, as practiced by that tribe, and who oppose the practice.” 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, that is enough to meet the statutory definition of refugee, and the applicant is not required to separately establish that his fear of future persecution based on the original persecution is well-founded. PWAs should be able to establish past persecution. If not, then they must establish that their fear of persecution has a valid basis. 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 [sic] chance, but more than a minimal or mere possibility. There is no intermediate ground: what falls between the two limits is ‘good grounds.’”

PWAs have “good grounds” for believing they will be persecuted. Those in the PWA community legitimately feel as though they are being hunted. For example, Yusuph Malogo,

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66 Id.
71 Delegation, supra note 45; see also Mugisho N. Theophile, Albino Killings Cause Fear and Anxiety, BROOWAHA.COM (June 23, 2010), http://www.broowaha.com/articles/7004/albino-killings-cause-fear-and-anxiety (dis-
a PWA, “carries a loud, silver whistle” to blow in case he needs to summon for help.\textsuperscript{72} 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 predators.\textsuperscript{73} Mr. Mluge and his family never go outside at night for fear of being attacked.\textsuperscript{74} Moreover, group persecution has been declared as sufficient in itself to establish eligibility for asylum in certain circumstances.\textsuperscript{75} The need to show a well-founded fear lessens 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.\textsuperscript{76}

\section*{C. Defining Persecution}

\subsection*{1. Motivation of the Persecutor}

To establish that he is a refugee within the meaning of INA § 101(a)(42), an 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.\textsuperscript{77} 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.\textsuperscript{78}
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Since per capita income in Tanzania is about $450 (USD) a year, a limb is a financial incentive to commit these crimes. Witchdoctors are profiting by “marketing albino skin, bones and hair as ingredients in potions that are promised to make people rich.” It could be argued that this is a mixed motive case since the targeting of PWAs is based in some part on economic concerns. This argument would likely fail, however, because depriving an individual of the right to life would outweigh any economic motive of the persecutor. Furthermore, the overall motivation of the persecutor in these cases is to overcome the characteristic of being a PWA.

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. Warning the applicant would qualify as direct evidence of motive. 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

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79 Id.
80 Gettleman, supra note 12.
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, leaving only stumps; Vumilia died. 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. 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 money.” 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. 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. No punitive or malignant intent is required for harm to constitute persecution. 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.

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 this is why they are being killed. There is a super-

84 Gettleman, supra note 12.
85 Id.
86 Nexus, supra note 83, at 20.
87 Gettleman, supra note 12.
88 Nexus, supra note 83, at 20.
89 Id. at 6.
91 Nexus, supra note 83, at 8.
92 Gettleman, supra note 12.
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Anthropological studies have reported this trade of body parts as a phenomenon directly related to globalization as well as the arrival of capitalism, the market, production, and consumerism. 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.

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 [him] for possessing a belief or characteristic a persecutor sought to overcome.” The BIA modified this definition in Matter of Kasinga 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, U.S. Legislation exists on

93 Id.
94 Redfern, supra note 59; see also Trade, supra note 35 (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).
95 Redfern, supra note 59.
97 In re Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996); see Pitcherskaija v. INS, 118 F.3d 641 (9th Cir. 1996) (holding that Immigration and Nationality Act § 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).
98 See supra note 90.
the matter.99 Congressmen Gerald Connolly (D-Vir.) authored a resolution, calling for an end to the attacks and killings.100 The resolution was passed by the House in March 2010.101 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.”102 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.”103 There is no requirement that an individual suffer “serious injuries” to be found to have suffered persecution.104 Serious

100 See Ben Pershing, Connolly Featured in 20/20 Report on Albinism, CONGRESSMEN GERALD E. CONNOLLY.COM (Aug. 27, 2010), http://con- nolly.house.gov/index.cfm?sectionid=44&sectiontree=6,44&itemid=398. See Ben Pershing, Connolly Featured in 20/20 Report on Albinism, CONGRESSMEN GERALD E. CONNOLLY.COM (Aug. 27, 2010), http://con- nolly.house.gov/index.cfm?sectionid=44&sectiontree=6,44&itemid=398. (The legislation was prompted by Connolly’s meeting with Mariamu Stafford Bandaba, the PWA referenced on page 10 of this paper. She was five months pregnant at the time of the attack and lost her unborn baby. Bandaba survived the heinous attack 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 resolu- tion:
condemns the murder and mutilation of people with albinism in East Africa; (2) urges governments . . . particularly the governments of Tan- zania and Burundi, to take immediate action to prevent further vio- lence against persons with albinism; (3) calls for swift justice against those who have engaged in such reprehensible practices; (4) calls upon governments in East Africa, along with international organizations, other donors, and the United States, to actively support the education of people with albinism about the prevention of skin cancer and provide appropriate levels of assistance; (5) and urges the United States to
work with the governments of East Africa and other international or- ganizations to eliminate violence against people with albinism.
101 Id.
102 See, e.g., Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969); Hernandez-Ortiz v. INS, 777 F.2d 509, 512 (9th Cir. 1985).
103 Makatengkeng v. Gonzales, 495 F.3d 876, 882 (8th Cir. 2006) (citing Woldemichael v. Ashcroft, 448 F.3d 1000,1003 (8th Cir. 2006)).
104 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
threats made against an applicant may constitute persecution even if the applicant was never physically harmed. A threat may be sufficient to establish a well-founded fear of persecution, depending on all the circumstances of the case. Emotional or psychological harm resulting from threats could also constitute persecution.

