



UNIVERSITY OF CAPE TOWN

**A 'HARVEST' IN MALAWI: THE POSITION OF ALBINISM IN  
REFUGEE LAW**

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**February 2020**

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## **DEDICATION**

To the community of people with albinism in Malawi.

## **ABSTRACT**

The albinism community in Malawi has been faced with gruesome human rights violations for the past decade. These violations have included, assaults, kidnapping, mutilations, and murder. The cause of such violations is that the community of Malawi has for so long embraced the superstitious belief that the body parts of people with albinism are an essential charm for good luck. As a result of this, the albino community faces extinction because of the small population. The definition of a refugee under the 1951 Refugee Convention on the other hand, only provides for five grounds of persecution which includes race, religion, nationality, political opinion and membership of a particular social group. The dissertation seeks to unravel whether the international law grants refugee status to people with albinism.

In response to the question, the dissertation analyses the definition of a refugee under the 1951 Convention. Persecution and inability of a State to protect victims of human rights violations are important elements to establish a solid case for refugee application. Hence, the dissertation tends to analyse whether the treatment of people with albinism in Malawi amounts to persecution. Besides, whether, they could be granted refugee status in other countries. The dissertation, furthermore, tends to analyse whether there are other mechanisms of the international community that are used to protect people with albinism.

The findings in this thesis are that albinism is a ground of persecution because of the treatment that is followed due to their defined characteristics. That due to certain factors that needs to be satisfied to amount to effective national protection; Malawi has failed to protect people with albinism. Therefore, based on those factors, people with albinism could be granted international protection of refugees. Though there are other mechanisms by the international community used to protect people with albinism, there is a need to change the definition of a refugee under the 1951 Convention to accommodate problems arising in the contemporary world.

## **ACRONYMS**

AI                      Amnesty International

CAT	Convention Against Torture
DTA	Declaration on Territorial Asylum
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OAU	Organisation of African Union
PWA	People with Albinism
UDHR	Universal Declaration on Human Rights
UNHCR	United Nations High Commissioner for Refugees
USA	United States of America
WWII	Second World War

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## Chapter One

### INTRODUCTION

#### 1.1 INTRODUCTION

The international refugee law for the past decade has done a great deal in protecting and advocating for the rights of refugees all over the world. There have been many instruments in the international community which aim to promote and protect the rights of refugees in host states. The refugee crisis is not a new situation. With the rise of conflicts within countries, famine, gender, and religious issues, to mention a few, there has been a tremendous increase of people for the past decade who have fled from their home country in seek of asylum and refuge in other countries. The Refugee crisis has become a worldwide phenomenon as there are about 25.4 million people who are living as refugees in different states.<sup>1</sup> There are international organisations set up by the international community dealing with the rights and social welfare of refugees like the United Nations High Commissioner for Refugees (UNHCR), a global organisation that acts as a refugee agency for the United Nations. They are dedicated to saving lives and protecting the rights of refugees, forcibly displacement communities and stateless people. These organisations set up standards regarding the 1951 United Nations Convention Relating to the Status of Refugees<sup>2</sup> (herein referred to as the 1951 Convention) to determine refugee status for people who have fled from their countries.

The 1951 Convention determines the refugee status of an individual. The Convention defines a refugee as:

an individual who as a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted by reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself to the protection of that country; or who, not having a nationality and being outside the

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<sup>1</sup> United Nations High Commissioner for Refugees, 'Figures at a Glance', available at <https://www.unhcr.org/figures-at-a-glance.html>, accessed on 22 May 2019.

<sup>2</sup> United Nations Convention Relating to the Status of Refugees 28 July 1951, United Nations, Treaty Series, Vol. 189, p.137.

country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>3</sup>

The definition, however, leaves a lot to be desired as it only provides for five grounds of persecution. Now, as the definition quotes, the key factor of determining a refugee status is having a well-founded fear of persecution preventing one from returning to their home country. However, not all people who flee their home country to other countries are granted refugee status. This is because there must be a satisfaction of an individual having a well-founded fear of persecution. Furthermore, there must be a failure of the State to protect the persecuted individual.<sup>4</sup> Therefore, an individual cannot be granted a refugee status if they can relocate to another place within their country. Furthermore, refugees have a well-founded fear that leaves them with no choice but to flee to another country or prevents them from returning to their country.<sup>5</sup>

The grounds of persecution as provided by the Convention were restricted in a way that they excluded other factors that may force individuals to leave their countries. Further to that, the definition starts by altering the words 'as a result of events occurring before 1 January 1951' which in this respect means as a result of the Second World War. Meaning to say, events occurring after 1951 onwards were not included in the definition of a refugee.

## 1.2 PROBLEM STATEMENT

Malawi has been swamped with savage acts of attacking and killing people with albinism. The killings have swept the country for quite some time. Apart from the killings, there have been other human rights abuses, which include, abductions, robberies, naming and exclusions against people with albinism. These acts have been fuelled with the spread of a belief that bones and some body parts of people

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<sup>3</sup> Op cit (n2) art (2).

<sup>4</sup> Ibid.

<sup>5</sup> *Refugee Appeal Board Decision (Tanzania)*, South Africa: Refugee Appeal Board, 5 December 2011. In this the board concluded that, (persecution is) harassment which is so constant and unrelenting that the victim thereof sees no other way out but to flee to another country for refuge.

with albinism bring about wealth, good luck and in some instances bad luck. Due to this belief, people with albinism have been targeted for their body parts.<sup>6</sup>

The belief, however, has been around for a very long time. People with albinism have been disappearing for as long as it can be remembered. Unfortunately, the cases were not frequent and most of them were not reported. The attacks became frequent at the end of the year 2014. Since 2013, about 26 Malawian albinos have been killed and 130 injured.<sup>7</sup> The figures could be higher as there is no systematic documentation of crimes against people with albinism in Malawi.<sup>8</sup>

Several cases have been reported that described the gruesome murder of people with albinism (PWA). The Human Rights Organisation Amnesty International (AI) and the Malawi Police reported on the gruesome murder of Mr. Machinjiri who had his limbs chopped off.<sup>9</sup>

Another case involved a two-year-old girl, Jean Ngwedula, who went missing in December 2017.<sup>10</sup> The father of the child had reportedly sold her to a traditional doctor for ritual purposes to neighbouring country of Mozambique.<sup>11</sup> A similar case was that of a nine-year-old Harry who was abducted from his home when a gang of people broke into his home at night. His severed head was found in a neighbouring village some weeks later. Mozambique was identified along with the Democratic Republic of Congo, South Africa, Swaziland and Tanzania for the cross-border trade in body parts.<sup>12</sup>

The purpose of the murders and attacks was to sell the body parts to witch doctors and other practitioners of traditional medicine. What caught the country's and world's attention to these gruesome acts was the way the attacks were being staged. For example, the fact that people were being attacked inside their homes had raised

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<sup>6</sup> Lameck Masina 'Malawi's Albinos Begin 2019 with Fear of Renewed Attacks', January 03, 2019, available at <https://www.voanews.com/a/malawi-s-albinos-begin-new-year-with-fear-of-renewed-attacks/4727109.html>, accessed on 22 May 2019.

<sup>7</sup> Ibid.

<sup>8</sup> Amnesty International 'Albinism in Malawi: Stop the Killings', available at <https://www.amnesty.org/en/latest/campaigns/2016/06/albinism-in-malawi-stop-the-killings/>, accessed on 6 June 2019.

<sup>9</sup> Ibid

<sup>10</sup> Amnesty International, 'Malawi: Impunity Fuels Killings of People with Albinism for their Body Parts', 28 June 2018, available at <https://www.amnesty.org/en/latest/news/2018/06/malawi-impunity-fuels-killings-of-people-with-albinism-for-their-body-parts/>, accessed on 22 May 2019.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

questions that the attacks were organised and planned for.<sup>13</sup> It has been estimated that between 7,000 and 10,000 people in Malawi live with the condition of albinism.<sup>14</sup> Thus normally one in every 1,800 people has albinism.<sup>15</sup> This raises an alarm that if the attacks persist, the current population of PWA could be extinct in a matter of time.

Due to these attacks, people living with albinism have resorted to an isolated type of life as they fear for their lives and safety. This has brought in a negative impact on their lives. People with albinism in Malawi have become marginalised and vulnerable as they are subjected to, abductions, killings, and intimidation, thereby restricting their right to dignity, life, education, security, and freedom of expression just to mention a few.

With that said, the Convention was adopted to guide in the protection of the rights of people with a well-founded fear of persecution to seek and enjoy asylum and refuge in a foreign State.<sup>16</sup> However, with these unprecedented killings, it is central to know whether international law does recognise the killing and attack on people with albinism as persecution. Can people with albinism be granted refugee status under international law? Besides, is albinism a ground for refugee status? Lastly, how has the international community responded to the said crisis in the region?

### **1.3 SIGNIFICANCE OF THE RESEARCH**

The research will provide a better understanding and interpretation of the 1951 Refugee Convention regarding the definition of a refugee. Therefore, the research will set up a broad understanding of asylum-seeking which would conform with international human rights standards. It could also enlighten people with albinism about the legal options they have under international refugee law to ensure their protection from persecution and extinction. Furthermore, the international community could also clearly understand its role under refugee law in protecting PWA.

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<sup>13</sup> Adrian Blomfield & Henry Mhango, 'Malawi albinos kidnapped and sacrificed by witchdoctor gangs on the hunt for election charms' The Telegraph 6 April 2019, available at <https://www.telegraph.co.uk/global-health/terror-and-security/malawi-albinos-kidnapped-sacrificed-witchdoctor-gangs-hunt-election/>, accessed on 30 May 2019.

<sup>14</sup> Amnesty International, 'Towards effective criminal justice for people with albinism in Malawi', available at <https://www.justice.gov/eoir/page/file/1079266/download>, accessed on 24 May 2019 at 3.

<sup>15</sup> Ibid.

<sup>16</sup> United Nations High Commissioner for Refugees, 'The 1951 refugee convention', available at <https://www.unhcr.org/1951-refugee-convention.html> accessed on 25 May 2019.

## 1.4 METHODOLOGY

The research will primarily be based on qualitative data of which will be restricted to desk research. On this, there will be an entirety use of primary sources such as journals, textbooks, reports by state and non-state actors, case law and legislation. Hence the research will be analysing whether albinism and the treatment awarded to them because of their condition amounts to persecution. This will be followed by an analysis of whether Malawi has failed to provide the required national protection to uphold their human rights. The analysis of the position of Malawi will provide an insight to determine whether people with albinism would be granted the international protection of refuge in other countries. Finally, the response of the international communities analysing whether there are other mechanisms that are used to protect people with albinism.

This combination will, therefore, enable the research question set forth, to be challenged and developed more fully.

## 1.5 LITERATURE REVIEW

The law relating to refugees is a very complex one. To start with, refugee law is and should be part of human rights law since it is ultimately concerned with the protection of the human person, albeit of a more vulnerable kind.<sup>17</sup> In international law, the definition of a refugee provides in the essence that, there must be persecution regarding a status, that is race, religion, political opinion, membership of a particular social group and nationality. The reason or the key component behind the grounds for persecution is whereby States must fail to protect people who face persecution. This has led to the basic rule that States must protect people within their jurisdiction.<sup>18</sup> If the State fails to do so, the obligation now switches to the international communities dealing with issues of human rights. The construction of this research will be based on the published work of renowned researchers. This will enable us to unravel the aim of this research which is to analyse whether people with

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<sup>17</sup> Vera Gowlland-Debbas, 'The Problem of Refugee in the Light of Contemporary International Law Issues', Martinus Nijhoff Publishers (26 and 27 May 1994), available at <https://www.unhcr.org/en-my/4ca348026.pdf>, accessed on 25 May 2019.

<sup>18</sup> Article 2 par 1 of the International Convention on Civil and Political Rights, entered into force on 23 March 1976.

albinism are being persecuted and whether the government is unable or unwilling to provide protection.

Since the 1951 Convention did not define the term 'persecution', scholars have provided different interpretations of the meaning according to their understanding. The general interpretation of persecution as agreed by scholars is that persecution must involve acts of harm that hinder the enjoyment of human rights.<sup>19</sup> These acts of harm as perceived must include discrimination, acts of violence, threats to life and freedoms.<sup>20</sup> These acts as agreed by Goodwin-Gill,<sup>21</sup> Fatima Khan and Tal Schreier<sup>22</sup> must be linked to specific characteristics of the victim of the violence. This means that the characteristic of the individual must be the trigger of the harassment that they are being subjected to. Acts of persecution have also been considered to cover prohibited conduct under the 'Prohibition of Cruel Inhuman or Degrading Treatment or Punishment'<sup>23</sup> and repeated punishment which does not concede with the offense.<sup>24</sup>

Other scholars opt for the interpretation of persecution to be considered on a case by case basis.<sup>25</sup> Grahl Madsen, for example, argued that:

It seems as if the drafters wanted to introduce a flexible concept which might be applied to circumstances as they rise, in other words that they capitulated before the inventiveness of humanity to think up ways of persecuting fellow men.<sup>26</sup>

Therefore, the fact that the term was not defined in the Convention provided the room for different interpretations depending on the circumstance and form.

Persecution has also been perceived in its contextual form. Meaning that it must stem from authorities or private individuals.<sup>27</sup> In that meaning, persecution would be said to be organised by certain individuals against certain persons because of their characteristics. Francesco Maiani emphasised on this by explaining that it is

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<sup>19</sup> Fatima Khan & Tal Schreier *Refugee Law in South Africa* (2014) 50.

<sup>20</sup> *Ibid.*

<sup>21</sup> Guy S. Goodwin-Gill *The Refugee in International Law* 2ed (1996) 66.

<sup>22</sup> *Ibid.*

<sup>23</sup> Prohibition of Cruel Inhuman and Degrading treatment or Punishment Adopted on 4 December 1986, A/RES/41/134

<sup>24</sup> *Op cit* (n21) 67.

<sup>25</sup> *Ibid.*

<sup>26</sup> Grahl Madsen A *The status of Refugees in International Law* vol 1 (1966) 193.

<sup>27</sup> *Ibid.*

harassment that is aimed at a certain group because of their defining characteristics and the inability or unwillingness of authorities to provide protection.<sup>28</sup> James C. Hathaway in support of this explained the standard of persecution to focus on the existence of persistent harassment by authorities or with their knowledge.<sup>29</sup> He further explained that there has to be a need to show a sustained or systematic risk rather than an isolated incident of harm.<sup>30</sup>

Responsibility, on the other hand, has been viewed in two contexts, this is on the receiving and origin State. Starting with the receiving State, the general idea has been that, States are not supposed to return individuals to a country where they would likely face persecution.<sup>31</sup> It is an internationally recognised idea that is known as “the principle of *non-refoulement*”.<sup>32</sup> Furthermore, it is natural in a civilised community that those who cannot summon an international legal instrument to their benefit should find refuge in some other country.<sup>33</sup> However, it is a requirement that has not been imposed on States as an obligation because the only principle that imposes this obligation is that of *non-refoulement*.<sup>34</sup> Hence, this dissertation will tend to analyse how States could be bound by the principle and whether the 1951 Refugee Convention could be regarded as a human rights treaty as proposed by numerous scholars.<sup>35</sup>

On the responsibility of the origin State, States have the obligation to protect its nationals.<sup>36</sup> This responsibility has been categorised into three, which include the responsibility to respect, to protect and fulfil the rights of individuals in its jurisdiction.<sup>37</sup> Therefore, it has been argued by the likes of Nafees Ahmad that States should conduct itself in a manner that would protect its nationals, so they do not seek

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<sup>28</sup> Francesco Maiani ‘The Concept of Persecution in Refugee Law: Indeterminacy, Context Sensitivity, and the Quest for a principles approach’ 2019-02 *The Grihl Dossiers*.

<sup>29</sup> James C. Hathaway *Law of Refugee Status* (1991) 101.

<sup>30</sup> *Ibid.*

<sup>31</sup> Article 3 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, GA/RES/39/46/1984.

<sup>32</sup> *Op cit* (n2) art 32.

<sup>33</sup> Nafees Ahmed, ‘Refugee-State Responsibility, the Country of Origin and Human Rights’, (2008) vol 10, *Asia-Pacific Journal on Human Rights and the Law*.

<sup>34</sup> Catherine Phuong, ‘Identifying State’s Responsibilities towards Refugees and Asylum Seekers’, available at <https://esil-sedi.eu/wp-content/uploads/2018/04/Phuong.pdf>, accessed on 20 November 2019.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Op cit* (n18).

<sup>37</sup> *Ibid.*

asylum in foreign States.<sup>38</sup> This statement has been uttered in a way that would make one contemplate whether seeking asylum, particularly the act of seeking refuge is a right or a burden. Furthermore, Ahmad's argument on the sovereign right of States to close its borders on the person seeking admission leaves a lot to be desired. Nevertheless, it is a responsibility that must be taken into deep consideration as much as human rights are concerned.

It seems the 1951 Refugee Convention has been faced with rough edges in trying to accommodate the contemporary world. The fact that the Convention was drafted in 1951 with only a handful of countries makes it difficult to conform to the world of today. Hence the dissertation also seeks to loosen the rough edges and analyse its accommodability.

## 1.6 CHAPTER SYNOPSIS

Chapter one introduces the research and the plight of people with albinism in Malawi. Besides, the question is posed whether they would be able to obtain refugee status in other countries.

Chapter two will analyse the meaning of persecution and identify the grounds of persecution in detail as stipulated by the 1951 Convention and the African Union convention. From there, the criteria for the general determination of refugee status will be addressed. This will help to conclude on whether albinism falls as a ground for persecution under international law.

Chapter three will look at the responsibility of the origin State. This will be drawn from the responsibility to protect, promote and fulfil. Furthermore, refugee status requires failure or the inability of origin State to prevent attacks.<sup>39</sup> Therefore, the chapter will seek to analyse the justice system of Malawi, as a case study, and analyse how the government is working towards preventing attacks to protect the rights of people with albinism.

Chapter four will look at the responsibility of receiving states. Based on the principle of *non-refoulement* and other international legal principles, the idea in this chapter is to analyse whether States have a binding duty to protect foreign nationals

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<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

who seek refuge. Furthermore, there have been incidents where people with albinism have sort asylum in other countries but have not been granted refugee status. Hence, the chapter will tend to look at whether people with albinism would be granted refugee status.

Chapter five will look at the response of the international community on the catastrophe and what other international mechanisms are currently used to protect PWA. Additionally, the chapter will look at the role of the UNHCR regarding the protection of PWA. The chapter will also analyse the situation of people with albinism in some parts of Africa.

Chapter six will conclude the findings of the study and draw recommendations.

## Chapter Two

### PERSECUTION

#### 2.1 INTRODUCTION

The term 'persecution' has been used in different ways to refer to catastrophic events that transpired throughout history. The earliest event to be referred to as 'persecution' was the mistreatment of Christians in the Roman empire.<sup>40</sup> Today, the word persecution has been cited in treaties and conventions. The 1951 Convention provides grounds of persecution, however without explaining the meaning of persecution. The convention under article one explains that a refugee is an individual who:

...and owing to a well-founded fear of being persecuted for reasons of race, nationality, religion, political opinion and membership of a particular social group, is outside of their home country and is unable to avail the protection of their state.<sup>41</sup>

Article 1 of the Organisation of African Union convention, on the other hand, defines a refugee in the same way the 1951 Convention does.<sup>42</sup> The common thing between the two definitions is that they set out grounds or forms of persecution through an individual would claim on.

The term 'persecution' has also been referred to in the Rome Statute of International Criminal Court under article 7.<sup>43</sup> The term 'persecution' was also used in the Nuremberg trials after the Second World War.<sup>44</sup>

Even though the instruments continuously used the term 'persecution', there is no provision for the definition. Therefore, this chapter seeks to analyse the definition of the said term. This will include the elements and grounds of persecution, the agents

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<sup>40</sup> Sophie Lunn-Rockliffe, 'Christianity and the Roman Empire', available at [https://www.bbc.co.uk/history/ancient/romans/christianityromanempire\\_article\\_01.shtml](https://www.bbc.co.uk/history/ancient/romans/christianityromanempire_article_01.shtml), accessed on 5 June 2019.

<sup>41</sup> Convention and Protocol Relating to the Status of Refugees, res. 2198 (XXI), U.N.G.A

<sup>42</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969 by the CAB/LEG/24.3.

<sup>43</sup> The Rome Statute of International Criminal Court, Adopted on 17 July 1998, Entry into force: 1 July 2002. The article provides that; "crimes against humanity means any of the following acts...persecution against any identifiable group...." It explained on grounds of persecution which include race, nationality, political opinion, membership of a social group and religion.

<sup>44</sup> Holocaust Encyclopaedia, 'The Nuremberg trials', available at <https://encyclopedia.ushmm.org/content/en/article/the-nuremberg-trials>, accessed on 25 November 2019.

of persecution. An analysis on the determination of refugee status will also be crucial in this and finally whether albinism could be a ground of persecution.

## 2.2 MEANING OF PERSECUTION

### 2.2.1 Etymological Meaning of Persecution

The dictionary meaning of the term 'persecution' is to oppress another for holding a belief or an opinion.<sup>45</sup> The term is derived from old French *persecucion* which means damage, suffering or affliction.<sup>46</sup> It is a direct word from the Latin verb *persecutionem* which is a past participle of the verb *persequi* which means to pursue, to follow or to hunt down.<sup>47</sup> As explained earlier, the term persecution was first referred to during the hunting down of Christians during the Roman empire.<sup>48</sup> Several scholars have written about the term persecution however, only a few have expressed the exact meaning of the term. Perhaps the assumption is that everybody knows the meaning of persecution which on the other hand is not much of the truth. For example, Jean-Jacques Rousseau in "the Social Contract" referred to the 'persecution' of Christians though did not clarify what it meant.<sup>49</sup> Persecution was also thought to be associated more closely with the annihilation of public discussion and pressure.<sup>50</sup>

John Stuart Mill's argument on persecution was based on the persecution of Christians.<sup>51</sup> Jaakko Kuosmanen's argument contrary expressed that persecution had something to do with the suppression of opinions and beliefs with an element of "asymmetrical power relationships" that were between intermediaries.<sup>52</sup> This is a recognition that there is an organised idea behind the persecution. John Locke, in contrast, linked the idea of persecution to suffering.<sup>53</sup> The suggestion nevertheless was that persecution has something to do with the power which is referred to as "institutionalised discrimination".<sup>54</sup> Therefore Locke defined persecution as

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<sup>45</sup> Online etymology dictionary 'Persecution', available at <https://www.etymonline.com/word/persecution>, accessed on 10 June 2019.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Jean-Jacques Rousseau *The Social Contract or The Principles of Political Rights* (1893) 206.

<sup>50</sup> Ibid.

<sup>51</sup> Carr Robert 'The Religious Thought of John Stuart Mill: A Study in Reluctant Scepticism' (1962) vol. 23 no.4 *Journal of the History of Ideas* 475-495.

<sup>52</sup> Jaakko Kuosmanen 'What's So Special About Persecution?' (2014) vol. 17, no. 1, *STOR*, <https://www.jstor.org/stable/24478705> 129-140.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

something that had been established in practice or had been made as part of official practice to cause suffering or inflict pain on a certain characterised group of people.

This helped to unmask the meaning of the term persecution. Normally the term persecution is understood to be related to the infliction of harm by individuals of higher ranking.<sup>55</sup> This, contrarily, concludes that, if persecution is said to be organised then it means that there are perpetrators. Nevertheless, this would be discussed later in this chapter.

### 2.2.2 Persecution under International Law

The international law has referred to the term ‘persecution’ in so many instruments. This includes the treaties and conventions. Yet again there is not any proper definition or meaning of the term itself. The 1969 Vienna Conventions on the Law of Treaties<sup>56</sup> formed part of International Customary Law which assists in treaty interpretation. Article 31 (1) of the Convention provides on how a treaty is to be interpreted. In that, it explains that a treaty is to be “interpreted in good faith which is in accordance with the usual meaning that is to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>57</sup> Further to that, three principles that have been identified to be used in interpreting a treaty. These were identified by McHugh J in an Australian case of *Applicant A v Minister for Migration and Ethnic Affairs*.<sup>58</sup> The first one is that there must be good faith in interpreting. The second one is that there must be an accurate presentation from the presumed representation of the parties’ intentions. And lastly, this is where “the usual meaning is not to be determined in a vacuum removed from the context of the treaty or its object or purpose.”<sup>59</sup>

The third principle of interpretation was agreed in the case *Golder v United Kingdom*.<sup>60</sup> In this case, the European Court of Human Rights noted that the preamble of an international convention may be used to determine its objective and purpose.<sup>61</sup> This case provided a guideline that expressed that, an interpretation

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<sup>55</sup> Ibid.

<sup>56</sup> United Nations, ‘Vienna Convention on the Law of Treaties’, 23 May 1969, Treaty Series, vol. 1155, available at <https://www.refworld.org/docid/3ae6b3a10.html>, accessed 18 June 2019.

<sup>57</sup> Ibid.

<sup>58</sup> *Applicant A & anor v. Minister for Immigration & Ethnic Affairs & anor* (1997) 190 CLR 225.

<sup>59</sup> Ibid.

<sup>60</sup> *Golder v United Kingdom* (1975) App No 4451/70, A/18, ECHR 1, (1979) 1 EHRR 524.

<sup>61</sup> Ibid.

could be found in the preamble of a treaty or convention. With that said, even though the preamble of the 1951 Refugee Convention does not provide for the meaning of the term 'persecution', the purpose of the convention could be understood from it.

Since everyone is entitled to human rights,<sup>62</sup> conventions serve as a back up to the Universal Human Rights declaration. The court in *Canada (Attorney General) v Ward*<sup>63</sup> expressed that:

International refugee law was formulated to serve as a back up to the protection one expects from the State of which an individual is a national. It was meant to come into play in situations only when protection is not available and only in certain situations. The intention of the international community was for the persecuted individuals to approach their home States for protection before other States engage their responsibility.<sup>64</sup>

A commentary on the 1951 Convention and the 1967 Protocol relating to refugees provided the general issues regarding interpretation. It first explained on wording, by saying a word is supposed to be defined from its historical origin.<sup>65</sup> So basically, a dictionary meaning alone could not suffice for the real meaning of a word because every dictionary provides its meaning.<sup>66</sup>

The second part is the systemic interpretation of the word.<sup>67</sup> Early attempts in determining contents of the Convention suggested persecution only happened in places where applicants' life or freedom were being threatened this, however, became outdated.<sup>68</sup> The principle of non-refoulement, however, changed this concept in the way that it provided protection different from who a refugee was and who was not.<sup>69</sup> Hence, referring to the principle of *non-refoulement* to determine persecution is however not useful.

The third part is to look at the object and purpose of that legal term.<sup>70</sup> This is found or explained in the preamble. Therefore, in the preamble of the 1951

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<sup>62</sup> Article 1 'Universal Declaration of Human Rights' 1948.

<sup>63</sup> *Canada (Attorney General) v Ward* (1993) 2 SCR 689.

<sup>64</sup> *Ibid.*

<sup>65</sup> Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, (2011) 89.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Op cit* (n65) 91.

Convention, the General Assembly affirmed the enjoyment of human rights to everyone without discrimination.<sup>71</sup>

## 2.3 ELEMENTS OF PERSECUTION

### 2.3.1 Historical Elements

The modern term of persecution is derived from the historical events of persecution. It is therefore important to discuss these elements first before the modern elements under international law. The historic argument to persecution as argued by Kuosmanen was that it comprised three components.<sup>72</sup> These components provide for the meaning of the term because they give a clear picture of what persecution is about, hence it would be referred to in this chapter. These components include; asymmetrical and systematic threat; severe and sustained harm; and unjust discriminatory targeting.<sup>73</sup> Even though these components separately amount to acts of harm, Kuosmanen argued that they institute a core of a distinct concept of 'persecution'.<sup>74</sup>

#### 2.3.1.1 *Asymmetrical and systematic threat*

It has been argued that those who face the threat of persecution also face a systematic threat.<sup>75</sup> This means that there are interconnected components. So basically, there is a system that inflicts harm to an identified group of individuals which is widespread rather than isolated.<sup>76</sup> The perpetrators jointly possess an extensive capacity which causes an interruption in the lives of victims.<sup>77</sup> Accordingly, there must be a clear power relationship that is asymmetrical. For example, in Nazi German, not only did they have the power to inflict harm on the ethnic and the social groups that they targeted, but also other bordering countries found it hard to resist their intentions.<sup>78</sup>

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<sup>71</sup> The 1951 Refugee Convention Preamble.

<sup>72</sup> Op cit (n52) 131.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Op cit (n52) 132.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Holocaust Encyclopaedia 'The Nazi rise to power' available at <https://encyclopedia.ushmm.org/content/en/article/the-nazi-rise-to-power>, accessed on 25 November 2019.

In other words, the asymmetrical and systematic threat entails that the threat or harm must be widespread through which the victims find it hard to resist and even if they try to fight against it, the harm should be irresistible.

### 2.3.1.2 *Severe and sustained harm*

Persecution, to begin with, refers to something powerful enough to force individuals to change their normal lives.<sup>79</sup> This includes fleeing from their homes to other places to seek refuge. There should be severe harm that ranges from imprisonments, killings, torture and forced migrations.<sup>80</sup> The severity of harm is said to lie in-between “threats to life or freedom” and “mere harassment and annoyance”.<sup>81</sup> The study of the concept of persecution referred to the deprivation of needs as part of persecution.<sup>82</sup> Scholars have argued that certain things could be opposed to being of universal value when they are fundamental in the pursuit of goals.<sup>83</sup> Therefore it is from the needs that provide a possible analysis to frame discussions regarding the threshold of the severity of harm in persecution.

Furthermore, persecution is more than just one time of exposure to harm.<sup>84</sup> In as much as detaining an individual for a few hours because of his ideologies amounts to severe harm,<sup>85</sup> however, it would not amount to persecution as the harm was only for one time. That is to say that the detention must be sustained to amount to persecution.

### 2.3.1.3 *Unjust discriminatory targeting*

As explained already that persecution targets individuals therefore, it is not uncritical and an accidental act.<sup>86</sup> Groups of individuals are targeted with severe and sustained harm. The acts of harm are specifically targeted to an individual's core beliefs, psychological or physical characteristics of an individual.<sup>87</sup> All the historical acts of persecution were mainly based on religious beliefs, race, nationality or sexual

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<sup>79</sup>Op cit (n52) 134.

<sup>80</sup>F Khan & T Schreier, *Refugee Law in South Africa* (2014) 50.

<sup>81</sup>Ibid.

<sup>82</sup>Andrew E. Shacknove 'Who is a Refugee?' (1985) *Ethics* vol. 95, no. 2 *JSTOR*, <https://www.jstor.org/stable/2380340> 281.

<sup>83</sup>Ibid.

<sup>84</sup>James C. Hathaway, *Law of Refugee Status* (1991) 101.

<sup>85</sup>Ibid.

<sup>86</sup>Ibid.

<sup>87</sup>Op cit (n52) 146.

orientation.<sup>88</sup> These characteristics were hard or impossible for one to change. The Conventional qualifications of persecution also known as the 'nexus clause', were a result of the fact that the people were historically affected by various forms of socio-political disfranchise therefore sought redress within States.<sup>89</sup> It is however observed that the nexus clause does not entirely cover all the possible scenarios of persecution as most characteristics possessed by individuals that are hard to change extend beyond the categories outlined in the nexus clause.

### 2.3.2 International law elements

The international law elements of persecution have been outlined under article 33 of the 1951 Convention.<sup>90</sup> The Convention sets out the manner through which persecution must be interpreted. The first one is whereby persecution must be for reasons of religion, race, political opinion, nationality or membership of a particular social group.<sup>91</sup> Secondly, the article further explains that no state shall return an individual to a place where his life and freedom would be threatened. Therefore, threats to life and freedom must always be considered as persecution.

There have been several scholarly opinions behind the term 'persecution'. James Hathaway as explained earlier argued that persecution must include all forms of unimaginable acts depriving one of international protection.<sup>92</sup> He argued further that there must be a flexible approach for the Convention to suit the contemporary world.<sup>93</sup> However, the flexibility of interpretation must be balanced against the requirements of the rule of law. Laws LJ in the case of *Sepet v Secretary of State*<sup>94</sup> stated that:

However wide the canvas facing the judge's brush, the image he makes must be firmly based on some conception of objective principle which is recognized as a legitimate source of law.<sup>95</sup>

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<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> 1951 Convention Relating to the Status of Refugees.

<sup>91</sup> Ibid.

<sup>92</sup> Hathaway, J., & Foster, M. *The law of refugee status* (2014) (2ed.) 183-186.

<sup>93</sup> Ibid

<sup>94</sup> *Sepet v. Secretary of State for the Home Department*, (2001) Imm AR 452 (Eng. CA, May 11, 2001).

<sup>95</sup> Ibid.

Grahl-Madsen also believed in the same ideology that the drafters intentionally did not define the term to allow the inclusion of all the forms of persecution that would arise.<sup>96</sup> In his own word he argued that:

the term 'persecution' has nowhere been defined and this is probably deliberate...it seems as if the drafter wanted to introduce a flexible concept which might be applied to circumstances as they arise; in other words that they capitulated before the inventiveness of humanity to think up ways of persecuting fellow men.<sup>97</sup>

Fatima Khan and Justin de Jager agreed with Hathaway and Madsen that even though there are several elements of persecution as per the definition, however, uncertainty remains about other definitional elements.<sup>98</sup>

Persecution could be identified through specific principles. The first one is where it must be identified universally and flexibly.<sup>99</sup> Secondly, there must be serious harm where it should not be limited to severe physical harm or a threat to life or freedom.<sup>100</sup> Thirdly, there must be a failure by the State to protect against the harm.<sup>101</sup> The fourth and last part is where the perpetrator does not need to be the State.<sup>102</sup>

From the arguments, there is no definition of persecution. Despite the provision on grounds of persecution under the 1951 Convention, certain acts in the contemporary world would be referred to persecution. The key element for persecution is the hindrance of freedoms that leads to harm or threats to life. Now the question would be; what is the harm? Or to what extent should the so-called 'harm' reach to amount persecution? Because merely thinking if one would just say that persecution involves harm then any scratch on a human body would amount to persecution. But as already explained earlier persecution must be severe and so should the harm. It must be so severe that it should force one to flee or relocate.

Fatima Khan explained very clearly on acts of harm. The description was, there are five different forms of harm.<sup>103</sup> These include; flexibility, physical and

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<sup>96</sup> Grahl-Madsen A, *The Status of Refugees International Law* (1966) vol.1 193.

<sup>97</sup> Ibid.

<sup>98</sup> Khan F and Schreier T, *Refugee Law in South Africa* (2014).

<sup>99</sup> Op cit (n43).

<sup>100</sup> Rodger Haines Q.C 'Gender Related Persecution' in Erika Feller, Volker Turk and Frances Nicholson (ed) *Refugee Protection in International*, (2003) 330.

<sup>101</sup> Op cit (n100) 332.

<sup>102</sup> Ibid.

<sup>103</sup> Op cit (n80) 51.

psychological, harassment and discrimination vs serious harm, persistency, and similarly placed individuals.<sup>104</sup> The following paragraphs elaborate clearly:

### 2.3.2.1 Flexibility

The argument was that harm should not amount to one form only but rather other unimagined forms.<sup>105</sup> This approach acknowledged that it is not possible to outline all the forms of harm because it limits all other acts of harm that could be defined by persecution. The argument was taken further that the only way of understanding persecution is to deal with each case separately because this helps to provide thoughtful consideration of the kind of harm that could amount to persecution.<sup>106</sup> However, even though it could be considered like that, there has not been a suggestion by the courts yet as to what approach would allow flexibility.<sup>107</sup>

### 2.3.2.2 Physical and psychological

The recognition in this argument was that persecution does not amount only to physical harm but psychological and emotional harm as well.<sup>108</sup> A referred example was in the United States where mental suffering, threats to eminent death, threats that another person would be tortured or killed, prolonged receipts of threats and forced compliance with religious laws or practices that are abhorrent to an applicant's belief.<sup>109</sup> Furthermore, courts in the United States recognised that witnessing harm to a family member could constitute severe psychological harm which could be raised to the level of persecution.<sup>110</sup> The case of *Mayongo v Refugee Appeal Board*<sup>111</sup> adopted a similar decision where the South African court concluded that the applicant had compelling reasons to qualify as a refugee.<sup>112</sup> The compelling reasons were the post-trauma syndrome which resulted from past experience.<sup>113</sup>

### 2.3.2.3 Harassment and discrimination vs Serious harm

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<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> Op cit (n80)52.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> *Mayongo v Refuge Appeal Board* (2007) JOL 19645 T.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

Harassment was argued to amount to persecution even though it is not a form of persecution. The reference to this argument was in the case of *New Zealand Refugee Appeal No 2039/93*.<sup>114</sup> The court recognised that various threats to human rights could deny human dignity in key ways and should be appropriately recognised as persecution.<sup>115</sup> Therefore, excessive harassment could result in psychological trauma which is a form of persecution as per the *Mayongo* case<sup>116</sup>.