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, freedom, or other serious violation of human rights on account of any of the protected grounds constitutes persecution. Moreover, certain violations of core or fundamental human rights, as prohibited by customary international law, may constitute harm amounting to persecution, as long as the harm is 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.

constituted past persecution), amended by 290 F.3d 964 (9th Cir. 2002).

105 Id.

106 See Matter of Villalta, 20 I. & N. Dec. 142, 147-48 (B.I.A. 1990); Kaiser v. Ashcroft, 390 F.3d 653, 658 (9th Cir. 2004); Arteaga v. INS, 836 F.2d 1227 (9th Cir. 1988); Cordero-Trejo v. INS, 40 F.3d 482, 489 (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).

107 See In re A.K., 24 I. & N. Dec. 275, 278 (B.I.A. 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 relative, with the intended purpose of causing emotional harm to the applicant, but does not directly harm the applicant himself”).

108 UNHCR, supra note 63, at 14.


110 Id.

111 See, e.g., Convention Against Torture and Other Cruel, Inhuman or
The Convention on the Rights of Persons with Disabilities (“CRPD”)\textsuperscript{112} is one such treaty that applies to PWAs.\textsuperscript{113} Although the U.S. has not ratified the treaty, it is a signatory; Tanzania is a party to the treaty.\textsuperscript{114} Article 3 of the CRPD outlines the general principles as follows:

(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.\textsuperscript{115}

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.\textsuperscript{116}

In Tanzania, much of the social discrimination of PWAs


\textsuperscript{114} CRPD, \textit{supra} note 112 (Tanzania ratified the 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) (describing that state 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).

\textsuperscript{115} CRPD, \textit{supra} note 112.

\textsuperscript{116} Ivanishvili v. U.S. Dep’t of Justice, 433 F.3d 332, 342 (2d Cir. 2006) (stating that “violent conduct generally goes beyond the mere annoyance and distress that characterize harassment”).
seems to stem from lack of education. While Tanzania has enacted the PDA, it may be some time 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: (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 attend school, which leads to an inability to secure gainful employment. If they go to school, they are more likely to drop out due to stigmatization. However, more recently, an estimated 10,000 PWAs have gone into hiding because of the fear that they too will be attacked or killed. Even absent the recent killings, PWAs are discriminated against and face segregation throughout most of their lives. In fact, even prior to the rash of attacks and killings, many PWAs had difficulty obtaining and maintaining social relationships and have been shunned by their own families. PWAs have also been criticized publicly. In 2008, a Parliamentary candidate said that his opponent, a PWA, would not be suitable for the posi-

117 Hong et al., supra note 12, 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).
119 Karimi, supra note 13.
120 Hong et al., supra note 12, at 4.
121 Hiding, supra note 11 (Many PWAs are hiding in schools for the disabled or in emergency shelters).
122 Id.
123 Hong et al., supra note 12, 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=200016790&cid=4&ttv=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).
tion because PWAs suffer from memory loss as a result of lack of Vitamin C. 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. For example, one myth holds that PWAs are born to black women who have slept with a white man. 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 contract the condition, or that food would be contaminated if touched by a PWA. Albinism is erroneously linked with conception during menstruation, which is culturally unacceptable in Tanzania. Others believe albinism represents a punishment from the gods for an ancestor’s wrongdoing. One U.S. court found that merely being a victim of social discrimination was not enough to show past persecution. The court 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.” Here, however, the myths serve to demonstrate evidence of the causes of systemic adverse treatment of PWAs.

More importantly, than Article 3, however, 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 [that

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125 Hong et al., supra note 12, at 4.
127 UTSS, supra note 126.
128 Hong et al., supra note 12, at 4.
129 Id.
130 Makatengkeng v. Gonzales, 495 F.3d 876, 880 (8th Cir. 2006) (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).
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States] shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.”131 The examples noted above prove that PWAs’ lives are in danger. PWAs are not even safe after death; in 2010, the body of a PWA was exhumed and dismembered by hunters who took her limbs in a likely effort to sell them.132

In addition to the CRPD, the International Covenant on Civil and Political Rights (“ICCPR”)133 also applies. Article 4 of the ICCPR designates as non-derogable particular internationally-accepted human rights, including (a) the right to life; (b) freedom from torture, or cruel, inhuman or degrading treatment or punishment; and (c) recognition as a person before the law.134 First, the right to life is self-explanatory. Second, torture can include severe physical pain such as beating, 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.”135 A five year old PWA had her throat slashed with a machete by attackers who then drank her blood and took her body away.136 Torture can include deliberate infliction of mental as well as physical harm but the suffering must be severe.137 The threats made to