Discrimination, on the other hand, is prohibited under the international human rights law.<sup>117</sup> Furthermore, acts of discrimination amount to badges and incidents of slavery.<sup>118</sup> So basically discrimination is already a non-starter because it is blacklisted. The case of *New Zealand Appeal No 71427/99* supported this view where it recognised that “the cumulative effect of threats to human rights is particularly important in the context of refugee claims based on discrimination.”<sup>119</sup>

#### 2.3.2.4 Persistency

Persistency generally means something that lasts for a long time. The argument has been that not all forms of persecution require persistence.<sup>120</sup> Therefore, a one-off act of persecution suffices.<sup>121</sup> However, the South African Refugee Board concluded that single acts of harm do not amount to persecution unless the act is seriously harmful to the individual.<sup>122</sup> The case of *Mustafa Doymus v Secretary of State for the Home Department* considered that acts of persecution need to be persistent to suffice.<sup>123</sup> The case concluded that persistence is usual but not a universal criterion for persecution therefore single acts affecting one’s rights should suffice as persecution.<sup>124</sup> The idea behind the reasoning was because some forms of harm are not repetitive.<sup>125</sup> For example, witnessing the death of a family member which leaves one with a traumatic experience that haunts them for a long time.

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<sup>114</sup> *New Zealand: Refugee Status Appeals Authority* (1996) No 2039/93.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> Article 2, Universal Declaration of Human Rights.

<sup>118</sup> *Brown v Board of Education of Topeka* (1954) 357, U.S.

<sup>119</sup> *New Zealand: Refugee Status Appeals Authority* (2000) Appeal No. 71427/99.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Mustafa Doymus v Secretary of State for the Home Department*, (2000) Immigration Appeal Tribunal, Appeal no. HX/80112/99.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

### 2.3.2.5 Similarly placed individuals

The argument surrounding this has been that an individual does not need to experience persecution. If another individual suffered persecution and there is another individual with the same characteristics and if there is enough evidence to support the claim, then it will amount to persecution.<sup>126</sup> The argument was raised in the case of *Chaudri v Canada (Minister of Employment and Immigration)*.<sup>127</sup> The applicant's evidence was that similar people doing the same activities as the applicant had been arrested and tortured and held in incarceration.<sup>128</sup>

This provides the court with the idea that an individual need not to have suffered to prove persecution but the danger following the similarity in traits with other individuals.<sup>129</sup>

## 2.4 AGENTS OF PERSECUTION

Debates surrounding the meaning of persecution have raised questions for one to believe that harm is organised. The fact that individuals are left with no choice but to leave their habitual countries to another means that the government did not offer any sort of assistance either willingly or unwillingly. Therefore, does this mean that governments are behind persecution?

It was observed that governments could sometimes not be able to suppress persecution because they could be reluctant to do so.<sup>130</sup> This could be the result of governments feeling like there are more important things to do than protecting the said groups.<sup>131</sup> In some cases, the government would expect the victims to reach an extent where they feel like they are completely helpless before they intrude to assist.<sup>132</sup> Or it could be the government conspiring with the persecutors. Therefore, it has been argued that the consequence in such cases could be conventional

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<sup>126</sup> Ibid

<sup>127</sup> *Chaudri v Minister of Employment and Immigration* (1986) 69 NR 114 (FCA).

<sup>128</sup> Ibid.

<sup>129</sup> Zimmermann A. (ed) *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (2011).

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Muleya Mwananyanda, 'Malawi: Minister's shameful denial comments fuelling attacks against persons with albinism, Amnesty International', Amnesty International 21 February 2019, available at <https://www.amnesty.org/en/latest/news/2019/02/malawi-minister-shameful-denial-comments-fueling-attacks-against-persons-with-albinism/>, accessed on 25 May 2019.

persecution because it does not follow its notion as it is restricted to the actions of governments and agents.<sup>133</sup>

The common definition of an agent is someone who acts for or on behalf of another individual.<sup>134</sup> Likewise in persecution, the thought is that there must be a master mind behind acts of harm. Furthermore, it is a definite fact that persecution is not coincidental because it is persistent and severe.<sup>135</sup> Therefore, the core factor in persecution is the unwillingness or inability of the government to protect. So, for whatever reason that would prevent the government from offering protection, it could conclude that the government plays a role. This is because governments must protect individuals within their jurisdiction.<sup>136</sup>

Grahl Madsen connected the dots of persecution by arguing that it is acts or situations where the government is accountable.<sup>137</sup> This included acts that are committed by the perpetrators at the government's disposal or behaviour's that are tolerated by the government leaving the victims unprotected.<sup>138</sup> These would include a lack of investigations and passing of laws to curb such acts. The decisive factor in his view is the place of those acts prevailing in the country of origin. For example, if they are irregular or quickly terminated or continue for a certain period without the government checking them effectively, which therefore amount to a flaw in the organisation of the State.<sup>139</sup>

The French jurisprudence of the "*commission des recours*"<sup>140</sup>, with references to protection under article 1A (2) and 1C (1) of the 1951 Convention, implied that persecution which does not derive from public authorities or government officials cannot form the basis of a convention refugee claim.<sup>141</sup> Therefore, 'public authorities' in this respect have been interpreted to include the government, the administration,

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<sup>133</sup> Ibid.

<sup>134</sup> Cambridge Dictionary 'Agent' available at <https://dictionary.cambridge.org/dictionary/english/agent> accessed on 25 November 2019.

<sup>135</sup> Ibid.

<sup>136</sup> International Covenant on Civil and Political Rights G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

<sup>137</sup> Grahl Madsen A, *The status of Refugees in International Law* vol 1 (1966) 189.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

and the military.<sup>142</sup> However, political parties, participants in civil conflicts, criminals and extremists have been excluded.<sup>143</sup>

## 2.5 GROUNDS OF PERSECUTION

Grounds of persecution have been provided in a definition of a refugee under the 1951 Refugee Convention.<sup>144</sup> Likewise, the OAU Convention also provides the same.<sup>145</sup> These include; religion, nationality, race, membership of a particular social group, and political opinion.

### 2.5.1 Race

Race could be defined as the physical appearance of an individual that distinguishes the physical characteristics of other individuals.<sup>146</sup> To set up race as a ground of persecution, an account should be taken from the Convention Against All Forms of Racial Discrimination.<sup>147</sup> Discrimination based on the racial background has encountered a detest from the international community.<sup>148</sup> Therefore, practices of racial discrimination that amount to persecution of its own are provocative.

The UNHCR handbook, however, interpreted the understanding of race to include “all kinds of ethnic groups that are referred to as races in the common usage.”<sup>149</sup> The court of appeal of Canada has emphasized that when a claimant belongs to a race of which is a defining element of which they belong to, then the ground of persecution is race.<sup>150</sup> Therefore as argued by Uthaya Kumar that there is no need to be looking at other grounds.<sup>151</sup>

### 2.5.2 Religion

Religion has been the ancient ground of persecution with the Christians in the Roman empire as an example.<sup>152</sup> A lot of people across the world have been

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<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Article 1 (A) (2)1951 Convention relating to the status of refugees.

<sup>145</sup> Ibid.

<sup>146</sup> Gendered Innovations ‘Race and Ethnicity’ available at

<https://genderedinnovations.stanford.edu/terms/race.html> accessed on 25 November 2019.

<sup>147</sup> The International Convention on the Elimination of all Forms of Racial Discrimination 1969.

<sup>148</sup> Ibid.

<sup>149</sup> Goodwin-Gill G.S, *The Refugee in International Law*, [1996] 2<sup>nd</sup> edition, Clarendon Press, Oxford University Press.

<sup>150</sup> Ibid.

<sup>151</sup> *Veeravagu, Uthaya Kumar v. M.E.I.* (F.C.A., no. A-630-89), Hugessen, Desjardins, Henry, May 27, 1992, at 2.

<sup>152</sup> Ibid.

persecuted based on their religious beliefs since then.<sup>153</sup> The most recent one was the persecution of the minority people by Buddhist monks in Myanmar which however even though recent, had been going on for quite some time.<sup>154</sup>

Article 18 of the Covenant on Civil and Political Rights<sup>155</sup> provides that everyone is entitled to freedom of conscious, religion and thought.<sup>156</sup> Therefore, no one shall be forced to experience a situation that would affect their freedom of religion, thought or conscious. Furthermore, the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief indicates an interest to protect one's belief of which an infringement to it amounts to persecution.<sup>157</sup>

### 2.5.3 Nationality

The idea of persecution on the ground of nationality is somehow absurd when referring to the definition of a refugee as provided by the Convention. This is because the definition requires the persecuted individual to be outside of the country of origin.<sup>158</sup> Therefore, if an individual is being persecuted in their own country because they are nationals of their own country is somehow irrational. This is the reason why nationality has been defined in a broader perspective by the 1951 Convention to include origins and membership of specific ethnic, cultural, religious and linguistic communities.<sup>159</sup> For example, South Africa included tribe as a ground of persecution<sup>160</sup> and the American case of *Abankwah v INS*<sup>161</sup> recognised ethnicity as a ground of persecution.

In the case of *Hanukashvili v M.C.I*<sup>162</sup> the court noted the difference between nationality as a ground and nationality as citizenship. Therefore, it does not mean

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<sup>153</sup> Ibid.

<sup>154</sup> Martin Banks, 'Suffering of Myanmar's Persecuted Rohingya Continues to Worsen', available at <https://www.neweurope.eu/article/suffering-of-myanmars-persecuted-rohingya-continues-to-worsen/>, accessed on 20 June 2019.

<sup>155</sup> International Convention on Civil and Political Rights 1976.

<sup>156</sup> Ibid.

<sup>157</sup> *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, Proclaimed by General Assembly resolution 36/55 of 25 November 1981.

<sup>158</sup> Op cit (n80)22.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> *Abankwah v INS* (1999) 18ILM 1267.

<sup>162</sup> Immigration and Refugee Board of Canada 'Chapter 4-Grounds of Persecution-Nexus' available at <https://irb-cisr.gc.ca/en/legal-policy/legal-concepts/Pages/RefDef04.aspx>, accessed on 25 November 2019.

citizenship when used as a ground, however, it has the same meaning as citizenship when used in the definition of Convention refugee.<sup>163</sup>

Grahl Madsen also noted that persecution for reasons of nationality is understood to include the persecution of lack of nationality which is because of statelessness.<sup>164</sup> Therefore, nationality interpreted broadly illustrates the points of distinction which can serve as the basis for the policy and practice of persecution.<sup>165</sup>

#### 2.5.4 Political opinion

Political opinion is a right provided under article 19 the Universal Declaration of Human Rights.<sup>166</sup> Though there are responsibilities that accompany the right provided under article 19 of the Convention on Civil and Political Rights.<sup>167</sup> Nevertheless, the case of *Tantoush v The Refugee Appeal Board* explained that there is no provision on the definition of 'political opinion.'<sup>168</sup> Nevertheless, the interpretation of this concerning relation to the Convention gives a clear opinion of what political opinion is all about. Scholars have argued that an understanding of political opinion as a ground of persecution is to consider its constituent components.<sup>169</sup>

The general meaning of political opinion as expressed in the case of *Chaudri v Canada* refers to an affiliation or involvement in political matters of the government.<sup>170</sup> The handbook of the UNHCR in its explanation of a political opinion supposed that it is where an individual holds an opinion that is not tolerated by the ruling party or government.<sup>171</sup> Therefore, it relates to an act of holding an opinion that the government thinks opposes its leadership. Furthermore, an individual who seeks asylum based on political opinion may also fear persecution from other subjects that deem the applicant to have opinions that are contrary to their political agendas or

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<sup>163</sup> Ibid.

<sup>164</sup> Ibid.

<sup>165</sup> Ibid.

<sup>166</sup> *Universal Declaration of Human Rights* G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)

<sup>167</sup> Article 19 of the ICCPR states that; but the right to freedom of expression is qualified there by reference to special duties and responsibilities.

<sup>168</sup> *Tantoush v Refugee Appeal Board and others* [2008] (1) SA 232 (T)

<sup>169</sup> Ibid.

<sup>170</sup> *Chaudri v Minister of Employment and Immigration (Canada)* (1986) 69 N.R 114 (FCA)

<sup>171</sup> Ibid.

aspirations.<sup>172</sup> So technically an individual does not need to act his political belief, an opinion based on the article suffices.

Le Forest J in case of *Attorney General v Ward*<sup>173</sup> explained on the political opinion that:

First, the political opinion at issue need not have been outright. In many cases, the claimant is not even given the opportunity to articulate his or her beliefs, but these can be perceived from his or her actions. In such situations, the political opinion that constitutes the basis for the claimant's well-founded fear of persecution is said to be imputed to the claimant. The absence of expression in words may make it more difficult for the claimant to establish the relationship between that opinion and the feared persecution, but it does not precluded protection of the claimant.<sup>174</sup>

Therefore, expressing a political opinion before migration is not necessary *per se*. The applicant in the case had rejected the persecutor's request which in their perspective, the applicant had rejected their political beliefs.

#### **2.5.4 Membership of a particular social group**

The dominant approach in defining membership of a particular social group was in the case of *Acosta*.<sup>175</sup> It was based exclusively on the existence of an indisputable characteristic which an individual cannot change or should not be required to change as it is essential to their identity of morality.<sup>176</sup> According to the *Acosta* case, any other factors are irrelevant. The court, in this case, applied the *ejusdem generis* rule which expresses that words should be interpreted in the same kind or nature.<sup>177</sup> Therefore, applying the rule to define membership of a particular social group not only does it engage a serious textual analysis of the convention and its protocol, but also "the specific situation known to the drafters concern for the plight of persons whose social origins put them at comparable risk to those in the other enumerated categories."<sup>178</sup> Furthermore, the *Acosta* approach is sufficiently open-ended which allows for evolution in much the same way as has occurred with four other grounds,

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<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> *Matter of Acosta* (1985) United States Board of Immigration Appeals A-24159781.

<sup>176</sup> Ibid.

<sup>177</sup> Op cit (n175).

<sup>178</sup> Ibid.

but not so vague to admit persons without a serious basis for claims to international protection.<sup>179</sup>

The *Acosta* principle was however criticised in the Canadian case of *Ward v Attorney General*.<sup>180</sup> The reason was that the case reflected what was known as the “classic discrimination analysis.”<sup>181</sup> Hence the court drew on the preamble that affirmed the international community’s commitment to upholding the principle that human beings should enjoy fundamental rights and freedoms without discrimination.<sup>182</sup> The court explained that the principle outlined boundaries of the objectives sought to be achieved and consented to by delegates thus it provides limitations.<sup>183</sup> Consequently, the way people are distinguished for purposes of discrimination law could be included in this area of the social group.

The United Nations High Commissioner for Refugees issued guidelines that presented the social perception and protected characteristics approach as alternative ways of establishing a particular social group.<sup>184</sup> This approach instructed that the first thing in determining a particular social group was to define a protected characteristic and to determine whether the group is recognised by society.<sup>185</sup>

The *travaux preparatoires*, however, provides limited information in why the social group was provided as a ground of persecution.<sup>186</sup> The delegates of the 1951 Refugee Convention explained that cases involving social groups exist and that the Convention should mention them openly.<sup>187</sup> The Universal Declaration of Human Rights under article 2 provides for the grounds that are prohibited from distinction.<sup>188</sup> These grounds include property, national or social origin, birth or another status.<sup>189</sup> Therefore, the Convention was not wrong in concluding membership of a particular social group as a ground for persecution.

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<sup>179</sup> Ibid.

<sup>180</sup> *Canada (A.G) v Ward* (1993) 2 S.C.R 689.

<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

<sup>184</sup> Marouf, F. ‘The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender’ (2008) *Yale Law & Policy Review*, 27(1), 47-106 available at <http://www.jstor.org.ezproxy.uct.ac.za/stable/40239706>.

<sup>185</sup> Ibid.

<sup>186</sup> Ibid.

<sup>187</sup> Ibid.

<sup>188</sup> *Universal Declaration of Human Rights* G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>189</sup> Ibid.

## 2.6 REFUGEE STATUS DETERMINATION

Refugee status determination is the process through which governments or the UNHCR legally determines whether an individual seeking international protection in the name of asylum is considered a refugee under the national and international laws.<sup>190</sup> The duty to determine the refugee status of an asylum seeker lies in a State. However, if the particular State is not a party to the current Refugee Convention then the UNHCR is mandated to do that on behalf of the State.<sup>191</sup> To determine the refugee status of an individual, credible documents are supposed to be submitted to prove the case of the applicant.<sup>192</sup> In the absence of credible documents, there is what is known as a 'credible assessment' conducted on the applicant which aims at proving the credibility of the claim.<sup>193</sup> Some individuals do provide false claims, however, it is the duty of the determination board to withdraw such claims.<sup>194</sup>

There are three grounds through which the board detects the integrity of an individual. The first ground is where they assess the inconsistency and vagueness in the statement provided by the applicant.<sup>195</sup> The issue generally is whether the applicant's statement is consistent or not? Therefore, the interviewer in this would ask more details like what happened, about attackers, the dates of the events and other important information.<sup>196</sup> The interviewer then tries to explore the vagueness of the statement whether it was a general statement that lacked other important information.<sup>197</sup> Traumatic memories are however difficult to prove because individuals usually just recall bits of it.<sup>198</sup>

The second ground is demeanour and interpretation. Refugee status determination officials are the ones capable of determining the demeanour in a

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<sup>190</sup> UNHCR the UN Refugee Agency 'Refugee Status Determination', available at <https://www.unhcr.org>, accessed on 17 June 2019.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

<sup>193</sup> McDonald, D. 'Credibility Assessment in Refugee Status Determination' (2014) National Law School of India Review, 26(2), 115-126 available at <http://www.jstor.org.ezproxy.uct.ac.za/stable/44283637>.

<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

<sup>198</sup> Zachary Steel, Naomi Frommer and Derrick Silove 'Part I - The mental health impacts of migration: the law and its effects: Failing to understand: refugee determination and the traumatised applicant' 27 *Int'l J.L. & Psychiatry* 511, 51.

claim.<sup>199</sup> This includes the ability of the applicant to respond to certain questions, self-presentation and the ability to respond to certain comments.<sup>200</sup> The demeanour test is, however, used as a guide in determining refugee status.

The last ground is credibility assessment and plausibility. Generally, a claim for asylum may be rejected when the determination officers' expectations are not satisfied with how a persecuted person is supposed to behave or act.<sup>201</sup> This, however, is opined to be arguable because a mere perception would not suffice.<sup>202</sup>

## 2.7 IS ALBINISM A GROUND OF PERSECUTION?

Albinism is a genetic skin condition whereby the skin lacks a dark pigment called melanin.<sup>203</sup> As a result of this, people with this condition are born with very light skin which makes them vulnerable to sunlight rays.<sup>204</sup> This condition happens in every race so basically, they can be found all around the world. However, it is a very uncommon condition that happens once in every 10,000 people.<sup>205</sup> Though the rate in Africa is different from the rest as it is estimated to be one in every 1400 people.<sup>206</sup> Meaning that there is a higher rate of people with albinism in Africa than anywhere else. The interesting thing about albinism is that in Africa they believe that people with this condition have lucky charms.<sup>207</sup> Some believe that they are a curse therefore they should not be associated with other people.<sup>208</sup> As a result of these beliefs, they are subjected to different forms of human rights violations which include assault and murder. These violations are most common in the eastern and southern countries of Uganda, Tanzania, and Malawi.<sup>209</sup>

In the past four years, the human rights violations towards these people have become a common occurrence in the country of Malawi.<sup>210</sup> Because of this, the said group of people have lived in fear as there is no place for them that is safe. The only

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<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid.

<sup>202</sup> Ibid.

<sup>203</sup> Healthline 'Albinism' 29 March 2018 available at <https://www.healthline.com/health/albinism> accessed on 25 November 2019.

<sup>204</sup> Ibid.

<sup>205</sup> UN website 'International Albinism Awareness day 13 June' available at <https://www.un.org/en/events/albinismday/background.shtml>, accessed on 13 June 2019.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

<sup>210</sup> Ibid.

place that they could be safe is to migrate and seek refuge in other countries where they could not be subjected to the violations that they face in their home country. Now, if they try to seek refuge, the 1951 Convention outlined five grounds of persecution. Therefore, do these people fall under any of these grounds?

As seen in the previous paragraphs, it is evident that albinism is neither a race, nationality, religion nor a political opinion. The only ground that they could be squeezed into would be membership of a particular social group. But to what extent is albinism a social group? The clear definition of a particular social group has still not been clearly expressed in the Convention. Courts have therefore relied on literal meaning like in the case of *Acosta*<sup>211</sup> and in *Ward v Canada*<sup>212</sup>, where they used specific guidelines. Nevertheless, it must be noted that international refugee law bears a relationship with international human rights law, therefore, the sole purpose of international refugee law is to protect human rights as well.<sup>213</sup>

The definition of membership of a particular social group by the UNHCR handbook is general and brief. The definition explained that: particular social group mainly comprises groups of people with similar traits, social status, and habits. This basically would include race or other grounds provided by the Convention. And referring to albinism, they are described with a pale physical feature that includes skin and hair.<sup>214</sup> Therefore, a claim for fear of persecution under this may mostly intersect with other grounds. The position taken in the courts has however been different. In the case of *Islam v Secretary of State for the Home Department*<sup>215</sup> and *R v Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah*.<sup>216</sup> In the cases, the UNHCR submitted that an individual of certain values may not always be considered as a member of a social group. To be so, the value must be of “such a nature that the person concerned should not be required to renounce them.”<sup>217</sup> Further, the particular social group means a group of people who

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<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

<sup>213</sup> Ibid.

<sup>214</sup> Ibid.

<sup>215</sup> *Islam (AP) v Secretary of State for the Home Department* (1999) U.K House of Lords (Judicial Committee).

<sup>216</sup> *R v Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah* (1999) U.K House of Lords (Judicial Committee).

<sup>217</sup> Alexander Aleinikoff T. ‘Protected characteristics and social perception: an analysis of the meaning of “membership of a particular social group”’ in Erika Feller, Volker Turk and Frances Nicholson ‘*Refugee Protection in International Law*’ (2003) 267.

share some characteristics which distinguish them from society.<sup>218</sup> The characteristic should, therefore, be unchangeable as it is innate or impossible or that it would be wrong to require them to change. This is also in conformity with people with albinism.

Albinism is a genetic condition and by that, it means that it is a hereditary which cannot be changed by any other means. There is no other possible way that albinism condition can be said to change. It is the same as the way a person is born Caucasian or Mongoloid, whereby once born like that, they cannot change. Talking about human rights violations towards these people, the UNHCR in its position in the case of *Islam and Shah*<sup>219</sup> agreed that persecution alone “cannot determine a group where none otherwise exists.”<sup>220</sup> It further said that “it is not the reaction to the behaviour of such persons which is the touchstone defining the group. However, the reaction may provide evidence in the particular case that a particular group exists.” So basically, it is not the direct human rights abuses that are being conducted towards them that defines them as a social group but rather, them being people with albinism.

The UNHCR executive committee and the international law in 1985 explained that women asylum seekers faced harsh and inhuman treatment due to the social norms of the society they lived in.<sup>221</sup> The conclusion was that States were free to regard them as members of a particular social group within the meaning of the 1951 Refugee Convention.<sup>222</sup> Further, the Australian court in *Applicant A, v Minister for Immigration and Ethnic Affairs* explained that the thing that distinguishes other people and particular social groups is the common attribute and societal perception that makes them stand apart.<sup>223</sup> And not only should these individuals have a common element but then again the element should unite them and make them a recognisable group within their society.<sup>224</sup> The same thing applies to albinism. The fact that they are distinguished by the way they look and that they have the term ‘albinism’ which refers to people like them, automatically places them to belong to a particular social group. So, it is not just about how they look, but the defining term

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<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid.

<sup>224</sup> Ibid.

and the perception of the society that adds to it. Furthermore, the fact they are subjected to persistent human rights abuses because of their appearance, it may be concluded that they are being persecuted. Therefore, albinism falls under the grounds of persecution.

## **2.8 CONCLUSION**

There is no genuine definition of persecution, however, what comes to mind about the term 'persecution' is that it is associated with human suffering causing pain and infringements of human rights. The defining perception of society towards an individual also matters. Therefore, even though individuals may not possess conventional grounds, if they are targeted because of their characteristics, they fall under the grounds of persecution. The only exception to it is where they can change their characteristics.

The next chapter will discuss state responsibility. The definition of a refugee provides that an individual must be persecuted followed by the failure of a State to protect. Thus, the next chapter is about Malawi and will tempt to look at whether it has failed to protect PWA.

## Chapter Three

### STATE RESPONSIBILITY: COUNTRY OF ORIGIN

#### 3.1 INTRODUCTION

The observation in the definition of a refugee is that there must be persecution based on an individual's defined traits that are followed by the failure or the inability of a State to protect.<sup>225</sup> It was also observed in the discussion of agents of persecution in chapter two that a State could be an agent of persecution.<sup>226</sup> This could be through the public authorities that include the government itself, the administration and the military.<sup>227</sup> Thus the conclusion was observed that persecution that does not derive from the government through its agents does not amount to a conventional definition of a refugee.<sup>228</sup> The thesis of this chapter is hence constructed from the observation.

Having set the thesis, the seriatim idea is that States owe their nationals a duty to protect basic human rights and freedoms. It is a profound duty that was later encoded in the International Covenant on Civil and Political Rights (ICCPR).<sup>229</sup> The failure of which would force the international community to take responsibility when nationals erode in seek of asylum. It must be noted that the aim of this chapter is not to analyse the liability of States for failure or inability to protect or to find an effective remedy but rather to explore the extent of its duty to nationals in as far as refugee law is concerned. Furthermore, with the issue of albinism in Malawi at the focal point, the aim is to analyse whether the government of Malawi is unable or has failed to protect such people.

Therefore, the chapter will begin by analysing the State's duty to protect and promote human rights, the failure or the inability to protect and finally whether Malawi is unable or has failed to protect people with albinism.

#### 3.2 THE DUTY TO PROTECT

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<sup>225</sup> Convention Relating to the Status of Refugees, UNGA (1951) article 1A (2).

<sup>226</sup> Ibid.

<sup>227</sup> Ibid.

<sup>228</sup> Ibid.

<sup>229</sup> International Covenant on Civil and Political Rights G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

The duty of a State to protect entails an obligation to protect and promote human rights, to ensure the security of citizens and the realisation of rights and freedoms without any form of discrimination from the State or any individual within its jurisdiction. As Goodwill-Gill puts it that the reference to the nexus of persecution in the 1951 Convention, exemplifies the group of individuals that are worthy of protection.<sup>230</sup> Unfortunately, it is an illustration that all individuals with every defined trait are worthy of protection. The ICCPR under article 2 (1) urged the State party to respect the rights of individuals within its jurisdiction and to ensure that every individual is awarded human rights without any distinction based on their characteristics.<sup>231</sup> Furthermore, States are obligated to adopt necessary measures that would ensure that such rights are recognised and respected.<sup>232</sup> These measures include the existence and adoption of proper legislation that promote and protect rights of individuals without discrimination. This would also include an effective judiciary as well as law enforcement mechanisms. The requirement of such is the assurance of an individual whose human rights have been violated to seek an effective remedy.<sup>233</sup>

The 1948 Universal Declaration of Human Rights (UDHR)<sup>234</sup> provides an epitome of human rights. The UDHR including the ICCPR and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) forms the International Bill of Human Rights. Furthermore, a series of human rights treaties adopted since 1948 have discussed the legal procedure on inherent human rights thereby framing the international human rights.<sup>235</sup> These have been generally accepted by the International community as the fundamental norms of human rights that everyone is bound to follow. Furthermore, States are bound to protect, and respect human rights based on these standards.<sup>236</sup> The adoption of such common international standards has been the result of the recognition of certain

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<sup>230</sup> Goodwill-Gill G.S *The Refugee in International Law* 2<sup>nd</sup> edition 68.

<sup>231</sup> Op cit (n225) Article 2 (1).

<sup>232</sup> Op cit (n225) Article 2 (2).

<sup>233</sup> Op cit (n225) Article 2 (3).

<sup>234</sup> Universal Declaration of Human Rights G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>235</sup> Human Rights Office of the High Commissioner 'International human rights' available at <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>, accessed on 26 November 2019.

<sup>236</sup> Ibid.

accepted behaviour that States accept as a limitation on claims of “cultural heterogeneity and autonomy of action.”<sup>237</sup>

By adopting and becoming parties to human rights treaties, States undertake the obligation and duty under international law to protect, fulfil and respect human rights.<sup>238</sup> The obligation to protect entails States to protect individuals from human rights abuses.<sup>239</sup> The obligation to fulfil entails States to take positive action to enable the enjoyment of basic human rights.<sup>240</sup> The obligation to respect, on the other hand, entails that States must refrain from interfering with the enjoyment of human rights.<sup>241</sup> Therefore States are mandated to adopt necessary steps that would create necessary conditions in political, social, economic and other fields which include a legal guarantee that ensures individuals to be able to enjoy rights and freedoms practically.<sup>242</sup>

The International Bill of Human Rights generally sets out standards of which States are to determine whether there is a failure of the State to protect. However, Grahl-Madsen argued that the denial of rights such as freedom of opinion, thought, conscious, religion, expression, and peaceful assembly are outside the domain of persecution.<sup>243</sup> Nevertheless, the dominant view under refugee law is the concern on actions that deny human dignity and the “systematic or sustained denial of core human rights”.<sup>244</sup> This was discussed in the judgement of the case of *Luis Enrique toha Seque*<sup>245</sup> that persecution is not only about physical torture but also acts that intend to deny an individual’s fundamental rights. This generally applies to inalienable rights.

Inalienable rights are generally those that cannot be transferred or surrendered.<sup>246</sup> The US case of *Morrison v State*<sup>247</sup> explained that alienable rights

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<sup>237</sup> Hathaway J.C *The Law of Refugee Status* 106.

<sup>238</sup> Universal Declaration of Human Rights G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>239</sup> Ibid.

<sup>240</sup> Ibid.

<sup>241</sup> Ibid.

<sup>242</sup> Article 2 par 1 of ‘The Declaration on the Rights and Responsibility of Individuals, Groups and Organs of the Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms’ Adopted by the General Assembly resolution 53/144 of 9 December 1998.

<sup>243</sup> Cited in Hathaway J.C *The Law of Refugee Status* 108.

<sup>244</sup> Ibid.

<sup>245</sup> *Luis Enrique toha Seque* (1980) Immigration Appeal Board Decision 79-1150, CLIC.

<sup>246</sup> US legal ‘Inalienable right law and legal definition’ available at <https://definitions.uslegal.com/i/inalienable-right/>, accessed on 26 November 2019.

could be transferred or surrendered by consent. The distinction of these rights was discussed by James C. Hathaway based on obligations within the International Bill of Rights. Hathaway had distinct the rights into four. The first distinction as per Hathaway are non-derogable rights provided in the UDHR and was also encoded in the ICCPR. These rights include: “the freedom from arbitrary deprivation of life”,<sup>248</sup> “the freedom from slavery”,<sup>249</sup> “protection against torture or cruel, inhuman or degrading treatment or punishment”.<sup>250</sup> Other rights provided in the same are: “the prohibition on criminal prosecution for *ex post facto* offences”,<sup>251</sup> “the right to recognition as a person in law”<sup>252</sup> and “the freedom of thought, conscious and religion”.<sup>253</sup> Derogation to these rights is not permitted even in cases of a persuasive national emergency.<sup>254</sup> Hence the failure to observe these rights would amount to persecution.

The second distinction is those that could be derogable in times of national emergency.<sup>255</sup> These rights, among others, include: “the freedom from arbitrary arrest or detention”,<sup>256</sup> “the right to equal protection”,<sup>257</sup> and “the right to due process”<sup>258</sup> provided in the ICCPR. Therefore, the failure of the State’s duty to ensure the protection of these rights amounts to persecution unless there is proof that the derogation was strictly on cases of emergency.<sup>259</sup>

The third distinction is the rights that are encoded in the ICESCR from the UDHR. Hathaway explained that these rights are neither derogable nor non-derogable.<sup>260</sup> Therefore the ICESCR does not impose any immediate binding standards but rather for States to take necessary steps to maximise available resources to progress the realisations of these rights.<sup>261</sup> These are the general

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<sup>247</sup> *Morrison v State* (1952) 252 S.W.2d 97. 101 (Mo. Ct. App. 1952).

<sup>248</sup> Op cit (n229) Art. 6.

<sup>249</sup> Op cit (n229) Art. 8.

<sup>250</sup> Op cit (n229) Art. 7.

<sup>251</sup> Op cit (n229) Art. 15.

<sup>252</sup> Op cit (n229) Art. 16.

<sup>253</sup> Op cit (n229) Art. 18.

<sup>254</sup> Op cit (n237) 109.

<sup>255</sup> Op cit (n229) Art. 4(1).

<sup>256</sup> Op cit (n229) Art. 9-10.

<sup>257</sup> Op cit (n229) Art. 3 and 26.

<sup>258</sup> Op cit (n229) Art 14.

<sup>259</sup> Op cit (n237) 110.

<sup>260</sup> Ibid.

<sup>261</sup> Ibid.

economic, social and cultural rights which among others include: the right to work,<sup>262</sup> the right to medical care<sup>263</sup> and social security.<sup>264</sup> The deprivation of these rights at a certain level amounts to inhuman and degrading treatment hence constitutes persecution.<sup>265</sup>

The fourth and last distinction are those rights recognised by the UDHR but were not encoded in any human rights binding covenant. These, for example, include the right to protection against unemployment.<sup>266</sup> These rights as explained by Hathaway are outside the scope of State's duty to protect and therefore alone, they would not serve as a basis for a claim of failure of a State to protect.<sup>267</sup>

These generally elaborated on the responsibility of a State to protect and a sense of taste on failure to protect. The next step is to provide proper analysis of what failure or inability to protect entails.

### **3.3 FAILURE OR INABILITY TO PROTECT**

The discussion on the duty to protect has brought in a realisation that not all rights that are provided are fundamental and absolute. Therefore, the failure of the State to provide protection and promotion on such rights could not always amount to persecution. Goodwill-Gill argued that the traditional response to individuals who flee from persecution has been to grant protection.<sup>268</sup> Therefore to what extent does failure or inability of State to protect amount to persecution?

To begin with, it must be noted that not all individuals fleeing their country because of the risk to basic human rights are refugees.<sup>269</sup> There are several reasons that individuals flee their country and a good example could be for economic reasons. Though it is controversial on whether economic migrants could be deemed as refugees. Nevertheless, it is a discussion that deserves separate research. Refugee law is substitute protection designed to interpose the protection of the international community in situations where national protection to human rights is

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<sup>262</sup> International Covenant on Economic, Social and Cultural Rights UNGA, Res 2200A of 1976, Art 6.

<sup>263</sup> Op cit (n262) Art 12.

<sup>264</sup> Op cit (n262) Art 9.

<sup>265</sup> Op cit (n262) 111.

<sup>266</sup> Op cit (n234) Art 6.

<sup>267</sup> Ibid.

<sup>268</sup> Op cit (n230) 79.

<sup>269</sup> Op cit (n237) 124.

absent.<sup>270</sup> Consequently, it is a kind of protection that is awarded to an individual when the expected protection from the government is lacking.

Thus, the measure or the determination on whether an individual is persecuted is based on the willingness and the ability of the State to effectively respond to risk.<sup>271</sup> However, the question about the determination of the willingness and ability to protect still rises. The determination as discussed by Hathaway could be in two ways. This could either be on the agents of persecution or regionalised failure to protect.

### 3.3.1 Agents of persecution

In chapter two it was argued that a State could be an agent of persecution if it fails to control the actions of its public authorities or administration.<sup>272</sup> So this could be organs of the State like the Police and the Army. This form of persecution could either be pursuance of a recognised scheme or certain behaviours by the organs that are not regulated or remedied by the State.<sup>273</sup> Such behaviour could, for example, be the Army taking advantage on the Citizens to inflict physical pain. In such circumstances, there is no expected protection from the government by Citizens because the harm is being instituted by government authorities. A practical example of this could be the *Mkundwe* case in Malawi where Police officers had raped and assaulted women in the township.<sup>274</sup> The victims could not complain against the perpetrators as it was the very same individuals whom they were to complain to.