131 CRPD, supra note 112, art. 10.
132 Meddy Mulisa, Body of Albino Woman Exhumed, DAILY NEWS ONLINE EDITION (June 12, 2010), http://www.dailynews.co.tz/home/?n=10742&-cat=home.
134 ICCPR, supra note 81, art. 4 (These rights are enumerated in Articles 6, 7, and 16).
135 Gettleman, supra note 12.
137 See J. HERMAN BURGERS & HANS DANIELUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST
PWAs, and living in fear of attack along with the awareness of how severe an attack can be, creates mental trauma for PWAs, amounting to torture. Third, PWAs are not considered human beings, at least not by the witchdoctors or the buyers of their potions.\textsuperscript{138}

Although not binding on the U.S., the Universal Declaration of Human Rights (“UDHR”)\textsuperscript{139} 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 CRPD and the ICCPR.\textsuperscript{140} 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.”\textsuperscript{141} 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 14.1 of the UDHR, which provides for the right to seek asylum from persecution.\textsuperscript{142} Since states, not the international community, have the primary responsibility to provide protection to refugees

\textbf{TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 117-18 (1988).}

\textsuperscript{138} Karimi, supra note 13.

\textsuperscript{139} UDHR, supra note 81; see also \textit{Human Rights Reports}, U.S. DEP’T 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).

\textsuperscript{140} See, e.g., UDHR, supra note 81, art. 1 (providing that “[a]ll human beings are born free and equal in dignity and rights”); \textit{id.}, 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)); \textit{id.}, art. 3 (providing that “[e]veryone has the right to life, liberty and security of person”); \textit{id.}, art. 5 (stating that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”); \textit{id.}, art. 6 (acknowledging that “[e]veryone has the right to recognition everywhere as a person before the law”); \textit{id.}, 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.”).

\textsuperscript{141} UDHR, supra note 81, art. 8.

\textsuperscript{142} UDHR, supra note 81, art. 14.1 (stating “everyone has the right to seek and to enjoy in other countries asylum from persecution”).
present on their soil, the U.S. must grant PWAs asylum.

IV. MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

The third element of the refugee definition stipulates individuals can seek asylum “on account of race, religion, nationality, membership in a particular social group, or political opinion.” PWAs are a particular social group. In 2005, the Ninth Circuit deemed Russian children with serious disabilities that are long-lasting or permanent in nature to be a particular social group. 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 shared common disabilities. Moreover, U.S. asylum officers are to construe protected characteristics broadly.

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: (1) identification of a particular social group; (2) determination that the applicant is a member of this identified group; and (3) determination of whether the persecutor or feared persecutor is motivated to harm the applicant on account of his or her membership (or perceived membership) in the particular social group.

Part one of the analysis requires the identification of a group that constitutes a particular social group within the meaning of INA § 101(a)(42). To satisfy part one, a three

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144 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, 549 U.S. 801 (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”).
145 Nexus, supra note 83, at 17-18 (noting, however, that the two-prong test of immutability and social distinctiveness must be satisfied).
146 Id. at 11.
147 Id. at 17.
148 Id.
prong test has been established by the BIA to determine if a group meets the definition. \[149\] First, the group must be comprised of 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. \[150\] Determining whether a characteristic is fundamental to an applicant’s identity or conscience is subjective. Officers should, therefore, consider how the applicant experiences the characteristic as part of his identity or conscience. \[151\] 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 at school or work. \[152\] Determining whether a characteristic is fundamental is considered subjective and an asylum officer should consider basic human rights norms. \[153\] A person cannot change skin color. As previously noted, albinism is a rare genetic condition that results in a lack of pigmentation in the hair, skin, and eyes. \[154\] In almost all cases, a significant visual impairment is also involved; most PWAs are legally blind. \[155\] Second, the group must be recognizable and distinct in society. \[156\] A distinctive shared trait is an indicator of a so-
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Social distinction or visibility. PWAs cannot hide their identity. Lastly, 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.”

Since most people in Tanzania are very dark-skinned, a PWA literally stands out from the general population. Thus, the three prongs for part one are satisfied here. Further, the Immigration Judge in Makatengkeng stated that “[a]lbinism is an immutable characteristic that . . . is incapable of changing. It clearly identifies him on sight.”

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

The third and final part of the analysis requires a determination of whether the persecutor or feared persecutor is motivated to harm the applicant on account of his or her membership (or perceived membership) in the particular social

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158 Id. at 28 (citing In re A.M.E. & J.G.U., 24 I. & N. Dec. 69, 76 (B.I.A. 2007); see also, Arteaga, supra note 106, at 945 (finding that a tattooed gang member failed as a particular social group for lack of particularity).
159 Makatengkeng v. Gonzales, 495 F.3d 876, 880 (8th Cir. 2006).
160 Nexus, supra note 83, at 17-18.
161 Id. at 20 (citing INS v. Elias-Zacarias, 502 U.S. 478 (1992)).
162 Id.; see supra note 77.
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. Both the second and third parts of the analysis have been satisfied per this paper’s discussion in Part II.

V. 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. 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 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

163 Nexus, supra note 83, at 17.
164 Id. at 32.
165 See supra Part II.A-C.2.
166 See Mesaki, supra note 32.
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this very vulnerable population.