The decision in the case of *Ganganee Janet Permanda*<sup>275</sup> is another illustration of the same subject. In the case, it was decided that:

The abuse of power by agents of the State or their unwillingness to discharge their duties in respect to a particular citizen or group of citizens could indeed constitute

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<sup>270</sup> Ibid.

<sup>271</sup> Op cit (n237) 125.

<sup>272</sup> Ibid.

<sup>273</sup> Ibid.

<sup>274</sup> News 24 'Malawi police probe officers over rape allegations', available at <https://www.news24.com/Africa/News/malawi-police-probe-officers-over-rape--20allegations191017>, accessed on 27 November 2019.

<sup>275</sup> *Ganganee Janet Permanda* (1987) Immigration Appeal Board Decision T87-10167.

persecution. However, to be so, such practices must be carried out systematically and with the overt or covert concurrence of the State.<sup>276</sup>

The case emphasized on the point that such acts of abuse of power must be systematic to qualify as persecution. The French case of *Esshak Danka*<sup>277</sup> it was decided that:

...the existence and the authority of the State are conceived and justified on the grounds that it is the means by which members of the national community are protected from aggression, whether at the hands of fellow citizens, or from forces to the State.<sup>278</sup>

Therefore, if there is an absence of any sort of meaningful protection, the unwilling or the inability to do so is deemed to be persecution. This is because the responsibility of the State includes a guarantee that there is a provision of benefits that are accorded to clear and accountable eligibility, proper administration and the provision of services to all people with respect to their rights.<sup>279</sup> The case of *Zahirdeen Raudeen v Minister of Employment and Immigration*<sup>280</sup> set out standards of State obligation. The standards were also confirmed in the case of *Surujpal v M.E.I.*<sup>281</sup> These standards explored scenarios through which a State could be deemed to have failed to provide protection. These include:

- a. Persecution committed by the State concerned;
- b. Persecution condoned by the State concerned;
- c. Persecution tolerated by the State concerned;
- d. Persecution not concluded or not tolerated by the State concerned but nevertheless present because the State either refuses or is unable to offer adequate protection.<sup>282</sup>

Nevertheless, failure of State protection as argued by Hathaway, cannot be confirmed before the provision of an opportunity to the government to respond to such acts of harm.<sup>283</sup>

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<sup>276</sup> Ibid.

<sup>277</sup> *Esshak Danka* (1983) Decision no. 42.074.

<sup>278</sup> Ibid.

<sup>279</sup> Responsibility of the State, Social Protection Human Rights, available at <https://socialprotection-humanrights.org/>, accessed on 30 November 2019.

<sup>280</sup> *Zahirdeen Raudeen v Minister of Employment and Immigration* (1985) 55 N.R 129.

<sup>281</sup> *Surujpal v M.E.I* (1985) 60 N.R 73 (F.C.A) 75-76.

<sup>282</sup> Ibid.

### 3.3.2 Regionalised failure to protect

The important thing in the understanding of refugee law as already explained is that it is the second form of protection that is granted when the State has failed to provide protection. Therefore, as an emphasis on the same, there must be a total failure of a country to protect nationals from the systematic act of abuse. This means that there could not be any risk of persecution if there would be a slight form of protection. This, for example, could be if an individual could escape the risk of persecution by relocating in some part of the State of origin.<sup>284</sup> It is from this perspective through which refugee law was based. The fact that States have a sovereign right, refugee law did not intend to interfere but rather to offer solace where there was a lack. The French delegate in the drafting of the 1951 Convention expressed that “there was no general definition covering refugee, since any such definition would involve an infringement of national sovereignty”.<sup>285</sup>

In the Canadian case of *Karnail Singh*,<sup>286</sup> an applicant’s application for refugee was denied because there was a possibility to avoid harassment from the Police by moving to a different region. The principle raised by the Refugee board was that “if an applicant is able to live in security in some other area of his own country, he is not a refugee from that country”.<sup>287</sup>

It must be understood that refugee law is reserved protection that is awarded to individuals who are in genuine risk of persecution. Therefore, if acts of harm could be controlled then there is no reason to possibly believe that an individual has a profound claim of refugee status.

## 3.4 THE CASE OF MALAWI

Malawi became a member of the UN on 1 December 1964.<sup>288</sup> The country is a signatory to major international human rights treaties that promote human rights and the rule of law<sup>289</sup> including the International Human rights Bill. Therefore, the laws of

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<sup>283</sup> Op cit (n237) 130.

<sup>284</sup> Op cit (n237) 133.

<sup>285</sup> Statement of Mr. Rochefort of France, U.N Doc. E/AC.7/SR.172, 4 August 1950.

<sup>286</sup> *Karnail Singh* (1983) Immigration Appeal Board Decision T84-9057.

<sup>287</sup> Ibid.

<sup>288</sup> United Nations ‘United Nations member states’ available at <https://www.un.org/pres/en/2006/Org1469.doc.htm> accessed on 29 November 2019.

<sup>289</sup> United Nation ‘Human rights’ available at <https://mw.one.un.org/human-rights/> accessed on 29 November 2019.

Malawi were drafted in a way that they could meet up with the International human rights law standards. This means that Malawi has a binding duty to protect the rights of its nationals. Furthermore, it means that the country is also under the obligation to promote and fulfil the rights of individuals within its jurisdiction. The laws of Malawi were drafted in such a way that they provided equal rights for women, children and people with disabilities. The laws forbid discrimination of all sorts including religion, culture, social status, language, disability and had provided for equality amongst all persons before the law.<sup>290</sup> Despite all that, the levels of assault, harassment, stigma, and discrimination towards people with albinism have undermined the efforts of an effective response to targeted human rights violations. Therefore, does this mean that the country has failed to protect people with albinism? To respond to this question, it is imperative to analyse the justice system of the country and how it has responded to the recent disaster.

### **3.4.1 The justice system of Malawi**

#### *3.4.1.1 The Constitution*

It would be unwise to discuss the justice system of Malawi without including the supreme law of the land as the governing tool. Hence it is central to provide a brief explanation of the important provisions in the Constitution. To begin with, the Constitution of Malawi provides for the equal protection of all individuals within the jurisdiction of Malawi.<sup>291</sup> It furthermore instil a duty of every individual to respect the right of other individuals without discrimination of any sort and to promote and recognise other people's rights.<sup>292</sup>

Chapter four of the Constitution provides for the bill of rights. The chapter generally recognises the human rights and freedoms of every individual and the protection, promotion, and enforcement of such rights.<sup>293</sup> The recognition and protection of these rights among others include the right to life,<sup>294</sup> freedom from genocide,<sup>295</sup> right to liberty,<sup>296</sup> the right to human dignity and personal freedoms.<sup>297</sup>

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<sup>290</sup> Ibid.

<sup>291</sup> Section 4 of the Malawi Constitution of 2010.

<sup>292</sup> Section 12 of the Malawi Constitution of 2010.

<sup>293</sup> Section 15 (11) of the Malawi Constitution of 2010.

<sup>294</sup> Section 16 of the Malawi Constitution of 2010.

<sup>295</sup> Section 17 of the Malawi Constitution of 2010.

<sup>296</sup> Section 18 of the Malawi Constitution of 2010.

<sup>297</sup> Section 19 of the Malawi Constitution of 2010.

The right to dignity entails that no individual shall be subjected to torture of any kind or cruel, inhuman or degrading treatment or punishment.<sup>298</sup> Furthermore, the constitution recognised the right to equality,<sup>299</sup> the right to family<sup>300</sup> and the right to access justice and legal remedies.<sup>301</sup>

The recognition of these rights provides a solid foundation through which individuals and organisations are supposed to draw from to create a balanced democratic society. Furthermore, it entails that every individual has equal protection and entitlement of the law to enjoy their rights and freedoms without any sort of interruption. Therefore, the Constitution does protect people with albinism and recognise their rights. However, is protection enough?

### *3.4.1.2 Investigation and prosecution of cases*

The justice system of the county was designed in such a way that it allowed for a remedial return whenever a right has been infringed. It is generally an establishment of agencies and processes that had been created by the government to control crime, impose penalties and promote justice for victims.<sup>302</sup> It is composed of law enforcers which in this respect are the Police. The establishment of the Police is recognised in chapter 15 of the Malawi Constitution. It is mandated to provide protection of public safety and the rights of individuals according to the prescriptions of the Constitution and any other law.<sup>303</sup> The Police works hand in hand with the court to ensure that justice is served and performs its duties with direction from the court and it is bound by the orders of the court.<sup>304</sup> Amongst other duties, the Police investigate and report incidents of crime, make arrests on suspected offenders, act as witnesses in court proceedings and conduct follow up on an ongoing investigation.<sup>305</sup>

Regarding the issue of brutalities regarding people with albinism, a 2018 joint Amnesty report by the Malawi Police, the Ministry of Justice and Constitutional

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<sup>298</sup>Section 19(3) of the Malawi Constitution of 2010.

<sup>299</sup>Section 20 of the Malawi Constitution of 2010.

<sup>300</sup>Section 22 of the Malawi Constitution of 2010.

<sup>301</sup>Section 41 of the Malawi Constitution of 2010.

<sup>302</sup>National Centre for Victims of Crime 'The criminal justice system' available at <https://victimsofcrim.org/help-for-crime-victims/get-help-bullet> accessed on 29 November 2019.

<sup>303</sup>Section 153 of the Malawi Constitution of 2010.

<sup>304</sup>Ibid.

<sup>305</sup>*R v Jasi* (6 of 2015) [2016] MWHC 478 (15 February 2016).

Affairs revealed that about 148 cases of attacks on people with albinism, 44 cases had been concluded.<sup>306</sup> The cases that had been reported included cases involving desecration of graves of people with albinism, cases of intimidation, kidnapping, abductions, possession, and selling of body parts of people with albinism, murder, and conspiracy to commit murder.<sup>307</sup> This represented a percentage of 30 indicating how slow the rate of concluding cases of albinism was compared to other criminal cases.<sup>308</sup> The reason for the low percentage of prosecution as explained the by the Police was that most of the crimes were committed at night hence it was hard to find witnesses.<sup>309</sup> Furthermore, the cases that involved murder and attempted murder were explained that due to inadequacies in the administration of justice, the cases remained unresolved.<sup>310</sup>

Statistics have revealed how there is a lack of effort to carry the investigations further. This is shown where the Police had mentioned the issue of the abductions happening at night hence it was difficult to find witnesses. What must be understood is that there is no provisional time for criminal activity to enable an effective investigation. It is the motive of a criminal mind to conceal evidence, therefore, it is the duty of the investigation officer to improve investigation skills. Furthermore, the Police must offer protection to the people in instances where there seems to be inadequate protection. The South African case of *Carmichele v Minister of Safety and Security*<sup>311</sup> the court stated that:

The police are one of the primary agencies of the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.<sup>312</sup>

### 3.4.1.3 The courts

The primary duty of the courts is to adjudicate matters, interpret the law, enforce and protect the Constitution whenever there is a need, uphold the rule of law, democracy,

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<sup>306</sup> Amnesty International 'Towards effective criminal justice for people with albinism in Malawi' available at

<https://www.justice.gov/ea/record/page/file/download>, accessed on 2 December 2019 5.

<sup>307</sup> Ibid.

<sup>308</sup> Ibid.

<sup>309</sup> Ibid.

<sup>310</sup> Ibid.

<sup>311</sup> *Carmichele v Minister of Safety and Security* (2001) 4 SA 938 (CC) par 62.

<sup>312</sup> Ibid.

and human rights as preserved in the constitution.<sup>313</sup> Furthermore, it is responsible for enforcing the Constitution and all laws that are under the Constitution independently and impartially<sup>314</sup>

The courts certainly play an important role in as much as serving justice is concerned. However, the statistical figures are a revelation on the evidenced weakness of the criminal justice. An activist interviewed by the AI stated that “the weakness of Malawi’s criminal justice system is that there were no trials and convictions. If the criminal justice system had worked, the attacks against people with albinism would have ended”.<sup>315</sup>

The activist had all the reasons to believe that the ineffective justice system of the country fuelled the crime. This is somehow true because perpetrators of the crime took the advantage of the fact that no one had been convicted of the crime therefore, they were perhaps motivated as there seemed to be no viable consequences. Despite all that, there have been a quite several amount of cases that have been adjudicated by the court, proving that, even though there are challenges, steps are being taken to try to end the barbaric acts.<sup>316</sup> Furthermore, the Chief Justice of Malawi, Andrew Nyirenda delivered a directive that cases involving people with albinism should be handled by experienced magistrates.<sup>317</sup> This includes the Chief Resident Magistrate, Principal Resident Magistrate, and Senior Resident Magistrate.<sup>318</sup> These magistrates are trained lawyers hence they have the experience.

Some of the cases that had been adjudicated by the courts include the case of *Republic v Willard Mikaele*.<sup>319</sup> The convict, in this case, was sentenced to death following the murder of an individual with albinism. Maclean Kamwambe J justified his reasoning for passing a firm sentence that such acts tainted the image of Malawi therefore it is an installation of fear in the perpetrators to curb such acts.<sup>320</sup> Furthermore, the reasoning was on how there has not been a permanent solution so

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<sup>313</sup>Section 9 of the Malawi Constitution of 2010.

<sup>314</sup> Ibid.

<sup>315</sup>Op cit (n306) 17

<sup>316</sup> Ibid.

<sup>317</sup> Op cit (n306) 6-7

<sup>318</sup> Ibid.

<sup>319</sup> *Republic v Willard Mikaele* (2018) Homicide case no. 238.

<sup>320</sup> Ibid.

far to the uncivilised behaviour of killing people with albinism therefore the penalty was necessary to deter future attacks.<sup>321</sup> The AI however opposed to such sentencing appealing that it was contrary to the Prohibition Against Cruel and Inhuman Form of Punishment.<sup>322</sup> Nevertheless, the court cannot be blamed for passing such a sentence. As Maclean Kamwambe J expressed that “courts should take their pragmatic role to protect citizens and others after experiencing public, social and political disorder, instability and insecurity”.<sup>323</sup> The genocidal behaviour must be controlled, and the court by being lenient to such gruesome cases, will only encourage the criminals in disguise to carry on the conduct.

In as much as the courts had revived death sentenced to lessen the crime towards people with albinism, the backlog of cases still fuels these attacks. Edge Kanyongolo, for example, commented on the passing of death sentence in Mchinji by Esmey Chombo J that, the death sentence could not deter attacks if cases take longer to be concluded.<sup>324</sup> For example, most of the cases took more than five years to be concluded. Furthermore, the delay has led to some witnesses being untraceable and some passing. Like in the attempted murder case of *The Republic v Joseph Ndimbwa*<sup>325</sup> where one of the core witnesses had passed on before the case had been concluded.

Nevertheless, since the beginning of the year 2019, there seemed to be some changes in the approach. Several cases have been concluded indicating that steps are being taken to control the crime. Another similar case that was recently concluded was *The State v Gerald Phiri et. al.*<sup>326</sup> The case involved eight individuals who were suspected of transacting human tissues of people with albinism. The case followed all eight individuals were found guilty and sentenced to life imprisonment.

### 3.4.2 Has Malawi failed to protect people with albinism?

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<sup>321</sup> Ibid.

<sup>322</sup> The Times Group ‘Amnesty against death sentence for albino killer’ available at <https://times.mw/amnesty-against-death-sentence-for-albino-killer> accessed on 30 November 2019.

<sup>323</sup> *Republic v Willard Mikaele* (2018) Homicide case no. 238, 8.

<sup>324</sup> Lameck Masina ‘Malawi court uses death sentence to help stop attacks on albinos’ VOS news 15 August 2019, available at <https://www.voanews.com/africa/malawi-court-uses-death-sentence-help-stop-attacks-abinos> accessed on 30 November 2019.

<sup>325</sup> *The Republic v Joseph Ndimbwa* (2018) MWHC, Attempted Murder case no. 8 (unreported).

<sup>326</sup> *The State v Gerald Phiri et. al* (2018) Criminal Case no.109.

As already discussed, the determination on whether an individual is at the risk of persecution is based on the failure or the inability of a State to respond and protect the targeted human rights abuses.<sup>327</sup> That is any slight chance or any event where there seems to be an effort to offer protection cannot amount to a failure to protect. It would be absurd to think the success in controlling prolonged targeted acts of harm could be achieved in a day. The issue in question is whether protection is being offered to the victims. It is a proven fact that the government of Malawi is doing whatever it takes to spread the message on the consequences of such brutality by introducing the conventional forbidden punishment of death sentence. It would be unmindful to undermine such efforts. Responsibility could not be switched to the international community unless there seems to be no other way.<sup>328</sup> As argued by Hathaway way; “the international human rights law is appropriately invoked only when the State will not or cannot comply with its classical duty to defend the interests of its citizenry”.<sup>329</sup> However, the question still stands whether it could be deemed that Malawi has failed to protect PWA.

James Hathaway explained that; to assess persecution for an asylum seeker, consideration must be taken on whether the individual has “access to a meaningful internal protection against the risk of persecution”.<sup>330</sup> The requirement was further broken down into three parts. These included:

- a) Does the proposed site of internal protection afford the asylum-seeker a meaningful ‘antidote’ to the identified risk of persecution?
- b) Is the proposed site of internal protection free from other risks which either amount to, or are tantamount to, a risk of persecution?
- c) Do local conditions in the proposed site of internal protection at least meet the Refugee Convention’s minimalist conceptualisation of ‘protection’?<sup>331</sup>

Regarding the first requirement, Hathaway explained that it is where individuals are at a place where they no longer have a well-founded fear of persecution.<sup>332</sup> Consequently, this is where individuals are outside the reach of

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<sup>327</sup> Ibid.

<sup>328</sup> Fatima & Tal Schreier *Refugee Law in South Africa* (2014) 57.

<sup>329</sup> Op cit (n237) 125.

<sup>330</sup> James C. Hathaway *International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative*, April 9-11, (1999) par 13.

<sup>331</sup> Ibid.

<sup>332</sup> Op cit (n 330) par 15.

agents of persecution. On the second requirement, the explanation was that assurance of protection requires total extermination of the harm or persecution.<sup>333</sup> Hence if a distinct harm or persecution exists, it would be enough of a reason to be granted refugee status.

The third requirement is where the denial of refugee status is not only based on the finding of an absence of risk of persecution but also on the realisation that an asylum seeker can access internal protection.<sup>334</sup> Furthermore, such protection should be measured by reference to the possibility of the protection by which refugee law assures.

Now discussing the case of Malawi, reports on albinism revealed the purpose of harvesting the body parts to be for rituals.<sup>335</sup> The reports furthermore explained that these body parts attracted a large amount of money when sold to buyers.<sup>336</sup> The reports alone insinuated the relationship between the buyer and the executioners being linked to that of an agent and a principal. Furthermore, the cases that were being prosecuted and others that had been adjudicated involved individuals who were executing the murders and amputations. Still, the principal in the cycle had been left out meaning that, the main cause of the problem had not been eliminated. The government did not identify who the buyers were, and regarding witch doctors, the government did not place in precautions regarding their practice methods. Therefore, in this respect, the initial problem being the root cause of persecutions have not yet been resolved. Hence, PWA in Malawi would still be at a risk of facing persecution.

Referring to Hathaway's assessment of persecution, PWA in Malawi would still be deserving of the protection of refugee law. Though the decision in the case of *Horvath v Secretary of State for the Home Department*<sup>337</sup> explained that a reasonable willingness by the Police and courts to notice, prosecute and punish perpetrators would suffice to the ability to protect. Nevertheless, the level of protection provided must be taken into consideration. For example, as indicated in the joint report by AI, the Malawi Police and Ministry of Justice and Constitutional

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<sup>333</sup> Op cit (n 330) par 17.

<sup>334</sup> Op cit (n 330) par 20.

<sup>335</sup> Op cit (n 6).

<sup>336</sup> Ibid.

<sup>337</sup> *Horvath v Secretary of State for the Home Department* [2000] UKHL 37.

affairs that only 30 percent of the reported cases had been concluded.<sup>338</sup> The report genuinely reviewed how slow the system in Malawi is in curbing the attacks. Furthermore, in as much as it could be said that there is a willingness to offer protection, however, with a low percentage, it could not be said that there is effective protection. Hence, it would not be a surprise to conclude that Malawi has failed to protect because it has failed to provide effective protection.

### **3.5 CONCLUSION**

It has been seen that for a refugee status to be granted, there must be an absence of protection from the home country. Furthermore, the requirements for such protection include the ability to eliminate threats and risks of persecution within the country. This also includes the ability to prosecute and punish perpetrators. However, regarding the case of persecution of PWA in Malawi, the protection provided by the government has been proven to be ineffective. Hence, Malawi has failed to protect the vulnerable group of people.

The next chapter will be looking at the responsibility of the host States regarding protection. The main question will be whether PWA would be granted refugee status.

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<sup>338</sup> Op cit (n306).

## Chapter Four

### STATE RESPONSIBILITY: HOST STATE

#### 4.1 INTRODUCTION

International law provides States with the obligation to protect the fundamental rights of people within its jurisdiction. As already explained in chapter three, States have obligations towards its citizens and everyone within its jurisdiction.<sup>339</sup> The general understanding is that States have an obligatory duty to ensure that the rights of every individual living within its jurisdiction are enjoyed without any interference from the State itself and anyone else. The conventional obligation or responsibility imposed on States, however, applies to nationals and permanent residents of the States.<sup>340</sup> Having established the status of people with albinism in Malawi, the next step is to look at whether refugee status could be granted.

Before unravelling this question, it must be understood that refugee law has been developed in its own capacity. This means that the analysis on the responsibility of host States towards asylum seekers and refugees is not based on the general perception of State obligation. It is, however, understood from the principle of *non-refoulement* perception. It is a provision under article 33 of the 1951 Convention, that entails that individuals should not be returned or expelled to a territory where rights and freedoms would be threatened based on their defined characteristics.<sup>341</sup> This chapter will, therefore, be constructed on the principle of *non-refoulement* as a solid foundation regarding people with albinism.

It must be noted that the process of granting refuge is very complex whereby individuals must first find themselves in a foreign State<sup>342</sup> and then apply for asylum before being granted refugee status upon meeting the satisfaction of the determination board. Consequently, it would be important to analyse the responsibility of the host States with respect to an asylum before drawing any conclusion. Thus, in this chapter, the idea will be to look at the concept of asylum,

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<sup>339</sup> Article 2 ICCPR, International Covenant on Civil and Political Rights G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

<sup>340</sup> Ibid.

<sup>341</sup> Convention Relating to the Status of Refugees, UNGA (1951 Article 33.

<sup>342</sup> Fatima Khan and Tal Schreier *Refugee Law in South Africa* (2014) 76.

the responsibility to grant asylum, the responsibility of *non-refoulement* and finally whether people with albinism could be granted refugee status.

## 4.2 THE CONCEPT OF ASYLUM

Asylum is referred to the legal protection from human rights violation that constitutes persecution committed by the government of a person's own country.<sup>343</sup> The protection is usually provided by another State to an individual who is not a citizen or a national but who flees to that State to escape persecution.<sup>344</sup> Once the protection is granted, the individuals are referred to as refugees up until cessation. Therefore, an individual seeking this kind of protection is referred to as an asylum seeker. However, there is a distinction between a refugee and an asylum seeker. The 1951 Refugee Convention<sup>345</sup> and the 1967 Protocol<sup>346</sup> defined a refugee as an individual who:

...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality, and is unable to or, owing to such fear, is unwilling to avail himself or herself of the protection of that country or return there because there is fear of persecution.<sup>347</sup>

An asylum seeker, on the one hand, is an individual seeking asylum, whilst a refugee, on the other hand, is an individual whose status has been determined by a refugee determination board.<sup>348</sup> Generally, asylum seekers wait for their status to be determined. Even though an asylum seeker and a refugee might have the same intent which is to seek asylum, if the determination board is not satisfied with the claim of that individual, the refugee status may not be granted.<sup>349</sup> Furthermore, Individuals waiting for their status to be determined may not be granted or entitled to the same rights as individuals whose status has been determined.<sup>350</sup> The reasons for this would possibly be that refugees are proven individuals whose lives are at stake,

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<sup>343</sup> Ibid.

<sup>344</sup> Ibid.

<sup>345</sup> Op cit(n341) art 1(A)(2).

<sup>346</sup> Ibid.

<sup>347</sup> Ibid.

<sup>348</sup> Amnesty International 'What's the difference between a refugee and an asylum seeker?' 24 January 2019 available at <https://www.amnesty.org.au/refugee-and-an-asylum-seeker-difference/> accessed on 3 December 2019.

<sup>349</sup> Op cit (n342) 39.

<sup>350</sup> Op cit (n342) 204.

therefore, they need protection in every way or it may not even be like that because it is just a simple assumption that happens to be convincing.

The basis of the right to asylum as argued by scholars is that “States may not claim to ‘own’ its nationals or residents.”<sup>351</sup> Therefore they are not bound to be in their origin States by their governments. Article 13 (2) of the Universal Declaration on Human Rights supports this idea by expressing that “everyone has the right to leave any country, including his own.”<sup>352</sup>

Article 14 of the Universal Declaration of Human Rights explains how “every individual has the right to seek and enjoy asylum in other countries asylum from persecution.”<sup>353</sup> However, as argued by Catherine Phuong, the right to seek asylum has not been included in any legally binding document.<sup>354</sup> Further to that, the 1951 Convention in as much as it addresses individuals seeking foreign protection, it also does not provide on the right to seek asylum. So, does it mean that the right to seek asylum is a hoax? Would people with albinism be denied the right to seek asylum even though they might be at risk of persecution? The interesting thing about International human rights law as argued by Catherine Phuong is that there is no provision on the responsibility to grant asylum.<sup>355</sup> However, the right to asylum has been seen to be part of Customary International law as the UDHR is not a legally binding document.<sup>356</sup> This would probably be the reason why States are often reluctant to grant asylum to foreign nationals. It might also be the reason why Donald Trump is trying to build a wall on the southern border of the USA.<sup>357</sup> For this reason, it has been argued that it is rather a right to grant asylum and not a duty.<sup>358</sup> Therefore, the whole concept of responsibility in this respect is a little complicated to unravel. This is so because having a right towards something entails one to have the autonomy to decide in however one pleases.

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<sup>351</sup> Ibid.

<sup>352</sup> Universal Declaration of Human Rights G.A. res. 217A (III), U.N. Doc A/810, 10 December (1948).

<sup>353</sup> Ibid.

<sup>354</sup> Catherine Phuong ‘Identifying States’ Responsibilities towards Refugees and Asylum Seekers’ 1, available at <https://esil-sedi.eu/wp-content/uploads/2018/04/Phuong.pdf>, accessed on 1 September 2019.

<sup>355</sup> Ibid.

<sup>356</sup> Ibid.

<sup>357</sup> BBC news ‘Donald Trump’s border wall’ available at <https://www.bbc.com/news/topics/c2gzednyvjkt/donald-trumps-border-wall>, accessed on 3 December 2019.

<sup>358</sup> Op cit (n354)2.

Nevertheless, the UDHR sets forth "the inalienable and inviolable rights of all members of the human family and [to constitute] an obligation for the members of the international community."<sup>359</sup> Therefore, the individual right to seek asylum, as already mentioned, could be viewed as part of the modern International Customary Law. The ICCPR also supports this right under Article 12 (2) where it states that "everyone shall be free to leave any country, including his own."<sup>360</sup> States are also obligated by the principle of *non-refoulement* regarding asylum and refugee law.

### 4.3 THE RESPONSIBILITY TO GRANT ASYLUM

The United Nations Declaration of Human Rights recognised an individual's right to seek asylum. The provision in the declaration states that "everyone has the right to seek and enjoy in other countries asylum from persecution."<sup>361</sup> In as much as this right is provided in the declaration, the lack of proper mechanism of enforcing this right makes States boundless to respect this right.<sup>362</sup> Grahl-Madsen in regarding the right to asylum observed the common perception of different scholars that "the right to asylum does not have any clear or agreed meaning."<sup>363</sup> Nevertheless, scholars have been able to list the actual elements from the meaning of the term 'asylum' as a right. In this regard, there have been arguments raised by scholars on the right provided under article 14 of the UDHR. It has been viewed that certain indicators must be embraced in State conduct.<sup>364</sup> These include:

- (i) to admit a person to its territory;
- (ii) to allow the person to sojourn there;
- (iii) to refrain from expelling the person;
- (iv) to refrain from extraditing the person;

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<sup>359</sup> Proclamation of Teheran, Final Act of the International Conference on Human Rights 3, at 4, para. 2, 23 U.N. GAOR, U.N. Doc. A/CONF. 32/141 (1968). Cited in Roman Boed 'The State of a Right to Asylum in International Law' (1994) vol 5:1 *Duke Journal of Comparative and International Law*, available at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1342&context=djCIL>, accessed on 2 September 2019.

<sup>360</sup> Ibid.

<sup>361</sup> Ibid.

<sup>362</sup> Op cit (n354) 2.

<sup>363</sup> Roman Boed 'The State of a Right to Asylum in International Law' (1994) vol 5:1 *Duke Journal of Comparative and International Law*, 3 available at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1342&context=djCIL>, accessed on 2 September 2019.

<sup>364</sup> Ibid.

- (v) to refrain from prosecuting, punishing, or otherwise restricting the person's liberty.<sup>365</sup>

Therefore, because there is no actual mechanism to monitor the right to asylum, it is for this reason that it has been viewed traditionally as a State's right to grant asylum instead and not the other way around.<sup>366</sup> This is the reason why State responsibility should be looked at in this context. These implications have certainly arisen because of the right to sovereignty,<sup>367</sup> whereby States have the right to control over their matters without facing interferences from other nations. With the notion of sovereignty, States have been deemed to have exclusive control over their own territory and as well as every other person in its territory.<sup>368</sup> Hersch Lauterpacht noted that the wording of the right to asylum to be interpreted as being the right of a State and not an individual was introduced by the British delegates.<sup>369</sup> The delegates had interpreted the right to mean that "the right of every State to offer refuge and to resist all demands for extradition."<sup>370</sup> Lauterpacht, on the other hand, interpreted the right and commented that it is a possession of every State in international law.<sup>371</sup>

Article 1(1) of The Declaration on Territorial Asylum (DTA)<sup>372</sup> states that "asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights,... shall be respected by all other States."<sup>373</sup> Article 1(3) of the DTA explains that the powers to grant asylum would be invested in the State through the authorities.<sup>374</sup> The two provisions provide for the universal respect to this right. It also shows that, though it is an entitlement, the verdict rests on the authorities as to whether asylum would be granted or not. Nevertheless, the principle of *non-refoulement* has bound States to protect asylum seekers and not to return them to a place where they would face persecution.<sup>375</sup> Therefore, asylum seekers have found solace from this principle.

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<sup>365</sup> Ibid.

<sup>366</sup> Ibid.

<sup>367</sup> Ibid.

<sup>368</sup> Ibid.

<sup>369</sup> Op cit (n363)4.

<sup>370</sup> Ibid.

<sup>371</sup> Ibid.

<sup>372</sup> The Declaration on Territorial Asylum, Adopted by the General Assembly of the United Nation in 1967.

<sup>373</sup> Ibid.

<sup>374</sup> Op cit (n372) art 1(3).

<sup>375</sup> Op cit (n342) 3.

The right to asylum has also been mentioned in regional human rights instruments. The African Union (AU), for example, explains on this right under Article 2 (1) of the “Organisation of African Union Convention Governing the Specific Aspects of Refugee Problems in Africa”.<sup>376</sup> The convention explains on how AU member States “shall use their best endeavours consistent with their respective legislations to receive refugees.”<sup>377</sup> In the American Human Rights System, the right to asylum has been expressed under article 1 of the “Convention on Territorial Asylum adopted by the Organization of American States”.<sup>378</sup> The Convention was adopted in 1954 and it states that; “every State has the right, in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable, without, through the exercise of this right, giving rise to complaint by any other State.”<sup>379</sup> The European Human Rights System also highlighted on the right. Under the DAT<sup>380</sup> Article 2 states that:

a member of the Council of Europe.... reaffirm their right to grant asylum to any person who, having a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, also fulfils the other conditions of eligibility for the benefits of that convention, as well as to any other person they consider worthy of receiving asylum for humanitarian reasons.<sup>381</sup>

Protocol no. 4 of the European Convention for the protection of Human Rights and fundamental freedoms<sup>382</sup> states that “everyone shall be free to leave any country, including his own.”<sup>383</sup>

The Asian Human Rights System though not yet fully developed, also expressed on the same issue. In 1977 the Asian-African Legal Consultative Committee adopted Principles Concerning the Treatment of Refugees.<sup>384</sup> Article 3 of

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<sup>376</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, art. 11(1), 1001 U.N.T.S. 45, 48.

<sup>377</sup> Ibid.

<sup>378</sup> Convention on Territorial Asylum, Mar. 28, 1954, OEA/Ser.X/1, art. 1.

<sup>379</sup> Ibid.

<sup>380</sup> Op cit (372).

<sup>381</sup> Ibid.

<sup>382</sup> Council of Europe Agreement No. 46: Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 16, 1963, 7 I.L.M. 978 (1968).

<sup>383</sup> Ibid.

<sup>384</sup> Principles Concerning Treatment of Refugees, 1966, art. 111(1), reprinted in UNHCR, Collection of International Instruments Concerning Refugees 201, 203 (1979).

the Principles expressed that “States have the sovereign right to grant or refuse asylum in its territory to a refugee.”<sup>385</sup>

Even though the right to asylum does not have an enforcement legal mechanism, States have shown a commitment to respect this right. The primary goal of the 1951 Convention was to protect and respect human rights in situations where the home country has failed to provide such protection. Further, the preamble of the 1951 Convention clearly states that States need to co-operate for effective co-ordination of the UNHCR’s obligation on refugees.<sup>386</sup> Furthermore, States needs to abide by this right to make the aim of the UDHR which is the enjoyment of fundamental freedoms and rights without discrimination a reality.

#### **4.4 THE RESPONSIBILITY NOT TO RETURN/ NON-REFOULEMENT**

The customary norm in international human rights law is “the right to be considered for temporary admission, whether by formal procedure or administrative discretion based on a need for protection”.<sup>387</sup> Generally customary international law, as argued by Hathaway, prevents the rejection and expulsion of individuals fleeing from countries where there are serious disturbances of public order without paying attention to their humanitarian need.<sup>388</sup> Hence the 1951 Convention included the principle of *non-refoulement* under article 33(1).

Lauterpacht and Bethlehem’s explanation on the principle of *non-refoulement* was that it prohibits the return of refugees and asylum seekers by States to a territory where their rights and freedoms would be endangered.<sup>389</sup> It is a principle that has been long practiced by States since the beginning of the 19<sup>th</sup> century.<sup>390</sup> States were bound by this principle due to treaties and it was in the mid19<sup>th</sup> century when the principle formed a solid ground due to political reasons.<sup>391</sup> Hence during the drafting of the 1951 Convention States opted for the principle to be encoded in it. It

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<sup>385</sup> Ibid

<sup>386</sup> Op cit (n341) Preamble.

<sup>387</sup> James C. Hathaway *Law of Refugee Status* (1991) 26.

<sup>388</sup> Ibid.

<sup>389</sup> Sir Elihu Lauterpacht and Daniel Bethlehem ‘The scope and content of the principle of *non-refoulement*: Opinion’ in Erika Feller, Volker Turk and Frances Nicholson *Refugee Protection in International Law* (2003) 89.

<sup>390</sup> Guy S. Goodwill-Gill *The Refugee in International Law* (2ed) 118.

<sup>391</sup> Ibid.

is for this reason why States have been seen to be criticised for expelling and returning asylum seekers to their origin country. For example, the criticism of the government of the United States for deporting immigrants calling the epic as the “draconian set of immigration policies”.<sup>392</sup> It has also been criticised on the building of the wall along the southern Mexican border.<sup>393</sup>

The principle of *non-refoulement* provided under article 33(1) of the 1951 Convention states that:

no contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.<sup>394</sup>

Commentary on article 33(1) explained that the principle guarantees the asylum seeker to remain beyond the reach of persecution in cases where asylum has not been granted.<sup>395</sup> Furthermore, even though the principle does not impose an obligation on States to grant asylum, it allows for individuals to remain in the country or be sent to other States where protection would be assured.<sup>396</sup>

The principle has also been recognised in regional human rights bodies. For example, the Asian-African Legal Consultative Committee<sup>397</sup> adopted the 1966 Principles Concerning Treatment of Refugees which stated under article III (3) that:

No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection as the frontier, return or expulsion.<sup>398</sup>

Article II (3) of the OAU convention also provides that no member State shall conduct measures that would compel the expulsion or return of an individual to a

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<sup>392</sup> Amanda Holpuch ‘Families divided at the border: The Most Horrific Immigration Policy Ever Seen’, The Guardian, 19 June, 2018, available at <https://www.theguardian.com/us-news/2018/jun/19/families-border-separations-trump-immigration-policy>, accessed on 4 September 2019.

<sup>393</sup> Ibid.

<sup>394</sup> Ibid.

<sup>395</sup> Andreas Zimmerman (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (2011) 1335.

<sup>396</sup> Ibid.

<sup>397</sup> Op cit (n389) 90.

<sup>398</sup> Ibid.

territory where their life would be threatened.<sup>399</sup> Furthermore, article V (1) of the Convention explains that a refugee shall not be repatriated against their will.<sup>400</sup> There are no exceptions to the two provisions, hence the African Convention has been considered to be effective in barring expulsion even if the host country might be at risk.<sup>401</sup>

The European Human Rights System has however not developed any document regarding the return of refugees. Therefore, the only document that is relied on in the context is the 1951 Convention under article 33. For example, in *Application no. 7706/76*<sup>402</sup> the United Kingdom government had revoked the deportation of a Ghanaian who had claimed to be at risk of political persecution if returned home. In *Application no. 5012/71*,<sup>403</sup> an Algerian who was to be returned home despite the risk was later extradited to France. In deciding whether the application was ill-founded, the Commission expressed that there was no problem under article 33 of the 1951 Convention if the individual was not returned to Algeria.<sup>404</sup>

The principle has also been developed in the American Human Rights system. Article 22(8) of the American Convention on Human Rights states that:

In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinion.<sup>405</sup>

Generally, the *non-refoulement* principle as observed applies the moment an individual presents themselves at the border of a country or in the jurisdiction of the country. The reason for that could be because the return of asylum seekers or repulsion could occur in various forms for example at the border of the State and the

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<sup>399</sup> Organisation of African Union (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) 10 September 1969 1001 U.N.T.S 45.

<sup>400</sup> Ibid.

<sup>401</sup> Gunnel Stenberg *Non-expulsion and Non-refoulement* (1989) vol. 9 249.

<sup>402</sup> *NK v The United Kingdom*, (1987) 9856/87 Council of Europe: European Court on Human Rights.

<sup>403</sup> *Kierkoub v Belgium* (1971) (App. No. 5012/71).

<sup>404</sup> Ibid.

<sup>405</sup> Organisation of American States (OAS), American Convention on Human Rights 22 September 1969.

deportation of individuals commonly termed as 'illegal migrants' and an extraterritorial interception.<sup>406</sup>

In as much as the principle of non-refoulement does not provide the right to asylum, it is however the first thing a State would do in conducting its duty towards asylum seekers by not returning them to persecution which is more like a temporary act of refuge.<sup>407</sup> Grahl Madsen explained that the principle of *non-refoulement* being a duty of a State was imposed in article 3(3) of the 1951 Convention.<sup>408</sup> The article stated that "Each of the Contracting Parties undertakes, in all cases, not to return refugees across the frontiers of their country of origin."<sup>409</sup> Therefore the right to asylum and *non-refoulement* principle has been compared to each other. The UNHCR in comparison stated that "Asylum entails admission, residence and protection; *non-refoulement* is a negative duty, not to compel a person to return to a country of persecution."<sup>410</sup>

The principle of *non-refoulement* has also been included in various human rights instruments that are binding and non-binding. Article 42(1) of the 1951 Convention<sup>411</sup> explains how States are not allowed to sign a reservation towards this right. The article proves how the Convention aims at protecting individuals whose rights are at stake in their respective States. Furthermore, as explained earlier, there is no proper enforcement mechanism for the right to seek asylum, however, the principle acts as a mechanism that binds States to protect asylum seekers in the form of the provision of a temporary refuge. The principle as per article 42 (1) is however binding to only those States that have ratified the Convention. Therefore, a problem still arises when asylum seekers enter States that are not a party to the Convention. Also, the principle strictly applies to persons or individuals who fit the definition of a refugee under the Convention.

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<sup>406</sup> Op cit (n342) 5.

<sup>407</sup> Op cit (n363)16.

<sup>408</sup> Ibid.

<sup>409</sup> Ibid.

<sup>410</sup> Ibid.

<sup>411</sup> Ibid.

Other human rights instruments where the principle has been encoded into include the “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.”<sup>412</sup> Article 3(1) of the convention states that:

No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.<sup>413</sup>

Scholars have however noticed some dissimilarities between the 1951 Convention and the Convention against Torture.<sup>414</sup> This is mainly shown on the person in focus that is supposed to be protected from *refoulement*.<sup>415</sup> The Convention against Torture mainly protects every individual who is believed to be in danger of being persecuted once they have been returned to their States. The 1951 Convention, on the other hand, provides this protection to individuals who fit the definition of a refugee as provided in the convention.

The reason behind the thought is that, for an individual to be regarded as a refugee under international law, the case must be brought by the refugee determination board or the UNHCR. The process might not take a day or two but rather a long time or even years for them to be given the refugee status. In as much as the difference between the two are like that, one must note that an individual who needs protection because of fear of being tortured equals persecution. Therefore, it would mean that the individual has a well-founded fear of persecution and in either way, they would fit in the definition of a refugee as provided in the Convention.

A significance between *refoulement* under the 1951 Convention and the one provided under the Convention against Torture perhaps would be on the effect it has on the extraterritorial issue. The significance lies in the application of this principle in each treaty to the rejection of individuals seeking asylum or aliens at the border of a State.<sup>416</sup> Both treaties, however, do not prohibit entrance at the border but, different States in their jurisdictions have interpreted the treaty differently. For example, the

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<sup>412</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly, 1465 UNTS 85, adopted on 10 December 1984 and entered into force on 26 June 1987.

<sup>413</sup> Ibid.

<sup>414</sup> Op cit (n363)18.

<sup>415</sup> Ibid.

<sup>416</sup> Op cit (n363)19.

Supreme Court of the USA in the case of *Sale v Haitian Centres Council*<sup>417</sup> interpreted the principle of *non-refoulement* that it did not have any extraterritorial effect. Therefore, the court was of the view that the principle did not prohibit the rejection of individuals who have not yet entered the territory of the State of refuge.<sup>418</sup> The CAT, on the other hand, does not have this kind of limitation. Christian Tomuschat, regarding the principle of *non-refoulement* and the CAT, stated that:

Since the paramount objective is protection from torture, one will have to conclude here that *refoulement* is to be interpreted in a broad sense as comprehending any form of State action, including rejection at the border. Article 3 [of the Convention Against Torture] proceeds from the assumption that governmental authorities surrendering a person to the authorities of another State that habitually practices torture would themselves become accomplices of the crime of torture. In that perspective, the subtle legal distinction between returning someone who has already put his foot on the territory of the desired host State and preventing another person from performing that symbolic act becomes immaterial.<sup>419</sup>

In the suggestion, Tomuschat explained how *refoulement* manifests when an individual is rejected at the entrance of the State which is at the border. With that coming to mind, one would wonder how that works regarding the issue of jurisdiction. The South African case of *Abdi v Minister of Home Affairs*<sup>420</sup>, where the issue of jurisdiction in respect with *refoulement* was in question, the court had noted that the sovereign State of South Africa had full control over its entire geographical territory.<sup>421</sup> Therefore, the place where the applicant was held, South Africa had full control and hence “South Africa had effective jurisdiction over the area.”<sup>422</sup> The South African court furthermore in the case of *Lawyers for Human Rights v Minister of Home Affairs*<sup>423</sup> held that “passengers on an international flight are subject to the jurisdiction of the South African courts.”<sup>424</sup> Thus, “South Africa has jurisdiction over all the passengers on the aeroplane as South African in such cases has claimed

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<sup>417</sup> *Sale v Haitian Centres Council inc. et al* (1993)113 SCt 2549 US 155.

<sup>418</sup> *Ibid.*

<sup>419</sup> *Ibid.*

<sup>420</sup> *Abdi and another v Minister of Home Affairs and others* (2011) (3) SA 37 (SCA).

<sup>421</sup> *Ibid.*

<sup>422</sup> *Op cit* (n342)7.

<sup>423</sup> *Lawyers for Human Rights v The Minister of Home Affairs and another* (2004) (4) SA 125 (CC).

<sup>424</sup> *Ibid.*

jurisdiction."<sup>425</sup> The two cases purposefully support Tomuschat's suggestion regarding jurisdiction. Hence, an individual or an alien does not need to be physically present in the State of refuge or asylum, but rather being present at an area where the State has full control amounts to *refoulement*.

Article 7 of the ICCPR<sup>426</sup> sums up the principle by stating that:

State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion, or *refoulement*.<sup>427</sup>

This clearly shows how the principle has been widely accepted by different human rights instruments. Even though it is like that, the question of whether the principle has attained customary International law recognition is still in question.

#### **4.5 WOULD PEOPLE WITH ALBINISM BE GRANTED REFUGE IN OTHER STATES?**

It is clear enough from this juncture that refugee law aims to protect individuals who cannot avail of the protection of their country. It is also clear that protection is granted to individuals with a well-founded fear of persecution based on their defining characteristics in their respective countries. However, as noted in the previous paragraphs, such protection is awarded when the county of origin has failed or is unable to protect the fundamental freedoms and rights of such people.<sup>428</sup> This means that, for one to be granted asylum, there must be evidence that their life is threatened and their State has failed to protect them.

Regarding people with albinism, they would have to undergo the process of status determination to be granted asylum. Therefore, people with albinism would be granted the refugee status upon satisfaction that they are being persecuted and that their country has failed to protect them. Though it is not a general application to all people with albinism, because the burden is on the applicant to establish their case.<sup>429</sup> Certain factors are taken into consideration for example the trauma faced by the individual in-flight imposes a duty on the officer in charge to evaluate relevant

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<sup>425</sup> Ibid.

<sup>426</sup> Ibid.

<sup>427</sup> Ibid.

<sup>428</sup> Ibid.

<sup>429</sup> Op cit (n390) 34.

factors to the case.<sup>430</sup> For example in the case of *Mayongo v Refugee Appeal Board*<sup>431</sup> where an applicant's refugee status was granted because of the compelling reasons which were post-traumatic stress syndrome and some major depressive disorder that had resulted from the experiences during persecution.<sup>432</sup>

Another thing that might be taken into consideration would be the future of the applicant in question.<sup>433</sup> Therefore, a well-founded fear of persecution or not would also be established on what might happen to the individual in the future. That is whether persecution would resume. For example, in the case of *Fernandez v Government of Singapore*<sup>434</sup> where the applicant was allowed to remain in the country because there was a possibility of future persecution when returned.

To determine the refugee status of people with albinism, it is important to consider certain issues. This is because different people have different experiences regarding what may be deemed as persecution. In as much as there could be a common ground of persecution, a determination must be considered on a case by case basis.

## 4.6 CONCLUSION

In as much as the right to be granted asylum rests in the hands or control of the States of refuge the important factor is on the issue of *non-refoulement*. Therefore, State parties are bound not to return an individual whose rights would be at risk when returned. It is for this reason that States have the responsibility of protecting individuals at risk.

The fact that PWA are being persecuted in Malawi and that the government has failed to protect them is enough reason for them to be granted international protection. Hence host States would be bound not to return them to Malawi and provide them the refugee protection.

The next chapter will be looking at the response of the international community regarding the issue of PWA.

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<sup>430</sup> Op cit (n390) 35.

<sup>431</sup> *Mayongo v Refugee Appeal Board* (2007) JOL 19645(T).

<sup>432</sup> Ibid.

<sup>433</sup> Ibid.

<sup>434</sup> *Fernandez v Government of Singapore* (1971) 1 WLR 987.

## Chapter five

### THE INTERNATIONAL COMMUNITY

#### 5.1 INTRODUCTION

In 2014, the then High Commissioner of UNHCR, Navi Pillay delivered a speech that addressed the impacts of human rights violations towards the people with albinism.<sup>435</sup> The speech addressed how people with albinism suffer discrimination in places like schools and even the communities that they live in.<sup>436</sup> The High Commissioner explained how these groups of people were bullied because of the colour of their skin.<sup>437</sup> That they were being called different names like, a ghost and were openly told that they were bad luck to their communities and their families.<sup>438</sup> In 2018, Oscar Duke, a British doctor with albinism visited countries in the eastern African region including Malawi, to analyse the situation of people with albinism.<sup>439</sup> In the expedition, Duke discovered how people with albinism have been the centre of human rights violations and abuses. The expedition had involved interviews that were conducted on victims of such violations.

Persecution of people with albinism in Malawi has become a worldwide phenomenon that has caught the attention of the international community. There have been several documented videos from broadcasting networks to try and understand the cause of such violations and possibly find a solution. The significance of this chapter to the dissertation is to show how serious the issue is in Malawi and Africa particularly, in the great lakes region and how It has caught the world's attention. Hence, the chapter will explore how the international community has responded to the issue including other international mechanisms that have currently been used to protect PWA. Lastly, the role of the UNHCR regarding the protection of PWA.

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<sup>435</sup> UN Human Rights 'People with Albinism have a right to live without fear of bullying and discrimination' 13 March 2014, available at [https://www.youtube.com/watch?v=G8N\\_w5C8FWE](https://www.youtube.com/watch?v=G8N_w5C8FWE), accessed on 18 August 2019.

<sup>436</sup> Ibid

<sup>437</sup> Ibid.

<sup>438</sup> Ibid.

<sup>439</sup> Reel Truth Documentaries 'Born too White: What it's Like to have Albinism in Tanzania' 24 August 2018, available on <https://www.youtube.com/watch?v=vfNZrIXMJrs&t=26s>, accessed on 19 August 2019.

## 5.2 ALBINISM IN THE GREAT LAKES

Apart from Malawi, the problem of human rights abuses has also been a challenge in most countries surrounding the great lakes region. Countries like Tanzania, Burundi, and Uganda have been greatly affected by the barbaric act of killing, amputation and abducting people with albinism for their body parts.

### 5.2.1 The case of Tanzania

Tanzania has been believed to host the highest population of people with albinism in the world with over 170,000 people.<sup>440</sup> In the country, human rights abuses towards people with albinism came to light in the early years of 2000.<sup>441</sup> In the year 2009, there were about 50 reported cases of human rights abuses towards people with albinism.<sup>442</sup> These included assaults, amputation, and killings. In 2007, the government of Tanzania introduced shelters that acted like temporary boarding houses for children with albinism.<sup>443</sup> The introduction of temporary shelters resulted because children were easy targets of abduction.<sup>444</sup> Therefore, the shelters were made available to offer physical protection from the abuses.<sup>445</sup>

In 2015, the government introduced provisional licences to witch doctors.<sup>446</sup> This led to the ban on witch doctors who practiced without a licence. The ban followed the discovery that witch doctors fuelled attacks on people with albinism as they spread around rumours that body parts of people with albinism were an important

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<sup>440</sup> Advocacy Brochure 'It felt like a Punishment: Growing up with Albinism in Tanzania' 9 February 2019, available at: <https://www.hrw.org/news/2019/02/09/it-felt-punishment-growing-albinism-tanzania>, accessed on 19 August 2019.

<sup>441</sup> Ibid.

<sup>442</sup> Daniel Wasangula 'Albinism in Tanzania: Slow progress in combating violence and discrimination' The Guardian, 13 May 2015, available at: <https://www.theguardian.com/global-development-professionals-network/2015/may/13/albinism-in-tanzania-slow-progress-in-combating-violence-and-discrimination>, accessed on 19 August 2019.

<sup>443</sup> I Kajiru & JC Mubangizi 'Human rights violations of persons with albinism in Tanzania: The case of children in temporary holding shelter' (2019) 19 *African Human Rights Law Journal* 246-266 available at:

<http://dx.doi.org/10.17159/1996-2096/2019/v19n1a12>.

<sup>444</sup> Ibid.

<sup>445</sup> Ibid.

<sup>446</sup> Kizito Makoye 'Tanzania bans witch doctors to deter albino killings' Reuters, 14 January 2015, available at: <https://www.reuters.com/article/us-tanzania-albinos/tanzania-bans-witch-doctors-to-deter-albino-killings-idUSKBN0KN16B20150114>, accessed on 19 August 2019.

concoction to their practice. The ban followed the arrest of several witch doctors which reduced the attacks on people with albinism by 90 per cent since.<sup>447</sup>

### 5.2.2. The case of Uganda

A study conducted between 2015 and 2017 in Uganda revealed the unreported cases of human rights abuses towards people with albinism.<sup>448</sup> People with albinism in the country have also been affected by the same fate affecting Malawi and Tanzania. The country, however, reported eight attacks on people with albinism countrywide.<sup>449</sup> The recent case being of a girl who was abducted for some rituals and was spared upon the discovery that the individual was not ideal for the ritual.<sup>450</sup>

Olive Namutebi, the director of Albinism Umbrella, an organisation that works in fighting against discrimination and stigmatisation towards people with albinism, stated that: “there is so much stigma in the communities. Parents of children with albinism also fear to send their children to school for fear of being kidnapped by traditional healers.”<sup>451</sup> Furthermore, people with albinism in Uganda have also been affected in terms of employment. This is whereby only a few of them find white-collar jobs as employers find them incompetent because of their condition to perform normal jobs.<sup>452</sup>

### 5.2.2 The case of Burundi

A report submitted to the United Nations Committee Against Torture expressed how people with albinism in the country face torture.<sup>453</sup> The report indicated the murders, the amputation and abductions of people with albinism for ritual purposes.<sup>454</sup> The country reported about 38 records of violence against these people which included

<sup>447</sup> Reuters ‘Tanzania Arrests 32 witch doctors over albino murders’ 7 March 2015, available at <https://www.news24.com/Africa/News/Tanzania-arrests-32-witch-doctors-over-albino-murders-20150307>, accessed on 19 August 2019.

<sup>448</sup> Bradbury-Jones C, Ogik P, Betts J, Taylor J & Lund P ‘Beliefs about people with albinism in Uganda: A qualitative study using the Common-Sense Model’ (2018) available at <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0205774>, 14 September 2019.

<sup>449</sup> Action on Albinism ‘Uganda’ available at [https://actiononalbinism.org/page/6vz5ca3uo78b71lx2aaoamj9k9\\_](https://actiononalbinism.org/page/6vz5ca3uo78b71lx2aaoamj9k9_) accessed on 14 September 2019.

<sup>450</sup> Ibid.

<sup>451</sup> Xinhua ‘Uganda Strives to Protect people with albinism’ 16 January 2019, available at [http://www.xinhuanet.com/english/2019-01/16/c\\_137746586.htm](http://www.xinhuanet.com/english/2019-01/16/c_137746586.htm), accessed on 14 September 2019.

<sup>452</sup> Ibid.

<sup>453</sup> Global Disability Watch ‘Albinism in Burundi: New report submitted to UN Committee Against Torture’ 7 July 2016, available at <http://globaldisability.org/2016/07/07/new-report-torture-people-albinism-burundi>, accessed on 15 September 2019.

<sup>454</sup> Ibid.

21 murder cases, 13 cases where people had survived the attacks and four graves that have been robbed over the last decade.<sup>455</sup> These acts of violence have been reported to continue occurring in contemporary Burundi with the agreement of public officials.<sup>456</sup> The most vulnerable group in the albino community in the country are women who usually fall as victims of sexual violence as it has also been believed that sexual intercourse with a girl or a woman with albinism cures HIV and AIDS.<sup>457</sup>

## **5.3 RESPONSE OF THE INTERNATIONAL COMMUNITY**

### **5.3.1 Other International Mechanisms used to protect PWA**

In 2013 the UN human rights council adopted Resolution 23/13 which addressed the attacks and discrimination against PWA.<sup>458</sup> The UNHRC in the resolution reaffirmed that everyone has a right to life, liberty and security therefore, no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.<sup>459</sup> It furthermore urged States to take necessary steps to ensure the protection of PWA. This included conducting impartial effective and speedy investigations on the attacks and bringing responsible individuals to justice and to ensure that victims are awarded proper remedies.

Under the same resolution, States were encouraged to promote and protect the rights of PWA. This included the elimination of any forms of discrimination against PWA and promote bilateral, international and regional initiatives to support the act of protecting people with albinism.

On 8 October 2013, the Human Rights Council adopted Resolution 24/33 which addressed the “Technical cooperation for the prevention of attacks against persons with albinism.”<sup>460</sup> The resolution requested for the Human Rights Council Advisory Committee to prepare a study that would address the situation of PWA. The resolution was adopted following the reaffirmation on the right to health and

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<sup>455</sup> Ibid.

<sup>456</sup> Ibid.

<sup>457</sup> Ibid.

<sup>458</sup> Attacks on People with Albinism, UNGA res/23/13 (A/HRC/23/2) 24 June 2013.

<sup>459</sup> Ibid.

<sup>460</sup> Technical Cooperation for the Prevention of Attacks against persons with Albinism, res/24/33(A/HRC/24/2) 8 October 2013.

education provided in the UDHR and other international human rights instruments and the need to protect their fundamental freedoms and rights.

Resolution 26/10 of 14 June 2014 recommended by the General Assembly proclaimed 13 June to be observed as the International Albinism awareness day.<sup>461</sup> This was after the observation that the attacks on people with albinism especially women and children were conducted with impunity.<sup>462</sup> Furthermore, the commemorating day was set up to encourage States to continue fighting against attacks and promoting the rights of people with albinism.

The African Human Rights Committee in response to the same issue adopted Resolution 263 on the Regional Action Plan on Albinism in Africa.<sup>463</sup> The resolution was followed by recalling the mandate of the African Charter on Human and Peoples Rights was to promote and protect human rights and that article 2 of the AU Charter guarantees the enjoyment of human rights.<sup>464</sup> The resolution, therefore, urged States to take measures to adopt the regional action plan to ensure the protection and promotion of the rights of people with albinism.<sup>465</sup> This also included a special mechanism for consideration of appropriate ways for effective promotion of the regional plan.

In considering the attacks on people with albinism in Malawi, the African Commission on Human and People's Rights adopted Resolution 349.<sup>466</sup> The resolution addressed the attacks on people with albinism in Malawi. The Commission through the resolution condemned the killing of people with albinism in the country and called the government of Malawi to take appropriate measures to prevent such acts.<sup>467</sup> The resolution also urged the country to conduct effective investigations to bring to justice the perpetrators and also to implement effective measures to eliminate violence and discrimination towards people with albinism.<sup>468</sup>

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<sup>461</sup> International Albinism Awareness Day, A/HRC/RES/26/10, 14 June 2014.

<sup>462</sup> Ibid.

<sup>463</sup> 373 Resolution on the Regional Action Plan in Africa (2017-20121) ACHPR/Res.373 (LX)2017.

<sup>464</sup> Ibid.

<sup>465</sup> Ibid.

<sup>466</sup> Resolution on the Attacks on Persons with Albinism in Malawi, ACHPR/Res.349 (EXT.OS/XX) 2016.

<sup>467</sup> Ibid.

<sup>468</sup> Ibid.

The United Nations furthermore conducted an ‘Experts workshop on witchcraft and Human Rights’ to address the issue of witchcraft which fuelled attacks on people with albinism.<sup>469</sup> The workshop aimed at engaging governments, civil society, and academics to increase an understanding and awareness to discourage the illegal trade of human body parts.<sup>470</sup> Furthermore, the workshop discussed how the judiciary fails to prosecute perpetrators of crimes related to witchcraft.<sup>471</sup> A special rapporteur on ‘Extrajudicial, Summary or Arbitrary Executions’ in 2009 explained that the reason why crimes related to witchcraft have not appeared on the radar was because it was difficult to define the term ‘witchcraft’ or ‘witch’ across cultures.<sup>472</sup> This proved to be problematic as the belief in witchcraft is highly condemned in most African countries. For example, in Malawi the belief in witchcraft is prohibited as per the ‘Witchcraft Act’.<sup>473</sup> Therefore, prosecution of crimes based on the accusation of witchcraft has been proven to be difficult.

The United Nations Regional Action Plan on Albinism issued a consultative forum on the Action on Albinism in Africa.<sup>474</sup> The forum was conducted from 17 to 19 June 2016 in Tanzania. The forum aimed at identifying the specific, concrete and achievable short, medium and long-term measures to arrange recommendations in addressing the attacks on people with albinism.<sup>475</sup> The forum had participants from all the 26 countries in Africa that are affected by human rights abuses on people with albinism. The recommendations in the forum were to engage governments and civil societies in advocating towards the elimination of discrimination towards these people.<sup>476</sup> This also included changing the school curricula to include issues of albinism. One of the representatives at the forum talked about the importance of prosecuting people who perpetrate the attacks and not only those who carry out the

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<sup>469</sup> UNHRC ‘Experts Workshop on Witchcraft and Human Rights’ available at <https://www.ohchr.org/EN/Issues/Albinism/Pages/Witchcraft.aspx>, accessed on 20 September 2019.

<sup>470</sup> Charlotte Baker ‘The Killing of People with Albinism is Driven by Myth and International Inaction’ Mail Guardian, 20 September 2017, available at <https://mg.co.za/article/2017-09-20-the-killing-of-people-with-albinism-is-driven-by-myth-and-international-inaction>, accessed on 20 September 2019.

<sup>471</sup> Ibid.

<sup>472</sup> Ibid.

<sup>473</sup> Laws of Malawi, Chapter 7 vol, 2.

<sup>474</sup> UNHRC ‘Regional Action Plan on Albinism’ available at: <https://www.ohchr.org/EN/Issues/Albinism/Pages/AlbinismInAfrica.aspx>, accessed on 20 September 2019.

<sup>475</sup> Ibid.

<sup>476</sup> Ibid.

attacks.<sup>477</sup> In summary, the forum addressed how the attacks could be curbed in the countries by encouraging governments and civil societies to act.

### 5.3.2 The role of the UNHCR

The UNHCR is the principal UN agency that is concerned with refugees.<sup>478</sup> It was established by the UN General Assembly to provide international protection in seeking permanent solutions to the problem of refugees.<sup>479</sup> The work of the UNHCR is purely non-political which is supposed to be social and humanitarian.<sup>480</sup> The UNHCR issued a handbook on “procedures and criteria for determining refugee status and guidelines for international protection”.<sup>481</sup> The handbook served as guidelines on the determination of refugees in international law.<sup>482</sup> The handbook provided for the definition of a refugee as expressed in the 1951 Convention. Regarding the issue of the definition of a refugee, the handbook emphasized on the point that an individual must be outside of their country of refugee to establish the refugee claim.<sup>483</sup> Furthermore, the UNHCR in the handbook strongly emphasized the point that there are no exceptions to the said rule.<sup>484</sup>

The problem that arises with the rule is that the majority of people in Malawi live below the poverty line and that includes people with albinism.<sup>485</sup> Therefore, it would be proven to be difficult for them to be outside of their country as it would be expensive to travel. Furthermore, the high levels of illiteracy amongst the population in Malawi<sup>486</sup> would mean that a lot of people are not aware of the refugee programme that is conducted by the UNHCR.

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<sup>477</sup> Ibid.

<sup>478</sup> Guy S. Goodwill Gill *The Refugee in International Law* (2ed) 7.

<sup>479</sup> Ibid.

<sup>480</sup> Ibid.

<sup>481</sup> UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV.3

<sup>482</sup> Op cit (n481)10.

<sup>483</sup> Op cit (n481)18.

<sup>484</sup> Ibid.

<sup>485</sup> The World Bank ‘The World Bank in Malawi’ available at <https://www.worldbank.org/en/country/malawi/overview> accessed on 5 December 2019.

<sup>486</sup> The World Bank ‘Literacy rate, adult total (% of people ages 15 and above)’ available at <https://data.worldbank.org/indicator/SE.ADT.L> accessed on 5 December 2019.

A 2016 news article reported that the UNHCR was resettling PWA in Malawi and their families.<sup>487</sup> The report furthermore revealed that handful families had been resettled to Canada under the Status of an asylum seeker.<sup>488</sup> However, the report did not reveal the status through which the resettled families were to hold. Hence, there is no well-known case of an individual with albinism being awarded refugee status.

Though the resettlement programme has benefited a couple of families in Malawi since 2017<sup>489</sup> some issues arise with the UNHCR resettlement programme. These issues are that it is only available to individuals who have mandated refugee status with a continued need for international protection.<sup>490</sup> The only exception that is available is where an individual is state-less or is a dependant of a person who is a refugee.<sup>491</sup> Therefore, It seems to be a challenge to effectively implement the programme for PWA in Malawi. This is because of the issue of Status determination and that it is only available for people who are outside their country of residence. Hence, it would be difficult for an individual whose status has not yet been determined to benefit from the programme.

## 5.4 CONCLUSION

Persecution of PWA has generally been proved to be a serious issue in Malawi and across Africa. In as much as the international community placed in mechanisms in to address the issues, there seem to be some difficulties more especially the UNHCR's resettlement programme. Hence, regarding PWA in Malawi, there would be a need to determine their Status before resettling them. Besides, it would require the international community to first recognise them as conventional refugees under international refugee law.

The next chapter will be drawing a conclusion and recommendation on the findings of the dissertation.

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<sup>487</sup> Golden Matonga 'UN Relocates Albino Refugees from Malawi' The Nation 20 November 2016, available at <https://mwnation.com/un-relocates-albino-refugees-from-malawi/> accessed on 04 January 2020.

<sup>488</sup> Ibid.

<sup>489</sup> Lameck Masina 'UN Resettles Albino Refugees Due to Threats in Malawi' Voice of America 12 June 2017, available at <https://www.voanews.com/africa/un-resettles-albino-refugees-due-threats-malawi>, accessed on 20 September 2019.

<sup>490</sup> UN High Commissioner for Refugees (UNHCR) *UNHCR resettlement handbook* (2011)75.

<sup>491</sup> Ibid.

## Chapter Six

### CONCLUSION AND RECOMMENDATION

#### 6.1 INTRODUCTION

The 1951 Conventional definition of a refugee has an egocentric feature that limits persecution to the grounds provided in the convention. The arising problems in the contemporary world raise questions on whether the International law does recognise persecution based on certain characteristics as a ground for the acquisition of refugee status. The question was triggered by the way people with albinism in Malawi were hunted for the superstitious belief that their body parts are an essential ingredient to an accumulation of wealth and good luck.<sup>492</sup> Hence the overall question in this dissertation was whether the international law grants refugee status to PWA. The other aspect of the dissertation was what other international law mechanisms are currently using to protect PWA.

In response to the overall question, the dissertation was analysing the requirements for a refugee status provided under article 1 of the 1951 Convention and comparing the same with PWA in Malawi.<sup>493</sup> The requirements include that individuals must have a well-founded fear of persecution because of their defined characteristics.<sup>494</sup> This follows evidence that their government has failed or is unable to provide protection and is outside their country of residence.<sup>495</sup> Therefore, the procedure in responding to the question is to analyse whether people with albinism are persecuted in Malawi and whether the government of Malawi has failed or is unable to provide protection. Furthermore, whether people with albinism, if they would be outside Malawi, could be offered international protection of refugees. This also led to analyse the response of the international community regarding mechanism currently used to protect PWA including the role of the UNHCR.

#### 6.2 SUMMARY OF FINDINGS

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<sup>492</sup> Amnesty International 'Albinism in Malawi: Stop the Killings', available at <https://www.amnesty.org/en/latest/campaigns/2016/06/albinism-in-malawi-stop-the-killings/>, accessed on 22 May 2019.

<sup>493</sup> Convention and Protocol Relating to the Status of Refugees, res. 2198 (XXI), U.N.G.A, article 1.

<sup>494</sup> Ibid.

<sup>495</sup> Ibid.

In analysing persecution concerning the treatment of people with albinism in Malawi, it was discovered that people with albinism were indeed being persecuted in Malawi. The discovery followed a thorough analysis of what persecution entails. Regarding Fatima Khan's explanation, it was said that persecution must include sustained and severe harm which ranges from killings, torture, imprisonment and forced migration.<sup>496</sup> Furthermore, persecution included harmful acts that were undeserved and discriminatory targeting individuals' characteristics which included physical traits, values as well as beliefs.<sup>497</sup>

Grahl-Madsen also believed that persecution was not only restricted to five grounds as provided in the 1951 Convention.<sup>498</sup> But rather included all forms of unimaginable acts that restricted the enjoyment of one's freedoms and rights.<sup>499</sup> Therefore, with those explanations, the treatment of people with albinism that involved the infringement of the right to life, freedom of movements and other targeted abuses amounted to persecution.

Having constructed on persecution, further analysis was on the position of Malawi. Whether, as a country, it failed or was unable to provide enough protection to people with albinism. Refugee law was understood to be a secondary form of protection that comes to aid when the country of origin has failed to provide its core duties. Therefore, a State could be deemed to have failed to protect when it fails to control the acts of harm targeted to certain individuals that infringe their inalienable rights.<sup>500</sup> Furthermore, assessment of persecution as explained by Hathaway required that individuals have access to a meaningful form of protection from the home country.<sup>501</sup> Hence, looking at the lower percentage of cases involving PWA being investigated and concluded by the Police and Court, there is no reason to believe that the protection is adequate. Furthermore, the fact that the principal offenders have not been eradicated means that the attacks would persist. Therefore, the finding was that Malawi has failed to protect PWA.

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<sup>496</sup> F Khan & T Schreier, *Refugee Law in South Africa* (2014) 50.

<sup>497</sup> Jaakko Kuosmanen 'What's So Special About Persecution?' (2014) vol. 17, no. 1, *STOR*, 146.

<sup>498</sup> Grahl-Madsen A, *The Status of Refugees International Law*, (1966) vol.1 193.

<sup>499</sup> Ibid.

<sup>500</sup> Goodwill-Gill G.S *The Refugee in International Law* 2<sup>nd</sup> edition 79.

<sup>501</sup> Op cit (n330).

The international law and refugee law also recommend for host States to take the responsibility of protecting people who seek asylum. The responsibility was derived from the principle of *non-refoulement* provided in the 1951 Convention.<sup>502</sup> Therefore, in as much as the principle was not an assurance of refugee status, persecuted individuals would be assured protection from persecution. Therefore, people with albinism whilst waiting for refugee status determination outside their home country would be offered temporary protection from other countries.

Analysing the reaction of the international community towards the issue through various resolutions, led to the conclusion that the plight of people with albinism is well-known amongst international organisations. Furthermore, the widespread of violence towards these people not only affected Malawi but also a lot of countries in the great lakes region. Even though it is a well-known phenomenon across the globe, no renowned court case of individuals with albinism have been granted refugee status so far.

The overall findings to the dissertation are that international law does recognise the persecution of people with albinism in Malawi. That the government of Malawi has failed to protect PWA. That though these people would be granted refugee status in other countries, the said protection is not being granted at a larger scale because the court cases are not well-known. Nevertheless, the international community still needs more than resolutions and the current laws to protect such vulnerable groups.

### **6.3 RECOMMENDATIONS**

There must be an amendment to the 1951 Convention definition of a refugee. It has been seen that the 1951 Convention was drafted to accommodate the problems that arose following the end of WWII. Hence, it is proving to be challenging to provide refugee status to individuals whose reasons for persecution do not match up with the provision of the Convention. Construction on albinism as a ground of persecution has generally provided an insight into how refugee law is not flexible in as far as the 1951 Convention definition is concerned. The fact that there had to be a theoretical interpretation of persecution abruptly expresses how difficult it is to determine the

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<sup>502</sup> Convention and Protocol Relating to the Status of Refugees, res. 2198 (XXI), U.N.G.A, article 3(3).

refugee status of individuals who need international protection. Therefore, refugee law being the only tool that ensures international protection to individuals who cannot avail the protection of their country must not adopt a restrictive approach but should rather look at purposes of international human rights law.

There must be a need for the international community to raise and promote awareness of asylum and refugee law by organisations that deal with refugees and asylum. The lack of awareness on refugee law not only affects the illiterate but literate individuals as well. This has been seen in the way asylum seekers are treated at the borders of most countries for example in the USA<sup>503</sup> proves that the principle of *non-refoulement* is not as binding as it is thought to be. Therefore, there is a need for reformation on the laws that provide for asylum if human rights are to be promoted.

Regarding violations of the rights of people with albinism, there is a need for the international community to work closely with governments of countries that are affected by the barbaric act. There must be an adoption of laws binding on States to allow the international community to intervene in cases where States have failed to provide enough protection in cases where there are gross human rights violations. This would generally help countries to be more serious in resolving human rights issues in their countries.

Such acts would generally assist in the better understanding of certain aspects of refugee law on States and individuals in seek of asylum. Furthermore, intervention would pressurise states to take immediate action on serious violations of human rights to avoid the shame that rises from it.

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<sup>503</sup>BBC news 'Donald Trump's border wall' available at <https://www.bbc.com/news/topics/c2gzednyvjkt/donald-trumps-border-wall>, accessed on 3 December 2019.

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